Neutral Citation Number: [2012] IEHC 279

THE HIGH COURT

[2011 No. 403 COS]

IN THE MATTER OF JEFFEL (IN RECEIVERSHIP)

AND IN THE MATTER OF SECTION 316 OF THE COMPANIES ACT 1963

DONNA COSGRAVE

NOTICE PARTY

JUDGMENT of Mr. Justice Gilligan delivered on the 3rd day of February, 2012

Introduction

1. The property at the centre of the present application, known as Saggart Lodge, is a detached Victorian house of circa 3,500 sq. ft., built around 1850 and situate on approximately one half acre (the "Property"). The Property was purchased as part of a larger parcel of land in May 2004 and was, at that stage, in a considerable state of disrepair. The remainder of the land was subsequently developed for housing and has, to a greater or lesser extent, since been sold off. That development, or a part thereof, also shares the name "Saggart Lodge".

2. It would appear that that parcel of land formed part of a single folio which was, however, dissected by a roadway. This appears to have had the effect of confusing matters somewhat and may at least be part of the reason why the present application has arisen at this stage.

3. The receiver of Jeffel (the "Receiver") has brought an application seeking the court's directions as to the nature of the respective property rights as and between the company and Ms. Donna Cosgrave, who presently resides in the Property with her children, and who is a notice party to the application.

Reliefs Sought

4. The following reliefs are sought by the applicant:

> "1. A direction and/or declaration that Martin Ferris, receiver is immediately entitled to possession of that portion of Folio 180093F County Dublin known as Saggart Lodge.
>
> 2. A direction and/or declaration that the Debenture dated 14 March 2007 ranks in priority to any purported conveyance of the said property to Ms. Donna Cosgrave (otherwise Mansfield).
>
> 3. Such further or other Order as this Honourable Court shall deem fit in the circumstances.
>
> 4. An Order for costs."

Procedure

5. The Receiver's application is brought pursuant to s. 316 of the Companies Act 1963 (as amended) (the "1963 Act"). Section 316 provides that:

> "(1) Where a receiver of the property of the company is appointed under the powers contained in any instrument, any of the following persons may apply to the court for directions in relation to any matter in connection with the performances or otherwise by the receiver in relation to his functions, that is to say-
>
> (a) (i) the receiver[...]
>
> and on any such application, the court may give such directions, or make such order declaring the rights of persons before the court or otherwise, as the court thinks just."

6. It is in the nature of s. 316 proceedings that they are ordinarily tried on affidavit evidence alone, subject of course to legal submission and oral argument, and are not therefore by way of a full plenary hearing. In the first instance, and before turning to the substantive issues of dispute, it is useful to examine the nature of a s.316 application insofar as it may be said that the form of these proceedings can have any bearing on the relief granted by the court, as contended by counsel for the Receiver.

Case law in relation to s. 316

7. The most recent case which dealt with s. 316 is that of Clarke J. in *In the matter of HSS (in receivership)* (Unreported., High Court, 28th day of October, 2011), and on which counsel for the Receiver sought to place reliance in the course of his submissions.

8. While the Receiver is correct, in his reference to para. 4.9 of that judgment, that the court does not have discretion under s. 316 to alter the legal rights of parties as determined by corporate insolvency, that proposition must be seen against the background facts of that case. There, unlike the position here, the receiver was appointed by a debenture holder who had the benefit of a first legal charge which was registered in a timely fashion in the Land Registry against the folio of the property concerned. Furthermore, it was undoubtedly the case that any right taken by the respondent came subsequent to that of the relevant bank. Here the matter is not so clear.

9. The purpose of the s. 316 procedure then was articulated by Clarke J., at para. 4.11, where he stated that:

> "[...] s. 316 is concerned with determining the rights of parties in the context of corporate insolvency law and making whatever orders or giving whatever directions are necessary to ensure that parties, having regard to those rights, are not dealt with in an unfair way. The starting point has to be, however, a determination of the party's legal rights.[...]"

10. Before turning to that determination, a number of other questions arise for consideration: namely who bears the burden of proof in such an application and to what extent (if any) is the court constrained in making any findings in the context of proceedings tried on affidavit?

Onus of proof

11. In *Salthill Properties Limited v. Porterridge Trading Limited* [2006] IESC 35 the Supreme Court addressed the question of where the onus of proof lies in s. 316 applications. The facts of the case are that the receiver sought directions from the High Court as to whether the transfer of certain property contravened a negative pledge clause in a prior debenture. The question therefore turned on whether the purchaser had notice of the existence of the negative pledge clause. In that case, McCracken J. expressly approved the following passage from Gough on "Company Charges" (2nd Ed. 1996) at p. 228:

> "Although creating no more than a negative contractual right, a restrictive clause can affect the quality of, and therefore bind, a subsequent proprietary interest through actual notice of the restriction. In equity it would be unconscionable to permit a subsequent third party to take his interest free of the restrictive right in spite of his actual knowledge that to do so would constitute a breach of a floating charge contract by the charger."

While noting that it is difficult to prove a negative, the judge nevertheless went on to state that the onus is on the party seeking to claim that it did not have actual knowledge of the negative covenant in order to shift that onus on to a receiver to (presumably) prove otherwise.

12. It would therefore appear, by analogy, that the onus of proof rests on the party seeking to defeat a prior interest in property on the basis that they are a purchaser for value without notice. Where the burden therefore rests in this case is very much dependent on the facts and will therefore be a question to which it will be necessary to return in due course.

Format of the hearing

13. It was established in two cases that the court has a wide discretion in approaching the format of a s. 316 application. In *Bula Ltd. v. Crowley* (No. 4) [2003] 2 I.R. 430, at 457, an appeal which, in part, concerned an application under s. 316, Denham J. ruled, on the question of an application to cross-examine deponents, that:

> "I am satisfied that the issue of cross-examination in an application under s. 316 is a matter for the judicial discretion of the court in an application or motion. It is not a right as is expressed for trials on affidavit."

In the case of *Salthill Properties Limited v Porterridge Trading Limited*, McCracken J., when faced with an appeal concerning an application under s. 316(1) of the 1963 Act, noted that:

> "Under Order 75, Rule 21 of the Rules of the Superior Courts it is provided that such applications shall be grounded on the affidavit of the party making the application and shall be heard and determined on affidavit unless the court authorises otherwise. This, of course, does not preclude the normal procedure whereby a person giving evidence on affidavit may be cross-examined on his affidavit."

