THE HIGH COURT

[2014 No. 394 COS]

IN THE MATTER OF THE COMPANIES ACTS 1963-2012 AND IN THE MATTER OF SECTION 316 OF THE COMPANIES ACT 1963 AND IN THE MATTER OF KEELGROVE PROPERTIES LIMITED (IN RECEIVERSHIP)

BRIAN CUNNINGHAM AND KEELGROVE PROPERTIES LIMITED

Applicants

AND

BANK OF SCOTLAND PLC, TOM KAVANAGH AND KENDLEBELL MID-WEST LIMITED

Respondents

Judgment of Ms. Justice Murphy delivered the 1st day of February, 2016.

1. The first named applicant is a director and shareholder of the second named applicant which company has been in receivership since 14th December, 2012. The applicants seek directions pursuant to s. 316 of the Companies Act 1963, (now contained in s. 438 of the Companies Act 2014), relating to the validity of a mortgage debenture dated 31st July, 1997 between Keelgrove Properties Limited ("the Company") of the first part and Equity Bank Limited (subsequently Bank of Scotland plc)("the Bank") of the other part; directions regarding the validity of the subsequent appointment by the Bank of Tom Kavanagh, as receiver over the property the subject of the mortgage; a declaration that the mortgage is invalid at law; a declaration that the appointment of the receiver was invalid; and, alternatively, directions as to whether or not there was a duty on the part of the receiver to provide information to the Company and/or the applicant in relation to the sale to the purchaser, Kendlebell Mid-West Limited and/or whether or not the best price reasonably obtainable was obtained for the property; a declaration that the duties to provide information and/or to obtain the best price reasonably obtainable were not complied with by the receiver; directions as to whether the possession subsequently taken by the purchaser following the conveyance was valid in law; a declaration that the receiver had no power to sell the property to the purchaser without notice to the Company or the applicant; a declaration that the purchaser was not entitled to take possession of the property or that it was not entitled to take possession in the circumstances in which it was so taken; a declaration that the third named defendant is a trespasser on the Company's property; an order restoring possession of the property to the Company and/or the applicant; an injunction restraining the third named defendant from trespassing on the property; and, if necessary, directions for the mode of trial of these proceedings, including trial by way of plenary hearing and, in that event, such further directions as to the exchange of such pleadings as the Court deems fit.

2. The number and breadth of the reliefs sought gave rise to immediate concern on the part of the Court as to the appropriateness of determining these matters in a s. 316 application. Having considered the facts, the law and the submissions of the parties as set out hereunder, the Court's initial concern has hardened into a conviction that this application is a wholly inappropriate use of s. 316. Furthermore, for the reasons set out herein, the Court is satisfied that even if this were an application appropriate to the powers conferred by s. 316, the second applicant lacks standing to bring such an application and the first applicant who claims to be a creditor of the insolvent company, has failed to adduce any evidence that in his capacity as such a creditor, he is being "*unfairly prejudiced by any actual or proposed act or omission of the receiver"*.

3. The catalyst for this application was events which took place in or about 23rd May, 2014. On that day the third named respondent, Kendlebell Mid-West Limited entered and took possession of a car park premises on Moore Lane, Dublin, which premises it had purchased from the second respondent, in his capacity as receiver of Keelgrove Properties. By an indenture of conveyance dated 17th December, 2013 ownership of the property was transferred to the third respondent. It appears that in order to gain access to the property the servants or agents of the third respondent broke and removed locks. The first named applicant has asserted that at the material time he was a lessee of the property on foot an oral tenancy granted by the applicant company prior to the receivership. Rather than pursue such rights as he might have in Landlord and Tenant law, the applicants have embarked on a s. 316 application which has as its objective the unravelling of all transactions relating to this property over a period of seventeen years right back to the original mortgage of the property executed by the applicant Company on 31st July, 1997, pursuant to which the Company had been placed in receivership.

