

THE HIGH COURT
COMMERCIAL

[2012 7554 P]

[2012 169 COM]

BETWEEN

ALEXANDRA O'DONNELL, BLAISE O'DONNELL, BLAKE O'DONNELL AND BRUCE O'DONNELL

PLAINTIFFS

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, BANK OF IRELAND PRIVATE BANKING LIMITED AND TOM KAVANAGH

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 31st day of July, 2013

1. These proceedings arise in relation to various securities executed in favour of the first named defendant over a property at Gorse Hill, Vico Road, Killiney, County Dublin ("Gorse Hill") by Vico Limited. These securities related to the liabilities of Brian O'Donnell and Mary Patricia O'Donnell, as well as various corporate entities controlled by them.

2. The plaintiffs are the children of Brian and Mary Patricia O'Donnell. They assert beneficial ownership over Gorse Hill, claiming that the various securities were executed in breach of trust and *ultra vires* the powers of Vico Limited, and seeking declarations that these instruments are void and of no legal effect. On foot of such declaration, or in the alternative, the plaintiffs seek rescission of these instruments.

3. The plaintiffs also seek a declaration that statutory declarations executed by them on 15th March, 2011, which purported to affirm the securities in question, are void and of no legal effect on the basis that these were procured on the basis of undue influence, in breach of trust and breach of duty. Again, the plaintiffs seek rescission of these instruments.

4. Further, the plaintiffs seek a declaration that they are entitled to the beneficial ownership of Gorse Hill, together with a declaration that the appointment of the third named defendant by the first named defendant as receiver of Vico Limited is void and of no legal effect, as well as injunctive reliefs restraining the first named defendant and the second named defendant from taking any step on foot of the securities held by them.

5. Finally, the plaintiffs seek damages, including aggravated, exemplary or punitive damages, for breach of trust, negligence and breach of duty.

6. The claim arises in the following circumstances. By way of Deed of Settlement dated 16th September, 1997, known as the "Avoca Settlement", a discretionary trust was established in favour of the plaintiffs by Brian and Mary Patricia O'Donnell. All of the plaintiffs were minors at this time. Aundyr Trust Company Limited, a Manx trust management company, was appointed as the initial trustee. This company changed its name in or around 2002 to IFG International Trust Co. Limited and will hereinafter be referred to as "IFG".

7. The precise manner in which the trust was structured is in dispute, and will be addressed in due course. It is not disputed, however, that a holding company, Tabasco Limited was incorporated, with IFG being the sole shareholder. This company in turn set up number subsidiary companies to hold the trust assets. In particular, Vico Limited was incorporated in the Isle of Man on 11th December, 1997.

8. Gorse Hill had been acquired by way of a contract for sale dated 27th May, 1997, with the purchaser being a solicitor employed by William Fry, in trust for Vico Limited. A second contract for sale was executed in relation a further parcel on 20th April, 2000, with Brian O'Donnell being the purchaser, again in trust for Vico Limited.

9. A deed of Mortgage and Charge in favour of the first named defendant was registered against Vico Limited in the Isle of Man on 20th February, 1998. A Power of Attorney had been executed by Vico Limited in favour of the Lower Mount Limited on 1st January, 1998, so as to facilitate this transaction.

10. The plaintiffs have been resident at Gorse Lodge since 2000. Brian and Mary Patricia O'Donnell also resided at the property up until 2011, when it is claimed that they moved to the United Kingdom.

11. On 20th October, 2000, Brian and Mary Patricia O'Donnell wrote in what was described as a "letter of wishes", addressed to IFG:-

"Following due consideration, we, the undersigned, confirm and assure you, the trustees, that we shall at all times care [sic] and support the beneficiaries of the settlement, namely Blake, Bruce, Blaise and Alex O'Donnell.

We confirm that we shall use the residence, Gorse Hill, Vico Road, as a residence of ourselves and the beneficiaries for so long as the trustees on behalf of the beneficiary shall permit. It is acknowledged by the trustees and the beneficiaries that any notice given to us to vacate the residence shall be in writing and shall, in the absence of our consent, be at least two calendar years prior to the vacation date to allow sufficient time for alternative arrangements to be made."

12. It is claimed that Brian and Mary Patricia O'Donnell invested significant sums in the construction, renovation and upkeep of Gorse lodge. A promissory note issued in their favour from Vico Limited in the sum of IR£1,055,000 on 4th February, 1998.

13. By way of two Deeds of Transfer dated 8th May, 2006, the previous arrangement (described at paragraphs 8 and 9 supra) was terminated and the property at Gorse Hill was transferred outright to Vico Limited. The company's title was registered at the Registry of Deeds on 19th May, 2006, and its ownership of Folio DN 211 was registered at the Land Registry on 18th June, 2006. Gorse Hill was the only asset of the Vico Limited.