After finding that the directions sought by the receiver in that application could be granted by the court in the terms requested, he nevertheless noted that:

> "It is, of course, always open to the court to direct a hearing on oral evidence rather than on affidavit if the court feels this is necessary to do justice between the parties. This is a power which the court may exercise at its discretion, and will usually do so if there is a clear and direct conflict of evidence on affidavit. In those circumstances the correct procedure is for the court to direct pleadings, as far as they may be necessary, within the motion before it under section 316, rather than to direct the receiver to commence or join in plenary proceedings."

14. In light of that jurisprudence, I have come to the view that in this case there is no such clear and direct conflict of evidence and it is therefore appropriate for me to deliver this judgment following the exchange of affidavit evidence, the delivery of written submissions and the hearing of extensive legal argument from each of the parties. While one question did arise during the course of proceedings regarding Ms. Cosgrave's claim that she has been residing in the Property since 2006, and to which I return in more detail in due course, that query was, to my mind, satisfactorily addressed by the filing of further affidavit evidence. I would also note that neither party sought leave to cross examine any of the deponents nor did either party seek to transform the present proceedings into a full plenary hearing. I therefore now turn to the factual background of this application.

Background facts

15. Jeffel Limited, a company incorporated under the laws of Ireland, with its registered offices in Rathcoole, Co. Dublin, was a part of, what might loosely be described as, the Mansfield Group, whose primary business interests were based in and around the City West Complex in West Dublin. Its primary purpose was to operate as a property development company and Hotel and Golf Course operator. By a special resolution dated the 2nd of October, 2007, it amended its memorandum and articles of association to remove its members' limited liability and became simply Jeffel (unless the context otherwise indicates, both forms shall hereinafter be referred to as "Jeffel" or simply "the Company").

16. H.S.S. is a second company within the Mansfield Group and is a related company, within the meaning of the Companies Acts, to Jeffel.

17. Bank of Scotland (Ireland) Limited merged into Bank of Scotland plc pursuant to the European (Cross-Border Mergers) Regulations 2008 with effect from the 31st December, 2008 (unless the context otherwise indicates, both forms shall hereinafter be referred to as "the Bank").

18. On the 14th March, 2007, the Company issued what might be described as an "all sums due" debenture to the Bank for all past and future debts which was secured on certain assets of the Company ("the Debenture"). There is no dispute between the parties but that the Bank did not conduct a detailed investigation into the title of those properties taken as security at that time. It will be necessary to return in due course to the terms of that debenture in more detail.

19. Mr. Richard Mahon ("Mr. Mahon"), who acted as the financial controller for the Mansfield Group at the relevant time, gave evidence in support of Ms. Cosgrave's position. In his affidavit of the 15th September, 2011, he averred that the primary purpose of the Debenture was described in a letter from the Bank dated the 8th March, 2007, which confirmed the agreement to provide a loan facility of up to €35m (the "Loan Agreement"), and which stated that it was:

> "To fund the purchase of a c. 10.6 acre site adjacent to the main Citywest Golf Club at Citywest, Saggart, Co Dublin (the "Site"), to be properly identified, and to repay bridging facilities advanced [...]".

20. That letter describes the security for this loan and includes the following clause:

> "It is a condition of the Loan that the Bank's Solicitor be satisfied with the title to land or property offered as security."

21. By a letter dated the 23rd December, 2008, the Bank agreed to amend the Loan Agreement (the "Supplemental Deed"). Of note for present purposes is that the Supplemental Deed makes reference to "Saggart Lodge" however, it appears obvious that such reference did not incorporate the Property but rather was limited to a development constituting 32 apartments, 18 townhouses and 6 social and affordable units. This view appears to have been commonplace and is fortified by the fact that on the 25th March, 2008, the Mansfield Group supplied a portfolio of its property, along with that of Mr. Jim Mansfield Senior, to the Bank which contained particulars of all of the assets of the Mansfied Group, not just those held as security by the Bank, along with details of corresponding internal valuations. In relation to "Saggart Lodge Townhouses & Apartments" which have a listed valuation of €32.8m, similar details were provided. Attention is also drawn to a letter dated the 7th May, 2009, from the Bank to CBRE auctioneers seeking valuations of assets listed in a schedule which describes "Saggart Lodge, Citywest, Saggart, Co. Dublin" and in which the terms again echo those of the Supplemental Deed and the March, 2008 portfolio description.

22. A letter dated the 29th March, 2007, was exhibited by Mr. Mahon, which was from Noel Smyth & Partners solicitors regarding "Jeffel Ltd- Purchase of Saggart Lodge & Mews, Saggart, Co. Dublin- Transfer to James Mansfield Junior?" and which notes that instructions have been received to transfer a portion of the Company's property to Mr. Mansfield. It notes that a request was made to the Land Registry to open two separate folios for the purposes of the transfer before raising a number of queries regarding the detail of the sale.

23. By a letter dated the 17th September, 2007, Mr. James Kilgallon, an auctioneer and valuer, valued the Property as of April, 2005 at a sum in the region of €900,000. Mr. Mahon explained that the rationale behind the backdating of the valuation was "to reflect the fact that 2005 was when the transaction was supposed to take place".

24. Mr. Mahon stated that while it was not his function to stamp or register the transaction related to the Property, it was, nevertheless, fully recorded in the accounts of the Company and those of H.S.S.. In the Directors' Report and Financial Statements for the year ended 31st March, 2008, for the Company the figure of €900,000 is given for turnover. Mr. Mahon described this sum as being generated solely from the sale of the Property. Subtracting cost of sales, he averred that this transaction generated a gross profit of €339,641 for the Company. Note 14, on related party transactions, described the following transaction:

> "The directors of Jeffel are also directors of H.S.S., a related company. During the year under review the related company incurred costs on behalf of Jeffel amounting to €25,387. A debtor balance of €900,000 owing to Jeffel was transferred to H.S.S. during the year. The amount owed by H.S.S. was reduced by €874,613 as part of a group debt re-organisation. At the year end, an amount of €nil (2007 €nil) is owed to this related company."