Facts

4. On 12th March, 1997, the second named applicant, Keelgrove Properties Limited ("the Company") was registered in the State pursuant to the provisions of the Companies Acts. It carried on business as a property developer and property holding company.

5. The first named applicant, Mr. Cunningham, was a director and shareholder of the applicant Company. He avers that he was appointed as a director on either 4th September, 1997 or 13th March, 1998. He is also a shareholder of half of the issued share capital of the Company. The other half of the shares was owned by Treasury Holdings. The applicant Company was formed to give effect to a joint venture between the two parties. On 9th October, 2012, Treasury Holdings went into liquidation and the applicant contends that as a consequence, he became entitled to their shares by virtue of a provision in the shareholder's agreement. Mr. Cunningham avers that he has since fallen out with Treasury Holdings and their directors/principals.

6. A further complication arose from an ongoing dispute between Mr. Cunningham and Valebrook Developments, another company in receivership of which Mr. Cunningham is also a director and which he has described as "*one of my property companies*". The dispute is whether Mr. Cunningham, the first applicant, or Valebrook holds the beneficial ownership of the applicant's shares in Keelgrove Properties. Mr. Cunningham's position is that he was and is the beneficial and legal owner of these shares. The Court has been told that the dispute is the subject of legal proceedings which are currently under appeal to the Supreme Court.

7. Mr. Cunningham also claims that he is a creditor of Keelgrove Properties in the sum of €412,611.

8. In 1997, the Company, Keelgrove Properties Limited, was involved in the acquisition and purchase of a number of properties, namely, 17, 18 and 19 Moore Lane, Dublin 7. On 30th July, 1997, title was transferred to the Company in respect of those properties.

9. Mr. Cunningham states that he paid various deposits out of his own funds for these properties so that his director's loan account with the Company amounted to £164,459 according to the year end for 1997. The balance of the funds was provided by the other joint venture vehicle, Treasury Holdings Limited and by a mortgage with Equity Bank Limited (now Bank of Scotland), the first named

respondent. On 30th July, 1997 the Bank issued a facility letter for a maximum sum of £1 million for the purposes of assisting with the purchase of 17, 18 and 19 Moore Lane. Among the security conditions, at paragraph 7(a) of this facility letter was the requirement that there be a debenture in the Bank's standard form creating fixed and floating charges over all the assets of the Company to include a first legal mortgage over the Moore Lane properties. This letter was signed for and on behalf of the Company by the applicant, Mr. Cunningham and Mr. John Ronan, who were expressed therein to be directors of the Company. On 31st July, 1997 the Company entered into a mortgage debenture whereby they agreed to mortgage and charge the Moore Lane properties to the Bank and to give the Bank power to appoint a receiver and/or sell the property in certain specified circumstances. Mr. Brian Cunningham, the first applicant, and Mr. Richard Barrett executed the mortgage deed on behalf of Keelgrove Properties Limited using the Company seal and the deed was witnessed by one Assumpta Kenny.

10. By virtue of s. 2, s. 3 and s. 38(1)(a) of the Real Property Act 1845 the mortgage, being a conveyance of land, was required to be under seal. The Company's articles of association provide:

> *"The seal shall be used only by the authority of the directors or of a committee of directors authorised by the directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for this purpose."*

Thus, according to the applicant, a valid legal mortgage can only be created in circumstances where the seal of the company is affixed to the document and that document is in turn signed by directors of the company. The first applicant has maintained that at the time he executed the mortgage on behalf of the second applicant he was not in fact a director of the Company. He has exhibited contradictory B10s both signed by him. The first, signed by him on the 29th October, 1999 and filed in the CRO on 18th November, 1999, confirms his appointment as a director with effect from 4th September, 1997 approximately six weeks after the mortgage was executed. The second, signed on 24th May, 2000, and filed in the CRO on 31st May, 2000, confirms his appointment as a director with effect from 13th March, 1998, some seven and a half months after the execution of the mortgage. On this basis he contends that since, at the time of the execution of the mortgage deed he was not a director of the applicant Company, the mortgage deed signed by him did not create a valid legal mortgage. He accepted that if his submission in this regard was correct, that the first respondent merely holds an equitable rather than a legal mortgage over the properties in Moore Lane.