14. Around this time, Brian and Mary Patricia O'Donnell entered into arrangements with the first and second named defendants whereby Vico Limited would offer security by way of mortgages and guarantees for their personal borrowings, as well as borrowings through the vehicle of a company wholly owned by them, Hibernia (2005) Limited. Subsequently, further arrangements were entered into, involving other corporate vehicles controlled by Brian and Mary Patricia O'Donnell. The security instruments ("Securities") in question are as follows:-

- (i) Deed of Mortgage dated 1st June, 2006, between Vico Limited and the first named defendant;
- (ii) Guarantee and Indemnity dated 1st June, 2006, executed by Vico Limited in respect of personal liabilities of Brian and Mary Patricia O'Donnell;
- (iii) Guarantee and Indemnity dated 1st June, 2006, executed by Vico Limited in respect of the liabilities of Hibernia (2005) Limited;
- (iv) Guarantee and Indemnity dated 19th October, 2006, executed by Vico Limited in respect of the obligations of Brian and Mary Patricia O'Donnell;
- (v) Deed of Confirmation dated 15th June, 2007, in respect of the Guarantee and Indemnity dated 19th October, 2006;
- (vi) Guarantee and Indemnity dated 24th March, 2011, executed by Vico Limited in respect of the liabilities of Brian and Mary Patricia O'Donnell, Vico Swiss Holdings AG and Grey Stoke Société Anonyme.

15. On 31st May, 2006, the plaintiffs signed a document addressed to IFG as trustees of the Avoca Settlement. The second and third named plaintiffs were minors at the time. This document provided:-

"We the current beneficiaries of the Avoca Settlement ... individually and irrevocably agree to Vico Limited, a wholly owned subsidiary of the Settlement, which is indebted to Brian and Mary Patricia O'Donnell, to give security of the company's sole asset to Bank of Ireland in respect of personal borrowings provided by the Bank to Brian and Mary Patricia O'Donnell and Hibernia (2005) Limited (a wholly owned company owned by Brian and Mary Patricia O'Donnell), up to a maximum of €17,000,000."

16. A further document was executed by the plaintiffs on 22nd August, 2006, in identical terms, save that the maximum authorised security was increased in amount to €25 million.

17. On 18th October, 2006, IFG ceased to act as trustee, and Chancery Company Managers Limited was appointed to that role. In 2008, Chancery Trustees Limited was appointed as trustees in succession to Chancery Company Managers Limited, arising out of a restructuring required by Manx law. For convenience, both entities will hereinafter be referred to as "Chancery".

18. As matters transpired, by 2010, the course of dealings between Brian and Mary Patricia O'Donnell and the first and second named defendants had reached a point where the borrowers were unable to discharge their borrowing commitments. A number of sets of proceedings were commenced by the first and second named defendants, including summary proceedings in the name of the first named defendant, bearing the record number 2010/6100S. This matter was listed for hearing on 3rd March, 2011. On 4th March, 2011, settlement was reached, whereby Brian and Mary Patricia O'Donnell agreed to take the following steps, in lieu of which judgment was to be entered against them:-

(i) To confirm on or before Wednesday 9th March, 2011, the identity of each person or company having any beneficial interest in the property at Gorse Hill, Vico Road, Killiney, County Dublin ...

(ii) To deliver to the Bank, on or before 16th March, 2011, full unencumbered security from each and every person or company having a legal and / or beneficial interest in the Gorse Hill property, such security to:

a. Secure all of the debts the subject of these proceedings;

b. Be executed within two days of receipt from the Bank of the form of documents required by it, without comment or negotiation on the part of the Debtors or any other person; ...

19. Pursuant to this settlement, the plaintiffs each executed a Statutory Declaration on 16th March, 2011, setting out, *inter alia*, the following:-

1.1 This Declaration relates to the property known as Gorse Hill, Vico Road, Killiney, Co. Dublin (hereinafter called "the Property")

1.2 I confirm that Vico Limited holds the entire legal and beneficial title to the property and that I have no interest in or right or title to the property except to the extent I am the beneficial owner of the shares in Vico Limited.

Legal Issues Arising

20. While the factual background set out heretofore is by and large common case between the parties, there is a dispute as to the legal ramifications of the arrangements as described. The legal issues falling for consideration in this case appear to me to be as follows:-

- (a) Is Vico Limited the full legal and beneficial owner of Gorse Hill?

(b) What interest, if any, may be asserted by the plaintiffs in Gorse Hill, given the structure of the Avoca Settlement and associated trust arrangements?

(c) Were the first and second named defendants aware of any beneficial interest in Gorse Hill operating in favour of the plaintiffs?

(d) Were the Securities properly executed and are they binding? Do the circumstances warrant a declaration that they are void or an order for their rescission?

(e) In light of the conclusions that may be reached to the foregoing questions, what is the effect of the Statutory Declarations executed by the plaintiffs? Were their signatures procured by way of undue influence or duress, such that their declarations may be declared void or rescinded?

Ownership of Gorse Hill

21. As set out *supra*, Vico Limited's title to Gorse Hill was registered at the Registry of Deeds on 19th May, 2006, and its ownership of Folio DN 211 was registered at the Land Registry on 18th June, 2006. Section 31 (1) of the Registration of Title Act, 1964, provides that:-

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register...the title of the owner to the lands appearing on the register and of any right, privilege, appurtenance or burden thereon as appearing thereon. And such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document or matter related to the land."

22. A Land Registry certified copy folio, dated 13th October, 2006, was produced to the court, showing Vico Limited to be the full owner at that time, subject to a charge in favour of the first named defendant. In response, the plaintiffs refer to s. 92 of the Registration of Title Act, 1964, which provides that *"notice of trust shall not be entered in the register"*.