In the Directors' Report and Financial Statements for the year ended 31st March 2008 for H.S.S. the directors' current account balance is set out for the year with a balance owing to the company of €1,051,158. The breakdown for the transactions for the year is the following:

> I. At beginning of year (owing to H.S.S) €1,194,422
>
> II. Arising in year (add) €2,077,341
>
> III. Repayments in year (less) €2,220,605
>
> IV. At end of year (owning to H.S.S) €1,051,158

Mr. Mahon averred that €900,000 of the figure arising at II above is constituted by the monies due to the Company arising out of the sale of the Property. Similarly he averred that 900,000 of the figure arising at III above is constituted by the monies repaid to the Company by or on behalf of its directors on foot of the sale of the Property.

25. The transaction referred to by Mr. Mahon is described by a contract for the sale of the Property was drafted by Noel Smyth & Partners, as solicitors for the vendor. It restates that by an agreement dated the 14th December, 2007, the Company agreed to sell the Property to Jimmy Mansfield "in trust for Jimmy and Donna Mansfield" for €900,000 subject to a closing date of the 20th December, 2007. The contract is signed and witnessed on behalf of both vendor and purchaser. It was this transaction that Mr. Mahon averred was fully reflected in the respective financial statements for the year ending the 31st March 2008 for the Company and for H.S.S.. In essence, it is Ms. Cosgrave's case that while she moved into the Property in 2006, the purchase price was only paid sometime in the financial year April, 2007 to March, 2008 and a deed of transfer executed in December, 2007. However it is undoubtedly the situation that that transfer was never formally effected as no stamp duty was paid nor was it registered against the folio in the Land Registry.

26. On foot of the Debenture, and also a supplemental deed dated the 27th February, 2009, the Bank appointed Martin Ferris to be receiver and manager over all of the undertaking, property and assets of the Company, as specified in the Debenture, by a deed dated the 6th July, 2010.

27. The Debenture was registered as a burden in the Land Registry against the Property on the 26th July, 2010. On the relevant folio it is described as a "[c]rystallised charge arising on the appointment of Martin Ferris as receiver of Jeffel by Deed of Appointment dated 6th day of July 2010 [...]".

Submissions of the parties

28. The notice party to these proceedings ("Ms. Cosgrave") is the estranged wife of Mr. James Mansfield Junior ("Mr. Mansfield"), who is a member of the Mansfield family and who was a director and shareholder of the Company. In 2005 they separated and in her affidavit of the 15th September, 2011, Ms. Cosgrave averred that they agreed that:

> "I would receive [the Property], for the purposes of being a family home where my children and I could reside, in the context of our separation."

She continued by stating that this agreement was made in 2005, that she and her children moved into the house in 2006, after a considerable amount of renovation work had been carried out, and that the arrangement was finalised and fully paid for in 2007. The nature of the arrangement was such that the Property was to be sold first to Mr. Mansfield who would in turn transfer some or all of it to Ms. Cosgrave.

29. It is Ms. Cosgrave's contention that although she did not know the identity of the then owner of the Property, she understood the transfer to be completely bonafide and was not carried out to shelter assets or to defraud creditors. She further expressed her opinion that the Property was never intended to be included among the Bank's security on foot of the Debenture. This is an issue to which it will be necessary to return in due course.

30. In any event, the arrangement was never finalised in that no stamp duty was paid nor were the details of the transfer registered on the title. However, as previously described, there is evidence that the sale was recorded in the Company's accounts.

31. It is the Receiver's position that the intention of the parties to the Debenture is irrelevant. It is urged that the court ought properly to focus on the interpretation of the terms of the document itself. While it is admitted that the Bank's property due diligence was far from exhaustive before the execution of the Debenture, it is nevertheless asserted that the Bank were not aware of Ms. Cosgrave's interest in the Property nor was it aware, from the Company's financial statements that it had received value for the sale to Mr. Mansfield. Finally, it is contended that Ms. Cosgrave's interest in the Property, taken at its height, can best be described as a "mere licence" which is revocable at will.

32. I am satisfied that there is no direct conflict of evidence between the parties. During the course of the proceedings the Receiver sought to question the veracity of Ms. Cosgrave's assertion that she has been residing in the Property since 2006. In response, I permitted further affidavit evidence to be filed. Ms. Cosgrave duly exhibited two utility bills dating from January and April, 2007 respectively. On the strength of these, the Receiver did not see fit to question Ms. Cosgrave's claim further. Similarly, I am satisfied that Ms. Cosgrave has resided in the Property since 2006 pursuant to the agreement with Mr. Mansfield.

33. I also accept the Receiver's position that the Bank was granted security by the Company over its property on foot of the Debenture. The main issue of substance between the parties is therefore the question of the interpretation of their respective legal interests (if any) in the Property. I now turn to that question.

The nature of the parties' interests

34. The interest in the Property claimed by the Receiver on behalf of the Bank is registered against the folio, whereas any interest which Ms. Cosgrave claims is not. As such, an appropriate starting point is to consider the nature of the Bank's interest in the Property.

35. The Bank's interest arises out of the Debenture executed on the 14th March, 2007. The "charging clause" at paras. 3.1 and 3.2 of the Debenture grants the Bank a number of different securities including the following:

> a. A mortgage over the Company's "freehold and leasehold lands, hereditaments, premises, property and all chattels both present and future including, without prejudice to the generality of the foregoing, the Mortgaged Property [...]";
>
> b. A first fixed charge over the Company's "freehold and leasehold lands, hereditaments, premises and property[...]"; and
>
> c. A floating charge over the Company's "undertaking and all its other property assets and rights whatsoever and wheresoever both present and future including but not limited to its property, assets and rights referred to in Clauses 3.1(a) to (m) if and insofar as such charges or any part or parts of the same shall be for any reason ineffective as specific or fixed charges."

The Debenture also incorporates a negative pledge clause in the standard form.

36. The security granted to the Bank is, on its face, broad and, on the level of principle, the Property is encompassed by at least some if not all of the various forms of security set out above. Counsel for Ms. Cosgrave sought to lay much emphasis on the argument that the intention of the contracting parties to the Debenture should form part of the court's consideration of its effect. Furthermore it is suggested there is an ambiguity in the Debenture and against the terms of the two related loan facility letters, which demonstrates, it is said, that the Bank never intended to take security over the Property and that any security taken was through inadvertence. Reliance was also placed in that regard on the decision in *Welch v. Bowmaker (Jr.) Ltd.* [1980] I.R. 251. The Receiver argues that the intention of the parties is irrelevant to the court's consideration and draws attention to the *dicta* of Parke J. in *Welch v. Bowmaker*. He otherwise distinguishes that judgment by arguing that no such ambiguity exists on the face of the Debenture or at all.