11. The first named respondent, Bank of Scotland, avers in the affidavit sworn on its behalf, that prior to the signing of the mortgage on 31st July, 1997, its predecessor, Equity Bank Limited, was provided with a certificate, signed by one Deirdre Lemass who was expressed to be secretary of the Company, which stated that at a meeting of the directors of the Company between 21st and 24th July, 1997, at which both Mr. Cunningham and Mr. Barrett were present, it was resolved that the cash advance facility of 14th July, 1997 from Equity Bank to the Company was approved and Mr. Barrett was authorised to sign the said facility. The Bank was further provided with two written board resolutions in respect of the approval of a lease from the Company to Valebrook Developments Limited and Treasury Holdings, dated 22nd July, 1997. Both resolutions were signed by Mr. Cunningham with Mr. Cunningham and Mr. Barrett recorded as present. On 24th July, 1997 the Company sent a letter to the Bank enclosing a certified resolution of the Company, a certified resolution of Treasury and a guarantee of Treasury. This letter is exhibited by the Bank without its enclosures. In addition, the Bank exhibits a certified extract of a board minute of a directors' meeting of 30th July, 1997 at which both Mr. Cunningham and Mr. Barrett were expressed to be present and which states as follows:

> *"IT WAS RESOLVED that the Cash Advance Facility No: 2746 dated 30th July 1997 from Equity Bank Limited addressed to the company produced to the meeting be and the same is hereby approved and accepted AND THAT John Ronan [and] Brian Cunningham be and is [sic] hereby authorised to sign the facility letter aforesaid and on behalf of the company…"*

Mr. Cunningham denies all knowledge of the certificate of the directors' meeting which apparently authorised the transaction, and also of the letter of 24th July, 1997 sent to Equity Bank. He avers that these were not written or signed by him, that they were clearly prepared by Treasury Holdings and that they are incorrect. For the purposes of this decision, it is neither necessary nor appropriate for the Court to resolve this issue. The facts are set out solely for the purpose of explaining the Court's determination of this application set out below.

12. In October 2012 a liquidator was appointed to Treasury Holdings by the High Court. Treasury Holdings had held a lease of the Moore Lane premises, however, following the appointment of a liquidator to Treasury Holdings, the applicant Company purportedly exercised its right to re-enter the premises pursuant to the lease agreement.

13. On 7th November, 2012, Bank of Scotland issued a letter of demand in respect of the sums advanced to the applicant Company pursuant to the agreement of 31st July, 1997. The amount outstanding on the relevant loan was €831,566.63. On about 13th November, 2012, the Company became engaged in a planning dispute with Dublin City Council who claimed that the use of the premises as a car park was unauthorised.

14. In or about early December 2012, Richard Barrett and Johnny Ronan were apparently removed from their directorships of the applicant Company at a board meeting. Following their removal, on or about 10th December, 2012, the first named applicant, Mr. Cunningham avers that the Company made an oral letting arrangement with him in respect of the properties at 17, 18 and 19 Moore Lane. The rent was to be €200 per month payable on resolution of the planning issue. The third named respondent who is now the *prima facie* owner of the premises doubts the existence of any such agreement, pointing out *inter alia* that the solicitor acting for the first and second named applicants made no reference to Mr. Cunningham's purported leasehold interest in his letter to the third named respondent of 15th May, 2014, a week before the third respondent took possession of the premises.