23. The charge referred to in the previous paragraph had been created by deposit of title deeds, and was registered against Vico Limited pursuant to Manx law, with a Certificate of Registration dated 20th February, 1998, being produced to the court which states that:-

"I hereby certify that a record of deposit of deeds dated the 4th of February 1998 and created by Vico Limited for securing the sum of all monies due and owing and passed to the Governor and Company of the Bank of Ireland was registered pursuant to the relevant provisions of the Isle of Man's Companies Act."

24. Similarly, the Power of Attorney executed by Vico Limited in favour of the Lower Mount Limited on 21st January, 1998, provided as follows:-

"Vico Limited hereby appoint Lower Mount Limited in our name and on our behalf as attorney to complete on behalf of this company a deposit of the title deeds of our properties at Gorse Hill, Vico Road, Killiney, County Dublin to the Governor of the Bank of Ireland."

25. The deed of Mortgage and Charge dated 1st June, 2006, executed by Vico Limited in favour of the first named defendant was presented by the defendants. This deed certifies in its recitals that Vico Limited was the beneficial owner of the property. When this matter was put to the third named plaintiff in cross examination, he accepted it as a clear statement of Vico Limited's beneficial ownership of Gorse Hill.

26. Objections and Requisitions on Title had been raised in contemplation of the latter arrangement by the first named defendant, including the following:-

"Has any person other than the vendor made any direct or indirect financial contribution or been the beneficiary of any agreement or arrangement whereby that person has acquired an interest in the property or any part of it?"

In their response dated 2nd June, 2006, Brian O'Donnell & Partners, acting on behalf of Vico Limited stated: *"Borrower says no."*

27. Gethin Taylor of Chancery, a trustee of the Avoca Settlement and a director of Vico Limited, swore an Affidavit of Discovery in these proceedings on 20th May, 2013, wherein he avers that:-

"To the best of [Chancery Trustees Limited's] knowledge and belief, at all material times the property was an asset of Vico Limited and not an asset held by the trustees."

28. The trust accounts for 2009, 2010 and 2011 were produced in support of this position, showing no entry indicating an interest in Gorse Hill, but each instead reflecting a holding of "2 £1 shares in Vico Limited". Previously, Tabasco Limited had held the shares in Vico Limited, with the shares in the former company being held by the trust. By August 2007, Tabasco Limited, as well as all other companies in the structure aside from Vico Limited had been dissolved and the remaining shares were held directly by the trust. The draft accounts of Vico Limited for the year ending 31st December, 2008, show a "[p]roperty at Gorse Hill, Vico Road" as being the sole fixed asset of the company.

29. The plaintiffs advanced the alternative plea that Vico Limited was a special purpose vehicle, holding legal title to Gorse Hill as nominee, with the trust retaining beneficial ownership. There is no basis upon which to hold that the company was specifically incorporated by the trustees as a nominee, given that its incorporation was registered before the Avoca Settlement had been executed and that legal ownership did not pass to the purported nominee until 2006. Furthermore, it is apparent from the Deed of Mortgage and Charge executed by Vico Limited in 1998 in favour of the first named defendant that the company was the beneficial owner at that time, rather than the trust.

30. This position is further confirmed in the plaintiffs' replies to the first and second named defendants' Notice for Particulars, which were delivered on 13th December, 2012. In response to the request for particulars contained at paragraph 3.1; namely:-

"Please explain how Vico Limited was the "legal owner" of Gorse Hill in or around 2000 having regard to the plea at

paragraph 12 of the Statement of Claim that title to the property was not registered until May 2006"

The reply delivered on behalf of the plaintiffs was:-

"From the plaintiffs' knowledge a solicitor in the firm of William Fry purchased Gorse Hill in trust for Vico Limited on 27th May, 1997. In those circumstances, Vico Limited was the beneficial owner in 1997."

31. Having carefully considered the evidence before me, I am quite satisfied that Vico Limited acquired the beneficial interest in Gorse Hill by way of the Contracts of Sale executed in 1998 and 2000. Furthermore, the evidence clearly establishes that full legal and beneficial ownership of Gorse Hill was conveyed to Vico Limited by way of Deeds of Transfer, executed in 2006.

The Plaintiffs' Position

32. Having established that Vico Limited is the full legal and beneficial owner of Gorse Hill, it is now necessary to consider the nature of the interest held by the plaintiffs, if any. As set out at paragraph 27 *supra*, Mr. Gethin Jenkins, a trustee of the Avoca Settlement and director of Vico Limited has sworn that to the best of his belief and knowledge, the trust has no interest in Gorse Hill. Rather, it appears that shares in Vico Limited are held by the trust, for the benefit of the plaintiffs. The accounts and minutes of both the trust and Vico Limited confirm this position.

33. Neither Brian nor Mary Patricia O'Donnell were called to give evidence at this trial. Mr. O'Donnell in particular would be uniquely placed to confirm the position with regard to the Avoca Settlement.

34. However, the position as outlined *supra* is again clearly stated in correspondence entered into in the context of settlement negotiations relating to summary proceedings issued by the first named defendant. On 9th March, 2011, Whitney Moore & Kelleher, the solicitors representing Brian and Mary Patricia O'Donnell, wrote to Arthur Cox, the solicitors representing the first named defendant, to confirm that:-

"... the property at Gorse Hill is owned by Vico Limited. This company's entire shareholding is owned by Chancery Trustees in trust for the beneficiaries who are Blake, Bruce, Blaise and Alex O'Donnell, the children of Brian and Mary Patricia O'Donnell"

35. An email sent by Stephen Walker of Whitney Moore & Kelleher to Eve Mulconry of Arthur Cox on that same date again confirms the position as being that:-

"My instructions are that Vico Limited holds the legal and beneficial interest in Gorse Hill and that the trust holds the shares of Vico Limited."