37. The decision in *Welch v. Bowmaker* requires, therefore, careful consideration. By a majority the Supreme Court held that the maxim *generalia specialibus non derogant* was applicable in the circumstances of the case where a special charging provision dealing with certain property followed a general charging provision dealing with, inter alia, the same property.

38. In the same decision, at 261, Parke J. described the following approach which is to be adopted when the court is tasked with interpreting a contract:

> "In construing a document, a court is not entitled to speculate as to what the parties intended to say; the court's task is to ascertain what is the true meaning and intention of the words used by the draftsman. If the words are free from inconsistency or ambiguity, it is not permissible to look outside the document itself or to attempt to ascribe any forced or strained meaning for such words in order to justify a particular construction. If (as in the present case) there is inconsistency between certain provisions of the document, it is necessary to consider the entire document and the facts and circumstances surrounding its execution in order to ascertain which of the conflicting expressions must take precedence in determining the true meaning of the document."

39. Applying that rationale, I am not satisfied that there is any inconsistency evident on the face of the Debenture. It describes that the Bank will take mortgages or first fixed charges over all of the Company's property, in the first instance, or, where any issue arises, a floating charge over the same property. While there might well be some inconsistency between the terms of the earlier loan letter and the Debenture itself, this is not an action for rectification based on mistake by the Company. As such, the court's consideration must be confined to the terms of the Debenture itself. This approach is in line with the decision of the Supreme Court in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, at 280-281, and also the decision of this court, in *BNY Trust Company*

[Ireland] Ltd & Anor v. Treasury Holdings [2007] IEHC 271, at section 4.

40. It is thus clear that the Bank has a charge over the Property. The next question is the nature of such a charge. In *Welch v. Bowmaker*, at 256, in approaching this same question, Henchy J. had regard for the fact that Bowmaker represented to the registrar of companies, and to the public at large, that the charge in that case was only a floating charge. Here, the description entered in the Land Registry folio for the Property makes a similar representation. While the argument was canvassed that if the Debenture did not create a mortgage or first fixed charge then the negative pledge clause in the Debenture served to automatically crystallise the floating charge at the time of the purported conveyance in December 2007 (the stage at which, the Receiver contends, Ms. Cosgrave received her interest, if any); it is nevertheless clear that at a minimum the Bank's security over the Property amounts to a crystallised charge post July, 2010. I will now proceed on the basis of that premise.

41. In accordance with s. 68(2) of the Registration of Title Act 1964, a charge or contract of charge creates an unregistered right over land or property pending registration. The question of the nature of that unregistered right and whether it may be said that the Bank's security is any greater than as described will be leftover as a matter to be addressed later in this judgment where necessary so to do.

42. With that in mind, the court must now move to consider the nature of Ms. Cosgrave's interest in the Property before then addressing the question of the priorities as an between the parties.

43. Counsel for the Receiver submitted that Ms. Cosgrave has no interest in the Property. He further argued that at its height, prior to the 14th December, 2007, Ms. Cosgrave's interest amounted to no more than a bare licence from Jeffel which is (and was) revocable at will. Thus, the Receiver contended that Ms. Cosgrave's interest, if any, in the Property is not sufficient to defeat his claim pursuant to the terms of the Debenture. Counsel for Ms. Cosgrave submitted that in the circumstances the Company holds the Property in trust for her and that she is therefore entitled to the full equitable and legal interest in the Property.

44. As I have already found; the facts are not substantially in dispute. Having purchased the Property, the Company then refurbished it for the purposes of selling it to Mr. Mansfield who was to hold it in trust for his wife and children. This was on foot of an agreement which resulted after Ms. Cosgrave separated from her husband. No evidence was proffered to suggest that that agreement was anything other than an oral contract. Ms. Cosgrave subsequently moved into the house in accordance with that agreement sometime in 2006 with her two children and has resided there ever since. The Company executed a debenture in favour of the Bank on the 14th March, 2007. There is correspondence which demonstrates that by the end of March 2007, the Company's solicitor had taken steps, no doubt on instructions from its client, to progress the sale of the Property on the Company's behalf to Mr. Mansfield Junior. In September, 2007 a valuation was obtained which indicated that the transaction was to be dated from 2005. Then in December, 2007 a contract for sale was executed between the Company and Mr. Mansfield. Finally, Mr. Mansfield arranged for the Company to receive payment for the Property in the manner set out above. This payment was made at some time prior to the 31st March, 2008.

45. The Company evidently permitted Ms. Cosgrave to reside in the Property. In so doing, it created a legitimate expectation on her part that she would thereafter remain in residence and consequently allowed her to act to her detriment. At that time she was entitled to have recourse to the courts under the family law legislation and through which she could have sought specific purpose of the terms of the separation agreement concluded with her husband, where necessary. Instead, in the belief that the necessary steps had been taken, Ms. Cosgrave was content to sit on her rights. Given the drastically different financial situation her husband no doubt now finds himself in as a result of the present economic difficulties and the fact that substantial parts of the Mansfield Group have succumbed to receivership, Ms. Cosgrave's position has clearly been prejudiced. Moreover, the Company then proceeded to engage in the process of instructing solicitors and valuers, executing a contract for sale and then later receiving value for the Property, no doubt on foot of an earlier agreement with Mr. Mansfield.

46. To suggest, as the Receiver's counsel has, that the transaction which permitted Ms. Cosgrave to assume residence of the refurbished Property was a separate transaction to that which was to be closed on foot of the executed contract for sale has an air of sophistry. It is undoubted that *stricto sensu* each action described above amounted to a separate legal exchange. However, each of those actions was in reality merely a step which formed part of a larger transaction. That transaction involved the refurbishment and transfer of the Property for value from the Company to Mr. Mansfield for the purposes of benefiting his wife and children with a residence for life, who in turn would refrain from issuing family law proceedings. For this court to adopt anything other than a holistic perspective in this case would risk allowing an injustice to occur.