36. In *Prest v. Petrodel Resources Ltd.* [2013] 3 WLR 1, Lord Sumption stated at page 30 that the question of:-

"Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts."

37. In that case, the plaintiff had been married to Mr. Prest. The couple divorced and the plaintiff sought ancillary orders in the family law courts in relation to properties which were held by Mr. Prest through the mechanism of off-shore companies. The structure of companies is described as having been "complex", but in essence, the companies held legal title in the properties, while Mr. Prest retained beneficial ownership. Based on this finding of fact that the beneficial interest in these properties vested in Mr. Prest and having particular regard to his ability to deal in and transfer the properties, the Supreme Court of England and Wales ordered that they be transferred to the plaintiff, pursuant to provisions of family legislation.

38. The Court took the view that the cardinal rule of separate corporate personality set in *Salomon v A Salomon & Co Ltd* [1897] AC 22 should not be departed from unless there is evidence of impropriety or of a party seeking to obtain an unlawful advantage through the use of corporate vehicles. Where it can be established that the corporate structure is a "sham", intended to conceal the reality of the situation, the courts may intervene. Lord Sumption stated at page 20:-

"... [T]he recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

In the present case, Moylan J held that he could not pierce the corporate veil under the general law without some relevant impropriety, and declined to find that there was any. In my view he was right about this. The husband has acted improperly in many ways. In the first place, he has misapplied the assets of his companies for his own benefit, but in doing that he was neither concealing nor evading any legal obligation owed to his wife. Nor, more generally, was he concealing or evading the law relating to the distribution of assets of a marriage on its dissolution. It cannot follow that the court should disregard the legal personality of the companies with the same insouciance as he did. Secondly, the husband has made use of the opacity of the Petrodel Group's corporate structure to deny being its owner. But that, as the judge pointed out, at para 219, "is simply [the] husband giving false evidence." It may engage what I have called the concealment principle, but that simply means that the court must ascertain the truth that he has concealed, as it has done. The problem in the present case is that the legal interest in the properties is vested in the companies and not in the husband. They were vested in the companies long before the marriage broke up. Whatever the husband's reasons for organising things in that way, there is no evidence that he was seeking to avoid any obligation which is relevant in these proceedings. The judge found that his purpose was "wealth protection and the avoidance of tax" ... It follows that the piercing of the corporate veil cannot be justified in this case by reference to any general principle of law."

39. Lord Sumption reiterated that, in the absence of factors such as those set out in the preceding paragraphs, the long-standing principle enunciated by Lord Buckmaster in *Macaura v Northern Assurance Co Limited* [1925] AC 619 at page 626 must apply:-

"No shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up."

40. The evidence very clearly establishes that the plaintiffs are beneficial owners of shares in Vico Limited, but hold no beneficial

interest in Gorse Hill. All legal documentation concerning Gorse Hill, as well as minutes and accounts of Vico Limited and the Avoca Settlement confirm this position. The documentary evidence proffered in support of the plaintiffs' case, consisting primarily of internal memoranda generated by the first and second named defendant, is unpersuasive. These do not unambiguously support the contentions advanced, but in any event these memoranda are of no legal effect, merely representing an officer of the Bank's interpretation of the subsisting legal situation.

41. The plaintiffs did not seek to maintain that the corporate structure of Vico Limited was a "sham", nor that there had been any wrongdoing by Brian and Mary Patricia O'Donnell in establishing the trust structure or in their dealings with the first and second named defendants. Therefore, there appears to be no basis upon which to depart from the ordinary rules of separate corporate personality in this case.

Constructive Trust / Knowing Receipt

42. The plaintiffs seek to advance an alternative argument based on an assertion that the first and second named defendants had not only been aware of the structure of the Avoca Settlement, but had played an active part in its creation. They therefore claim that any interest in Gorse Hill conveyed to the first and second named defendant should be deemed by the court to be held on constructive trust to their benefit, citing *Agip (Africa) Limited v. Jackson* [1989] 1 WLR 1367, *Re Varko Limited* [2012] IEHC 278 and *Rolled Steel Products (Holdings) Limited v. British Steel Corporation* [1986] Ch. 286 in support of this proposition. In *Rolled Steel*, Browne-Wilkinson LJ stated at page 303:-

"In my judgment, for this purpose the position of a company is analogous to that of a human being who has fiduciary powers. If two trustees convey trust property in breach of trust, the conveyance is not void. As human beings they have the capacity to transfer the legal estate: their capacity to transfer flows from their status as human beings, not from the powers conferred on them as trustees. Even if their powers under the trust instrument did not authorise the conveyance, the legal estate will vest in the transferee. Beneficiaries under the trust would be entitled, if they learnt in time, to restrain the execution of such conveyance in excess of the powers of the trustees. If the beneficiaries only discovered the position after the conveyance, the transferee, if he took with notice, would be personally liable as a constructive trustee and the property conveyed could be recovered: but the conveyance would not be a nullity. So in the case of a limited company, if a transaction falls within the objects of the company (and is therefore within its capacity) it is effective to vest rights in a third party even if the transaction was carried out in excess or abuse of the powers of the company. If the members of the company learn of what is proposed in time, they will be able to restrain such transaction: if they only discover the facts later, their remedy lies against those who have wrongly caused the company to act in excess or abuse of the company's powers. If a third party has received the company's property with notice of the excess or abuse of powers, such third party will be personally liable as a constructive trustee and the company will be able to recover the property: see Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. (No. 2) [1980] 1 All E.R. 393"

43. The contention that the first and second named defendant had devised the trust structure was exposed to be utterly without merit on the second day of this trial, where Mr. Rory O'Beirn, and accountant and advisor to the O'Donnell family, confirmed that it was he who had apprised the Bank of the existence and form of the trust structure. The single document relied upon in support of this contention, a fax sent by Michael Moriarty, then head of private banking with the second named defendant, was admitted in evidence to have represented the sender's summary of information furnished to him by the plaintiffs.

44. The plaintiffs plead that the court should infer constructive knowledge on the part of the first and second named defendants that Vico Limited, its directors and/or the trustees of the Avoca Settlement had acted in breach of trust or breach of fiduciary duty entering into the Security arrangements. In general, a third party dealing with a company is entitled to assume that the company's internal affairs are in order. In *Rolled Steel* Browne-Wilkinson LJ stated the position thus at page 304:-

"However, the principles of ostensible authority apply to the acts of directors acting as agents of the company and the rule in Turquand's case, 6 E. & B. 327 establishes that a third party dealing in good faith with directors is entitled to assume that the internal steps requisite for the formal validity of the directors' acts have been duly carried through. If, however, the third party has actual or constructive notice that such steps had not been taken, he will not be able to rely on any ostensible authority of the directors and their acts, being in excess of their actual authority, will not be the acts of the company."

45. I find no basis in the evidence upon which to infer any knowledge of a breach of trust or other irregularity on the part of the first and second named defendant. In entering in to the Security arrangements, the bank sought advice of the firm of Dickson Cruickshank, Manx advocates, who diligently assessed the position and concluded, *inter alia*, in their letter to the second named defendant dated 19th October, 2006, that:-

"4. The Company has power to charge its property and assets as security for repayment of monies borrowed. It should be noted that for certain charges to be effective against the liquidator or creditors they require to be registered in the Isle of Man Companies Registry under Section 79 of the Companies Act 1931 ... We confirm that the Deeds of Mortgage and Charge dated 1st June 2006 referred to ... below have been duly registered in the Isle of Man Companies Registry.

5. The company has the power to issue guarantees and indemnities for payment of liabilities of others and to charge the undertaking and property of the Company as security for its liability as guarantor, subject to the proviso contained at paragraph 4 above.

6. The company will have duly executed a document where such document has been expressed to be executed by the Company and has been signed as a deed by a director and the secretary of the Company or a second director.

We can confirm the following:-

(1) The company is of good standing as of the date hereof.

(2) We have examined:

(i) a Guarantee in favour of The Governor and Company of the Bank of Ireland and can confirm that the company has the power to execute the said document and perform its obligations thereunder;

(ii) Facility letter dated 17th August 2006 from the Governor and Company of the bank of Ireland to Brian and Mary Patricia O'Donnell; and

(iii) Deeds or Mortgage and Charge dated 1st June 2006 over properties at Gorse Hill, Vico Road, Killiney, County Dublin and Folio 211 County Dublin. (together, the "said documents")

(3) We have examined copies of the resolutions passed by the Company which:-

(a) authorise the execution delivery and performance of the said documents

(4) We can confirm as follows:-

(a) the said documents have been duly executed by the persons authorised by the said Resolutions.

(b) the said documents constitute valid and binding obligations of the company

(c) that any proceedings commenced in pursuance of the said documents would be proper proceedings in the Courts of the Isle of Man which would proceed notwithstanding that the choice of Irish Law has been made as the governing law of the said documents."

46. It is clear on the evidence that the first and second named defendants at all times proceeded on the basis of an understanding that Vico Limited from 1998 held a beneficial interest in Gorse Hill and from 2006 held full legal and beneficial title, with the shares in the company being held to the benefit of the plaintiffs. This understanding correctly reflected the true position. Furthermore, the bank sought professional advice and satisfied itself that Vico Limited was entitled to enter into the Securities and had done so in compliance with the requirements of Manx company law.

47. The plaintiffs similarly seek to establish an equitable interest through the doctrine of knowing receipt citing *inter alia* the judgment in *Ulster Factors v. Entonglen Ltd* [1997] IEHC 34 wherein Laffoy J approved the approach taken by the Court of Appeal of England and Wales in *Belmont Finance Corporation v. Williams Furniture Limited (No. 2)* [1980] 1 All ER 393 and stated at page 3:-

"Under the Belmont principle, as applied by the Supreme Court, what renders the recipient of or the dealer with funds which are being misapplied in breach of the fiduciary duties of the directors of a company liable as a constructive trustee is knowledge, actual or constructive, of the breach of trust."

48. While it is clearly established that constructive knowledge may suffice to demonstrate knowing receipt, the plaintiff's assertion on this point is again unfounded. Both of these grounds are premised on the fact of there having been a disbursement of property that is impressed with a trust. The evidence in this case unequivocally demonstrates that Vico Limited was the full legal and beneficial owner of Gorse Hill. Given that there has been no dealing in trust property

49. Furthermore, the evidence also shows that the first and second named defendants had no knowledge, or reason to believe that there had been a breach of trust or breach of fiduciary duty on the part of the trustees of the Avoca Settlement or of the directors of Vico Limited. Insofar as the plaintiffs claim that the surrounding circumstances should have put the bank "on inquiry" of the possibility of a breach of trust, the evidence before me shows that appropriate inquiries were in fact made, disclosing no difficulties.