47. However for present purposes that transaction may be divided into two discrete, yet related, elements: the first was that Ms. Cosgrave was to receive the beneficial interest in the Property for life in return for which she agreed to compromise her rights under the family law legislation; and second the Company was to transfer the legal interest in the Property to Mr. Mansfield in return for payment of €900,000. There seems no doubt but that Ms. Cosgrave was merely to receive a life interest in the Property. This is evidenced by the manner in which she described her separation agreement with Mr. Mansfield and also by the terms of the December 2007 contract for sale.

48. It is a maxim that equity looks on that as done which ought to have been done (see Delany H., *Equity and the Law of Trusts in Ireland* (5th Ed. Round Hall 2011) at 37 et seq. and Wylie, J.C.W. *Irish Land Law* (4th Ed. Bloomsbury Professional 2010 at para. 3.79 et seq.). In *Tempany v. Hynes* [1976] I.R. 101, at 114, Kenny J., for the majority in the Supreme Court, found that a specifically enforceable contract for the sale of land transfers the equitable interest to the purchaser to the extent that the purchase price is paid, and the vendor holds the legal title on a constructive trust until completion. Applying that principle to this case, the Company then held the Property on constructive trust for Mr. Mansfield. However, the creation of such an interest would have been subject to any prior interests in the Property, for example any which may have been created by the Debenture. As the court is not now tasked with determining the nature of Mr. Mansfield's interests in the Property, if any, the matter is to be left over.

49. Nevertheless, it is worth noting that in his dissenting judgment, Henchy J. at 109, noted that where a vendor parts with possession of a property, he retains an equitable lien on it for the unpaid purchase money. While the learned judge was overruled by the majority on the issue of whether a purchaser is entitled to the benefit of an equitable interest in a property before the full purchase price is paid, a point of distinction, not addressed by Kenny J., nevertheless arises. It is accepted that, as a matter of law, where a purchaser has paid the full purchase price the vendor hold both the legal title and beneficial interest on a constructive trust until completion. In this case, however, the Company transferred the beneficial interest in the Property to Ms. Cosgrave before Mr. Mansfield, as purchaser, had paid over the purchase price. What then is the status of Ms. Cosgrave's interest in light of the above maxim and associated jurisprudence?

50. Citing the case of *Re Anstis* (1886) 31 Ch. D 596, and the dicta of Lindley LJ at 605 in particular, Delany, at 37, notes that:

> "[i]t has traditionally been assumed that the maxim cannot be relied on in this context by a volunteer and equity will regard the obligation as carried out only in favour of persons who are entitled to specifically enforce the contract."

In this case, I have already found that the Company created a legitimate expectation on the part of Ms. Cosgrave, in reliance on which she prejudiced her rights.

51. While the Company's motivation behind the transaction described above was not canvassed at the hearing of the action, nor in these proceedings is it for this Court to rule on the commercial value of the transaction. It appears clear that the Company received the full market value for the sale of the full legal title in the Property which transaction was to be backdated to 2005 and which was never transferred. Before that sale was ever to occur, the Company permitted Ms. Cosgrave to reside in the Property. In doing so she refrained from exercising her strict legal rights. Taken together there is sufficient evidence to satisfy me that in this case Ms. Cosgrave is not a volunteer.

52. Although Ms. Cosgrave is clearly not entitled to seek to enforce the terms of any agreement between the Company and Mr. Mansfield for the sale of the legal title in the Property, she is entitled to bring an action in equity to vindicate her position. On that basis I am therefore satisfied as a matter of law and fact that Ms. Cosgrave's interest in the Property accrued from the date she took up residence therein. That interest may be characterised as an equitable life interest to reside in the Property. That interest did not require registration under s. 72(1)(j) of the Registration of Title Act 1964. It therefore arose prior to the interest of the Bank. Nevertheless, the matter does not conclude there for a question arises as to the extent to which the Bank may be said to have been a *bona fide* purchaser for value without notice of Ms. Cosgrave's interest in the property. I now turn to that issue.

53. The second element described above, i.e. the legal interest in the Property as and between the Company and Mr. Mansfield, is not a matter which is presently before the court and does not therefore require any further consideration.

The question of notice

54. Counsel for the respondent first raised the issue of notice. In particular, albeit in the context of a submission in respect of the Family Home Protection Act 1976 (to which it will be necessary to return later), the respondent referred to the case of *Northern Bank v. Henry* [1981] I.R. 1 in which the Supreme Court addressed the provisions of the Conveyancing Act 1882 (the "1882 Act") which deal with constructive notice.

55. Section 3 of the 1882 Act (as amended s. 3(7) by the Family Horne Protection Act) entitled "restriction on constructive notice" provides that:

> (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless-
>
> (i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or
>
> (ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, or of his solicitor, or other agent, or would have come to the knowledge of his solicitor, or other agent, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.
>
> (2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.
>
> (3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would have not been so affected if this section had not been enacted.
>
> (4) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

56. Section 1(4) defines a "purchaser" as including:

> "[...] a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser".

It also defines "property" as including:

> "[...]real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not".

57. The Bank contracted with the Company to provide certain credit facilities, which included the payment of interest, and for which the Company in turn issued a debenture and granted certain securities, in the form of mortgages, fixed and floating charges, over its property and assets. The Bank is therefore clearly a "person, who, for valuable consideration, takes or deals in property" and as such the terms of s. 3 of the 1882 Act are applicable.

58. There is no doubt but that the Bank did not have actual notice of any interest (alleged or otherwise) that the respondent has in the Property. However, it is equally undoubted that the Bank did not seek to, nor did not in fact, make any inquiries or inspections of the property. In truth, it would appear that, until the Receiver conducted a property search against the Company, the Bank was not aware either of the existence of the Property or of the fact that the respondent was resident therein with her two children.

59. The question thus turns to whether the Bank failed to make "such inquiries and inspections [...] as ought reasonably to have been made" in order to avoid a finding that it was on constructive notice of the respondent's prior interest in the Property.