50. The plaintiffs claim that a "manifest breach of trust" was evident in the fact that Vico Limited entered into an arrangement to guarantee the borrowings of Brian and Mary Patricia O'Donnell, who were "excluded persons" in the Avoca Settlement, explicitly prohibited from benefitting from the trust. I am satisfied, having heard the evidence of key bank personnel involved in the obtaining the Securities from Brian and Mary Patricia O'Donnell, that the officers of the first and second named defendants had no knowledge, actual or constructive, of the specificity of the settlement, and in particular were unaware of the contents of this provision. This point will be addressed in more detail at paragraphs 62-67 *infra*,

Capacity of Vico Limited to Enter into the Securities

51. The plaintiffs claim that Vico Limited acted *ultra vires* in agreeing to offer its only asset as security over the borrowings of Brian and Mary Patricia O'Donnell. The court heard expert evidence of Manx law to the effect that the *ultra vires* rule was abolished by section 2 of the 1986 Companies Act in that jurisdiction, such that the capacity of a company to deal is no longer limited by its memorandum and articles, so long as it is not specifically restricted therein. The relevant section provides as follows:-

(1) A company has the capacity and, subject to this Act, the rights, powers and privileges of an individual.

(2) Without prejudice to the generality of subsection (1), a company may —

(a) issue and allot fully or partly paid shares in the company;

(b) issue debentures of the company;

(c) distribute any of the property of the company among the members, in kind or otherwise;

(d) give security by charging uncalled capital;

(e) grant a floating charge on the undertaking or property of the company;

(f) procure the company to be registered or recognised as a body corporate in any place outside the Island;

(g) make provision in connection with the cessation of the whole or part of the business of the company, or of any subsidiary of the company, for the benefit of employees or former employees of the company or of a subsidiary of the company or for the dependants of such employees or former employees; and

(h) do any other act that it is authorised to do by any statutory provision or rule of law.

52. Section 4 of that same Act states:-

"Nothing done by a company and no conveyance or transfer of any property, whether real or personal, to or by a company shall be invalid, void, or unenforceable by reason only of the fact that the company was without capacity or power to do it, or to execute, or give, or take such conveyance or transfer."

53. The plaintiffs argue that the decision to enter into the security should be deemed to have been made in excess of the directors' authority, as not having been entered into *bona fide* in the best interests of the company. In *Regentcrest plc v. Cohen* [2011] 2 BCLC 80, Jonathan Parker J stated at page 105:-

"The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

54. Minutes of a meeting of the board of Vico Limited, dated 1st June, 2006, were opened to the court. Here, it was recorded that:-

"2.1 The chairman advised the Meeting that the Company had received a request from Brian and Mary Patricia O'Donnell to consider providing a Guarantee to Bank of Ireland for a period of 45 months in relation to their personal and indirect personal borrowings via the wholly owned company Hibernia (2005) Limited up to a maximum of €17,000,000."

"2.2 It was reported to the Meeting that the assets of the company comprise of a property and adjacent land in Killiney Co. Dublin Ireland (The "Assets") currently with a market value of €30,000,000. The Guarantee provided to the Bank would require First Legal Charges over the Property and the adjacent Land. Furthermore, a Guarantee and Indemnity in relation to Mr and Mrs Brian and Mary Patricia O'Donnell and Hibernia (2005) Limited borrowings would also be required."

"2.3 The chairman reported to the meeting that discussions had taken place in relation to level of guarantee to be provided, as the company's indebtedness to Mr. and Mrs. Brian and Mary Patricia O'Donnell currently was recorded at just over £1 million. The chairman further advised that Mr. O'Donnell had confirmed to Mr. Harris at a meeting in Dublin in January 2005 that Mr. and Mrs. O'Donnell had invested a further amount of money in improving and refurbishing the property since its acquisition, approximately £10,000,000."

"2.4 Mr. Harris has requested details of the refurbishment to facilitate the correct accounting. An undertaking of Mr. O'Donnell was requested to provide the directors with all the necessary in relation to the company accounts."

"2.5 The Chairman advised the meeting that IFG International Trust Company Limited as Trustee of the Avoca Settlement, the ultimate beneficial owner of the Company had consented to the transaction."

55. On that same day, a corporate certificate issued from Vico Limited, setting out *inter alia* that the directors had acted "*bona fide* in the interests of the company". For each subsequent Security entered into by Vico Limited, a similar procedure was followed.

56. On 21st August, 2006, Brian and Mary Patricia O'Donnell wrote to IFG in the following terms:-

"We, Brian O'Donnell and Mary Patricia O'Donnell, hereby waive the repayment of all and any existing loans currently owed to us by [Vico Limited] until such time as all and any guarantees due and payable to Bank of Ireland have been discharged."

57. Insofar as this matter falls for my consideration, it appears that the directors of Vico Limited had legitimate regard to the very significant indebtedness of the company to Brian and Mary Patricia O'Donnell, and received from them a waiver with regard to all outstanding loans. There is no evidence before the court to demonstrate a lack of honest belief on the part of the directors that the transactions were in the best interests of the company as a whole, including those of its shareholders, being the plaintiffs (*Greenhalgh v. Arderne Cinemas Limited* [1950] 2 All ER 1120).