60. The terms of s. 3 and the question of the test for inquiries and inspections, in particular, were considered by the Supreme Court in *Northern Bank v Henry*. The facts of that case are relevant to the present proceedings. In the circumstances a husband and wife separated but the respondent wife continued to reside in the family home with the children of the marriage. It was her claim that she

and her husband had agreed that this house, held in his name although purchased with monies advanced by her, would be transferred into her name. It was not. Nevertheless, the High Court ordered that the husband held the property in trust for the wife. On the same day the husband mortgaged the house to the plaintiff bank to secure the repayment of monies owed by him. Prior to the execution of the mortgage by the husband, the plaintiff, apart from making a search in the Registry of Deeds, made no investigation whatsoever of the husband's title to the house. Subsequently the plaintiff brought proceedings seeking a declaration that its estate in the property pursuant to the mortgage was superior to the interests of the husband and the wife.

61. In his decision, at 9, Henchy J. held that:

> "In my judgment, the test of what inquiries and inspections ought reasonably to have been made by the plaintiffs is an objective test which depends not on what the particular purchaser thought proper to do in the particular circumstances but on what a purchaser of the particular property ought reasonably to have done in order to acquire title to it.
>
> [...]
>
> In a particular case a purchaser, looking only at his own interests, may justifiably and reasonably consider that in the circumstances some of the normal inquiries and inspections may or should be dispensed with. The special circumstances, thus narrowly viewed, may justify the shortcut taken, or the purchaser may consider that they do so. In either event, such a purchaser is not the purchaser envisaged by s. 3, sub-s. 1, of the Act of 1882. That provision, because it is laying down the circumstances in which a purchaser is not to be prejudicially affected by notice of any instrument, fact or thing, is setting as a standard of conduct that which is to be expected from a reasonable purchaser. Reasonableness in this context must be judged by reference to what should be done to acquire the estate or interest being purchased, rather than by the motive for or the purpose of the particular purchase.
>
> A purchaser cannot be held to be empowered to set his own standard of reasonableness for the purpose of the sub-section. He must expect to be judged by what an ordinary purchaser, advised by a competent lawyer, would reasonably inquire about or inspect for the purpose of getting a good title. If his personal preference, or the exigencies of the situation, impel him to lower the level of investigation of title below that standard, he is entitled to do so; but, ifhe does so, he cannot claim the immunity which s. 3, sub-s. 1, reserves for a reasonable purchaser. A reasonable purchaser is one who not only consults his own needs or preferences but also has regard to whether the purchase may affect, prejudicially and unfairly, the rights of third parties in the property. In particular, a reasonable purchaser would be expected to make such inquiries and inspections as would normally disclose whether the purchase will trench, fraudulently or unconscionably, on the rights of such third parties in the property."

The learned judge then held that in the circumstances of the case, the plaintiffs made no inquiry as to who was in occupation of the property which was an action which a reasonable purchaser would have made.

He continued by finding that:

> "A minimum requirement for the proper investigation of a title is to see that the purchaser will either get vacant possession on completion or, if the contract or the needs of the purchaser do not so permit or require, get evidence of any estate or interest that will stand between him and vacant possession. Considering the many ways, both at common law and under statute, in which a person in occupation may have an estate or interest adverse to that of a vendor, and which would not appear on an investigation of the vendor's paper title, I consider that the plaintiffs, as purchasers, ought reasonably to have investigated this aspect of the title. Had the plaintiffs done so, the fact of the wife's possession of the property would have come to light, as well as her well-founded claim to the beneficial ownership of it."

62. It hardly needs to be articulated but that the facts of the present application bear more than a passing resemblance to those in *Northern Bank v. Henry*. The Bank did not see fit to make any inquiries as to the precise nature of the property over which it was to take security nor did it seek to question whether that property was subject to any third party interests. Moreover, it is worthy of noting in passing that Kenny J. stated:

> "I do not think that a mortgagee is bound to inspect the property on which he is taking a mortgage [...]."
>
> The burden on the Bank was therefore to simply make an inquiry of the Company as it was not required to physically travel to inspect the Property. It is in this way that the Irish law can be said to be less onerous than that articulated in the decision of the Court of Appeal in *Hunt v Luck* [1901] 1 Ch. 45.

63. In his judgment, at 19, Kenny J. held that the onus is on a plaintiff to prove that it was a purchaser for value without notice. It was therefore incumbent on the Bank in putting its case before the court to demonstrate that it had compiled with its obligations under the 1882 Act. In this case, far from seeking to discharge that burden, the Bank, in its submissions, has argued that the question of notice is irrelevant as the two interests are equal for the purpose of determining priority, and the first in time ranks first. In his affidavit dated the 7th October, 2011, the Receiver averred that:

> "[...] the Bank could not be expected to be on notice of a bare record of the purported transaction in third party company accounts [...]".

64. There is no identity between the interests of the Bank and Ms. Cosgrave in the Property. Similarly, I find that the respective interests are not equal and as such the question of notice is relevant. Furthermore, the 1882 Act, as interpreted by the Supreme Court, dictates that a reasonable purchaser is expected to make the necessary inquires and inspections. Where it has not, as the Bank in this case has failed so to do, it will be held to be on constructive notice of a transaction. I, therefore, find that the Bank has not discharged the burden articulated by Kenny J. nor has it conducted its affairs in this regard as a "reasonable purchaser", as described by Henchy J. as set out earlier, and is, therefore, on constructive notice of, and subject to the priority of, Ms. Cosgrave's interest in the Property.

65. It appears abundantly clear that the Bank in this case used what Henchy J. described as a "shortcut" in putting in place security over the Company's property. At the time that decision was taken, the Bank ought to have known that such an approach involved an element of risk. It is not, however, for the court to make any judgment on what is essentially a commercial decision. However, it is equally not for the court to "correct" what turns out to have been a poor choice, especially by a large organisation with the benefit of considerable legal advice and assistance. In opting for a cost effective and efficient route, the Bank hazarded its security. That risk has manifested and the Bank must reconcile itself to those consequences.

Constructive notice in commercial transactions
66. For the sake of completeness I must address the comments of Professor Wylie *"Land Law"* (4th Ed. Bloomsbury Professional 2010) at p. 139, to the extent that they have a bearing on the present application. Citing the case of *Bank of Ireland v.Rockfield* [1979] I.R. 21, the author notes that the "courts are reluctant to apply the doctrine of constructive notice to commercial transactions". In that case Kenny J. referencing the earlier comments of Lindley J. in *Manchester Trust v. Furness* [1895] 2 Q.B. 539, noted that:

> "There is strong authority that the doctrine of constructive notice is not to be extended to commercial transactions."