58. Furthermore, as addressed at paragraphs 44 to 50 *supra*, there is no evidence that the first and second named defendants were on notice of any abuse or misuse by the directors of their powers. The bank is entitled to rely upon the assumption that the directors exercising their powers properly and for the purposes of the company.

59. Notwithstanding the foregoing, it seems to me that, having found that the plaintiffs hold no proprietary interest in Gorse Hill, the ordinary application of the rule in *Foss v Harbottle* (1843) 67 ER 189 would entail that where a wrong has purportedly been done to the company, the company should be the party to seek relief. The plaintiffs have not pleaded that their case falls into one of the exceptions to this rule. The purported loss to the plaintiffs is a reflective loss by way of diminution of the value of their shareholding which should properly be addressed by means of a suit by the company against the directors (see *Stein v. Blake* [1998] 1 All ER 724). No basis has been shown upon which this court might set aside the securities based on a lack of capacity of the company or lack of good faith by the directors.

Actions by the Trustees

60. It is accepted by the parties that a ratification by shareholders will in most instances cure any defect in authority. In Courtney's *The Law of Companies* (3rd Ed., 2012, Butterworths), the author states at paragraph 13.140:-

"The raison d'être for the members in the general meeting being able to validate unauthorised acts of the directors which are intra vires the company's capacity is because the director's powers derive from their members."

61. On 1st June, 2006, a meeting had taken place of the board of IFG acting as trustee of the Avoca Settlement and shareholders of Vico Limited, which ratified the decision of the board of Vico Limited. The minutes of that meeting record the following:-

"The chairman reported to the meeting that the Trust's underlying company Vico had been requested to enter into guarantees and security arrangements relating to the borrowings of Brian and Mary Patricia O'Donnell..."

...and indirectly via their wholly owned company Hibernia. It was reported to the meeting the Bank had agreed to lend Brian and Mary Patricia O'Donnell €11.3 and €5.6 million. As security provision for the loan the Bank required from Vico a legal charge of the company's assets, property and lands at Vico Road, Killiney.

The chairman reported to the meeting that Brian and Mary Patricia O'Donnell were specifically excluded from the benefit of the Trust. It was further reported that Vico Limited was indebted to Mr. and Mrs. O'Donnell for IR£1,055,000. It was further reported to the meeting that Mr. O'Donnell had confirmed to Mr. Harris at a meeting held in Dublin in January 2005 that he and his wife had invested approximately £10 million in furthering, improving and renovating the property and lands at Vico. It was reported to the meeting that to correctly reflect the indebtedness a schedule of work of construction and refurbishment was required to reflect correctly in the books of Vico the correct indebtedness to Mr. and Mrs. O'Donnell.

The chairman advised the meeting that the offices of Vico had received a letter from Mr. O'Donnell confirming that all information would be provided to the company to facilitate the correct indebtedness figures. Furthermore, as Mr. and Mrs. O'Donnell were specifically excluded from benefit from the Trust the trustees had been provided from the beneficiaries an agreement to consent to the provision of the security and guarantee in relation to Mr. and Mrs. O'Donnell's borrowings, a copy of which is attached and forms part of these minutes.

It was also reported to the meeting that the beneficiary of the settlement are the children of Mr. and Mrs. O'Donnell and it was also possible the borrowings would facilitate Mr. and Mrs. O'Donnell to ultimately increase the family estate which would ultimately benefit the children, the beneficiaries of the Trust.

After due consideration and discussion it was resolved that approval be given to the directors of Vico Limited to enter into the proposed security arrangements relating to the borrowings by Mr. and Mrs. O'Donnell and Hibernia (2005)."

62. The plaintiffs allege that the security transactions involve a "manifest" breach of trust, as Brian and Mary Patricia O'Donnell are defined in the Avoca Settlement as "excluded persons" who may not benefit in any way from the trust. Clause 19 of the Avoca Settlement states:-

(a) No Excluded Person shall be capable of taking any benefit of any kind by virtue or in consequence of this Settlement ...

(b) The Trust Fund and the income thereof shall henceforth be possessed and enjoyed to the entire exclusion of any such excluded person and of any benefit to him by contract or otherwise.

(c) No part of the capital or income of the Trust Fund shall be paid or lent or applied for the benefit either directly or indirectly of any such excluded person in any manner or in any circumstances whatsoever.

(d) No power or discretion hereby or by any appointment made hereunder or by law conferred upon the Trustees or any of them shall be capable of being exercised in such manner that any such Excluded Person will or may become entitled either directly or indirectly to any benefit in any manner or in any circumstances whatsoever.

63. The Avoca Settlement confers upon the trustees at Clause 13:-

"... the widest possible powers of investing, disposing of and dealing with the Trust fund and of carrying out any transaction whatever in connection with the Trust Fund which are lawfully capable of being conferred on trustees, to the same effect as if such powers were expressly conferred by this Settlement and specified in extensor; and the Trustees may exercise or omit to exercise all or any of such powers in their absolute and uncontrolled discretion as if they were the absolute beneficial owners of the Trust Fund."