On their face, these comments would appear to render the previous analysis moot. However, at the very least, further scrutiny of the jurisprudence is required.

67. The decision in *Bank of Ireland v. Rockfield* was later followed by McGovern J. in *Danske Bank A/S trading as National Irish Bank PLC v. Madden* [2009] IEHC 319 who, in the course of his judgment, distinguished the decision in Northern Bank v. Henry. That distinction is important here. In both *Rockfield* and *Madden* the respective defendants sought to avoid transactions viz. their banks. In the former case it was on the grounds that the plaintiff bank ought to be held to have taken constructive notice of the fact that the sums advanced were used to purchase shares in a company, which were secured over the property of that same company, with the result that the transaction was said to be in breach of s. 60 of the 1963 Act. In the latter case it was on the grounds that the plaintiff bank ought to have taken constructive notice of the fact that the defendant's solicitor had committed or was in the process of committing a fraud on his client.

68. In the present case, as in Northern Bank v. Henry, the question of notice is as and between a bank and a third party. If either Kenny or Park JJ., both of whom formed part of the Supreme Court in both *Bank of Ireland v. Rockfield* and *Northern Bank v. Henry*, which judgments were delivered little more than two years apart, had wanted to clarify that a rule prohibiting the application of constructive notice in all commercial transactions, regardless of the context, existed then they could have done so. Failing same, I am bound to follow the later decision as representing the applicable law in this matter. Consequently, the comments of Professor Wylie do not have any bearing on the present proceedings.

69. Reference was made in the course of the submission by counsel for the Receiver to the Land and Conveyancing Law Reform Act 2009. I now turn to a consideration of that legislation and to examine whether its provisions affect the present proceedings.

The Land and Conveyancing Law Reform Act 2009
70. It is to be noted that s. 3 of the 1882 Act has since been repealed by s. 8(3) of the Land and Conveyancing Law Reform Act 2009. That act came into operation, to the extent relevant here, on the 1st December, 2009, in accordance with the terms of the Land and Conveyancing Law Reform Act 2009 (Commencement) Order 2009 (SI 356/2009). However as the scope of this act is not said to have retrospective effect, at least insofar as it applies here, it has little if any relevance to the present proceedings.

71. As an aside it is worth noting that s. 52 of the Land and Conveyancing Law Reform Act 2009, has since reversed the finding of the majority in *Tempany v. Hynes*. Thus in effect vindicating the approach adopted by Henchy J. However this change in the law only applies to those contracts entered into after the 1st December, 2009.

Nature of the Bank's pre July 2010 interest in the Property
72. The question of the nature of the Bank's interest in the Property prior to the registration of the crystallised charge is now rendered moot by the fact that any interest acquired by the Bank post March, 2007 was nevertheless subject to Ms. Cosgrave's prior equitable interest. It is therefore unnecessary to address the questions of whether the Bank's interest was initially created as a mortgage or first fixed charge, or, alternatively, if that interest was created as a floating charge, whether such a charge crystallised at any point prior the appointment of a receiver.

Family Home Protection Act
73. However, in any event it appears that the provisions of the Family Home Protection Act 1976 as amended, have a particular relevance which overtakes all other considerations.

74. In the course of legal submission, counsel for Ms. Cosgrave advanced the argument that the Property and more particularly, Ms. Cosgrave, was covered by the terms of the Family Home Protection Act 1976 (as amended) (the "1976 Act"). It was canvassed that the Company held the Property on trust for Ms. Cosgrave and that any deficiencies in her title to that house do not bar her from the protections afforded by the legislation. Moreover, it was contended that the act was designed to meet precisely the position where a spouse did not have a full legal interest in a property in which they resided.

75. The Receiver countered that the 1976 Act has no application in this case, nor does it affect the validity of the Debenture. It was submitted that Ms. Cosgrave does not possess sufficient "interest" in the Property and that it would require a "strained and unnatural reading" of s. 3(3)(b) of the 1976 Act to require all potential vendors to elicit the consent of somebody in Ms. Cosgrave's position.

76. The court's attention must therefore turn to a close inspection of the terms of the legislation before considering their applicability and effect in the case at hand. First, it must be remembered that the purpose of the 1976 Act, as articulated in Somers v. W [1979] IR 94, at 112, by Griffin J. for the Supreme Court, is the following:

> "The main purpose of the [1976] Act is to ensure that the family home, or any interest in it, cannot be sold or in any way disposed of by the owner over the head of his or her spouse. Although the Act applies to both spouses and, therefore, protects the husband where the wife is the legal owner, for all practical purposes the Act is designed to protect the wife and the dependent children (as defined ins. 1 of the Act) of the family, since in Ireland the legal title to a house is rarely vested in the wife alone.
>
> In respect of any attempted alienation of the family home, the protection afforded by the Act is given by s. 3 and is in the widest terms."

77. The judgment of Henchy J. in *Somers v.W* is also noteworthy for the examination which he engages in of the interaction between the 1882 Act and the 1976 Act. At 109, he stated that s. 3 of the 1976 Act is to be operated within the doctrine of notice set out in s. 3 of the 1882 Act. He noted that the deletion of the clause "as such" by s. 7 of the 1976 Act from s. 3 of the 1882 Act is indicative of this and facilitates the extension of the reach of constructive notice.

78. In *Nestor v. Murphy* [1979] I.R. 326, Henchy J., again for the Supreme Court, held, in a pithy judgment, that:

> "The basic purpose of [s. 3(1) of the 1976 Act] is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction. [...] The point and purpose of imposing the sanction of voidness is to enforce the right of the non-disposing spouse to veto the disposition by the other spouse of an interest in the family home. [...] The provisions of s. 3, sub-s. 1, are directed against unilateral alienation by one spouse. [...]
>
> In such circumstances we must adopt what has been called a schematic or teleological approach. This means that s. 3, sub-s. 1, must be given a construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to the legislative scheme as expressed in the Act of 1976 as a whole. Therefore, the words ofs. 3, sub-s. 1, must be given no wider meaning than is necessary to effectuate the right of avoidance given when the non-participating spouse has not consented in advance in writing to the alienation of any interest in the family home."