64. It is clear that the trustees enjoyed a wide discretion in dealing with the trust property. In assessing the conduct of the trustees, the court will have regard to the circumstances pertaining at the time, per Lindley LJ in *Re Hurst* (1892) 67 LT 96 at page 99:-

"The conduct of trustees ought to be regarded with reference to the facts and circumstances existing at the time when they had to act which were known or ought to have been known by them at the time."

65. Having regard to the minutes of the trustee dated 1st June, 2006, it is apparent that the expectation that *"... the borrowings would facilitate Mr. and Mrs. O'Donnell to ultimately increase the family estate which would ultimately benefit the children, the beneficiaries of the Trust"* was to the fore in the board's deliberations. It is clear, also, that the board had regard to the fact that Vico Limited was very significantly indebted to Brian and Mary Patricia O'Donnell, and received consideration from them, in the form of an undertaking not to seek repayments of the sums advanced by them to Vico Limited while the guarantees remain extant. Furthermore, the beneficiaries themselves assented to the security transactions by letters dated 31st May, 2006, and 22nd August, 2006. There is no evidence to show that the trustees acted otherwise than *bona fide* in the best interests of the beneficiaries, based on the information available to them in approving the actions of the directors of Vico Limited.

66. With regard to the question of whether the transaction conferred a benefit upon Brian and Mary Patricia O'Donnell as "Excluded Persons", as I have previously adverted to, I am satisfied that the first and second named defendants had no knowledge, actual or constructive, of the provisions of Clause 19 in their dealings relating to Gorse Hill, that they had approached the Security transactions with appropriate caution and diligence, and had no reason to suspect a breach of trust. Therefore, there is no remedy available to the plaintiffs with regard to the Securities on this basis.

67. I did not receive evidence from the trustees, except in the form of an Affidavit of Discovery, nor did Brian or Mary Patricia O'Donnell submit witness statements or give evidence to the court. Therefore, I form no view on this matter save to remark that any remedy that may be available to the plaintiffs on the basis of the trustees having purportedly conferring a benefit on excluded persons should be sought directly as against those same trustees. It is noteworthy that the plaintiffs did, at the eleventh hour, attempt to join Vico Limited and Chancery to these proceedings, but that application was refused.

The Statutory Declarations

68. On 16th March, 2011, the plaintiffs each executed statutory declarations purporting to *"confirm that Vico Limited holds the entire legal and beneficial title to [Gorse Hill]"*. This arose in the context of a settlement of an application for summary judgment by the first named defendant against Brian and Mary Patricia O'Donnell.

69. The plaintiffs contend that their signatures were procured by the undue influence of their parents and that the court should declare that the Statutory Declarations are void and without legal effect, or rescind same.

70. The relevant section of Statutory Declaration sets out the following:-

I confirm that Vico Limited holds the entire legal and beneficial title to the [Gorse Hill] and that I have no interest in or right or title to the property except to the extent I am the beneficial owner of the shares in Vico Limited.

71. Given my findings that Vico Limited in fact did hold the entire legal and beneficial title to Gorse Hill, and that the plaintiffs were limited to a beneficial interest in Vico Limited, I must conclude that the Statutory Declarations merely stated the subsisting legal position. As such, they did not operate to modify the position in any way and it is therefore unnecessary for me to give further consideration to this claim.

Conclusion

72. Having carefully considered the evidence, it is clear that Vico Limited acquired the beneficial interest in Gorse Hill by way of transactions based on a power of attorney scheme in 1998 and 2000.

73. In 2006, perhaps in contemplation of the Security arrangements, full legal and beneficial title was transferred to Vico Limited, and was duly registered. All available formal documentation supports this view. The expectation at that time was, as expressed by the trustees in their minutes, that "*the borrowings would facilitate Mr. and Mrs. O'Donnell to ultimately increase the family estate which would ultimately benefit the children, the beneficiaries of the Trust*".

74. The plaintiffs were entitled, under the Avoca Settlement, to a beneficial interest in the shares of Vico Limited. For a time, owing to the structure of the trust, the beneficial interest had been held in the shares of Tabasco Limited, which in turn held the shares in Vico Limited. Be that as it may, it is clear that the trust held shares rather than any interest in Gorse Hill.

75. Having determined that Gorse Hill was not held by the trust, it follows there had been no dealing in trust property. Accordingly, there is no proprietary claim open to the beneficiaries of the trust, and the bulk of the plaintiffs' case, which was premised on establishing an appropriation of trust property, must fall away. Mr. Timothy Mann, an expert in Manx law called on behalf of the plaintiffs accepted this proposition in his evidence.

76. Having regard to the balance of the arguments advanced by the plaintiffs, concerning the behaviour of the directors of Vico Limited and the trustees of the Avoca Settlement, I find no basis, on the evidence, to hold that the first and second named defendants had knowledge, actual or constructive, of any breach of duty or breach of trust by the directors or the trustees. As such, there is no basis upon which to grant relief going to the validity of the Securities on these grounds.

77. If any cause of action arises from these circumstances as against the directors, the rule in *Foss v. Harbottle* applies and the company should be the appropriate plaintiff in seeking to make good any reflective loss in the value of the shareholding in Vico Limited, held to the benefit of the plaintiffs. Any action in relation to the conduct of the trustees should be brought against the trustees. In making this observation, I offer no view as to whether a cause of action exists against them.

78. For the foregoing reasons, the plaintiffs are not entitled to the reliefs sought, or any relief. I will hear the parties as to costs.