79. Arising out of that judgment, it is clear that the court must adopt a teleological approach in the interpretation of s. 3 of the 1976 Act in order to give effect to the purposes of the Act which is, at the level of principle, the protection of a wife and dependent children of the family. Moving to the 1976 Act itself; s. 2 states:

> "(1) In this Act *"family home"* means, primarily, a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving.
>
> (2) In subsection (1), 'dwelling' means any building or part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with the dwelling, being land that is subsidiary and ancillary to it, is required for amenity or convenience and is not being used or developed primarily for commercial purposes, and includes a structure that is not permanently attached to the ground and a vehicle, or vessel, whether mobile or not, occupied as a separate dwelling."

80. As such, the Property, on the grounds that Ms. Cosgrave is ordinarily resident therein, comes within the first part of the above definition. A second element is the question of whether she can be said to be a spouse "whose protection is in issue". It is to be presumed that such a spouse is the "non-owning spouse" for it would be absurd to find that a spouse vested with full legal and equitable title in a property could have recourse to the 1976 Act. Moving on, therefore, to the substantive provisions contained in s. 3 which provide:

> "(1) Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2), (3) and (8) and section 4, the purported conveyance shall be void.
>
> [...]
>
> (3) No conveyance shall be void by reason only of subsection (1)-
>
> (a) if it is made to a purchaser for full value,
>
> (b) if it is made, by a person other than the spouse making the purported conveyance referred to in subsection (1), to a purchaser for value, or
>
> [...]
>
> (4) If any question arises in any proceedings as to whether a conveyance is valid by reason of subsection (2) or (3), the burden of proving that validity shall be on the person alleging it.
>
> [...]"

81. As such s. 3(1) only applies to a conveyance by a spouse of any interest in a family home. In principle a company therefore falls outside of this definition and may validly sell or convey its interest in a property without first having to obtain any consent under the 1976 Act. This flows from the fact that a company by its very nature cannot have a spouse. However, s. 3(3)(b) makes provision for situations in which a third party purports to convey an interest in a family home. As such, while a company is clearly not a spouse, if its property constitutes a family home then a spouse residing therein may have recourse to the protections under the 1976 Act.

82. Such a company must therefore obtain consent from the affected spouse or face the prospect of the conveyance being deemed void. If consent is not forthcoming the company may, of course, apply to court in accordance with s. 4 of the 1976 Act before the conveyance takes place. Alternatively, the purchaser may seek to claim exemption from s. 3 on the grounds that they are a bona fide purchaser for valuer without notice.

83. The decision in *Walpole's (Ireland) Ltd v. Jay* (Unreported, High Court, 20th November, 1980) (cited in Shannon G. (ed.), *"Family Law Practitioner"* (release 12 Sweet & Maxwell 2008) at para. BD-049 and in Shatter, A., *"Shatter's Family Law"* (4th Ed. Lexis Nexis Butterworths 1997) at p. 728) is of note in this regard. In that case, the vendor was a company but the purchaser was aware that a director and his wife had resided in the premises for a time. MeWilliam J. found that the purchaser was entitled to make enquiries as to the nature of the interest held by the director and if such enquires revealed that the director had an interest in the property, then the consent of the director's spouse was required. As such it would appear that the purchaser was obliged to conduct such enquires as would be necessary to be afforded protection as a *bona fide* purchaser for value.

84. On foot of this decision, the Law Society published a Practice Note in the Law Society Gazette of October 1983 which stated, in part, that:

> "It is therefore the view of the Conveyancing Committee that where a purchaser is aware that any person, other than the vendor or his predecessors in title has been or is in occupation of the property as a 'family home', then additional requisitions should be raised."

While a Practice Note does not have the force of law, it can nevertheless be viewed as describing "best practice" in an area which practitioners should only deviate from in a cautious and deliberate manner and for sound reasons.

85. The question arises as to whether in granting a charge over the Property the Company purported to convey and interest as defined in the 1976 Act. "Interest", according to s. 1, "means any estate, right, title or other interest, legal or equitable". Furthermore the definition of a "mortgage" includes "an equitable mortgage, a charge on registered land and a chattel mortgage". As such, there appears little doubt but that any security granted by the Company to the Bank under the terms of the Debenture falls within either or both of these definitions and is therefore caught by the 1976 Act. This finding is supported by the decision of Barron J. in *Bank of Ireland v Purcell* [1989] I.R. 327.

86. In this case, I have already found that the Bank failed to conduct proper enquires into the title to the Property. As such, it has been fixed with constructive notice of Ms. Cosgrave's interest. It therefore follows that any interest in the Property which the Company sought to transfer or grant security over it was necessarily subject to Ms. Cosgrave's interest in the first instance. In light of the Family Home Protection Act, the fact that the Property constituted Ms. Cosgrave's family home means that is afforded the protections set out in that Act.

87. It therefore follows that, as the procedures set out in the 1976 Act for the conveyance of an interest in a family home were not complied with, in accordance with s. 3 of the act, any such purported conveyance is void. Here the Company sought to convey an interest in the Property to the Bank without either seeking consent in writing from Ms. Cosgrave or by applying to court to dispense with the consent. I have already found that the Property constitutes a "family home". It therefore following that the purported conveyance is void and that the Bank consequently does not have any legal interest in the Property.

Conclusion

88. The Receiver brought an application under s. 316 of the 1963 Act seeking directions from court as to the parties' respective interests in the Property. I have found that Ms. Cosgrave has an equitable interest in the Property arising from the fact that the Company permitted her to install herself and her children in the house and to subsequently sit on her rights as against her estranged husband to the extent that those rights are now seriously prejudiced. That interest was created before the Debenture was executed. The Bank failed to make any enquiries of the Company as to the nature of the title of the property over which it was seeking to take security. Had it made such enquires then it would have had actual notice of Ms. Cosgrave's residence in the Property. The 1882 Act therefore serves to fix the Bank with constructive notice of that fact, the effect of which is that any interest which the Bank has in the Property is subject, in terms of priority, to that of Ms. Cosgrave.

89. Furthermore, because the Property was "a family home", the terms of the 1976 Act as amended, apply. The Company purported to convey an interest in the Property to the Bank without complying with the terms of the 1976 Act regarding consent, the effect of which is to render the purported transaction void.

90. In the circumstances as outlined the Receiver is not entitled to the reliefs as sought.