15. On 14th December, 2012 a receiver was appointed by Bank of Scotland, the mortgagee, pursuant to the terms of the mortgage of 31st July, 1997. At this time the Company was continuing to trade and the Moore Lane premises were being operated as a car park by Mr. Cunningham in his personal capacity. On 11th January, 2013, the receiver sent a letter to Mr. Cunningham, the first named applicant, informing him of his appointment over the assets at 17, 18 and 19 Moore Lane, seeking various information including details of any occupants, leases or licences affecting the premises and seeking return of any keys to the premises in Mr. Cunningham's possession. It also provided Mr. Cunningham with contact details should he wish to arrange a meeting or seek information from the receiver. There was no response by Mr. Cunningham to this letter. In particular, he did not challenge the validity of the mortgage, nor the validity of the appointment of the receiver. Furthermore, he did not notify the receiver of the existence of the oral tenancy which he allegedly held from the Company.

16. Around the same time, on 4th January, 2013, Dublin City Council wrote to Mr. Cunningham, in his capacity as secretary of the applicant Company, to advise him that the properties at Moore Lane were being used as a car park without the benefit of the relevant planning permission. The letter further required him to cease using the properties in such a manner, advised him that the matter was

under investigation, and invited him to make submissions on the matter. On 22nd April, 2013, Dublin City Council again wrote to Mr. Cunningham requesting that he submit a response to confirm cessation of the operation of the car park within three weeks and informing him that otherwise enforcement proceedings would be pursued. The same letter was also sent to Mr. Tom Kavanagh, as receiver of the applicant Company and to the Company itself at its registered address. In January 2014, Dublin City Council issued a number of summonses against the applicant Company and its directors in respect of the planning dispute. In April 2014, the planning proceedings were withdrawn as they were statute barred. Mr. Cunningham avers that the receiver was on notice of such proceedings but did not defend them. Mr. Cunningham avers that he and the applicant Company spent a considerable time and considerable effort in engaging solicitors and dealing with the dispute in an effort to make the premises more valuable and states that at this time he was not aware of the planned sale of the property by the receiver.

17. On 14th November, 2013, a sale was agreed in respect of the properties which were sold by private treaty. On 17th December, 2013, the receiver closed a sale agreement with Kendlebell Mid-West Limited. The amount achieved upon the sale of the property was €550,000 with a further €50,000 achieved by the receiver in respect of a nearby plot at Moore Street. At this date the secured indebtedness of Keelgrove Properties Limited in relation to the properties was €852,238.33.

18. On or about 8th May, 2014, the first named applicant, Mr. Cunningham, avers that he became aware that the receiver had entered into an agreement for the sale of the Moore Lane properties, on being served with a possession notice from the third named respondent, Kendlebell Mid-West Limited. The notice stated that his occupation of the premises was unlawful and that Kendlebell, as owner, would enter on the premises in order to repossess it in seven days. The notice further stated:

> *"Take further notice that if vacant possession is not furnished to the Owner seven days from the date hereof, the Owner will be forced to issue court proceedings for same. If court proceedings are issued, this Notice will be relied upon to recover legal and other costs incurred."*

19. On 15th May, 2014, Mr. Cunningham's solicitor wrote to Kendlebell Mid-West Limited seeking evidence of its title in respect of the premises, requesting full details on the basis on which they claimed that Mr. Cunningham's occupation was unlawful and informing Kendlebell of his client's intention to vigorously defend any court proceedings. In his affidavit sworn on behalf of Kendlebell, Mr. Ben Deane, director of Kendlebell, notes the significance of the fact that the solicitor acting for the first and second named applicants did not refer to Mr. Cunningham's alleged leasehold interest in his letter of 15th May, 2014.

20. On 23rd May, 2014, Kendlebell, with the apparent assistance of the Gardaí, took possession of the Moore Lane premises. At 9 a.m. on the same day, Mr. Cunningham's solicitor received a call informing him that the property had been taken over by MCR Security acting on behalf of Kendlebell. He avers that it appears that the servants or agents of Kendlebell entered the property forcibly by breaking the locks and states that the Gardaí were not present when he attended the property on that date. Mr. Cunningham's averments in relation to Kendlebell's taking of possession are disputed by Kendlebell in the affidavit sworn on its behalf. On attending the property Mr. Cunningham was presented with a copy of the Indenture of Conveyance between Kendlebell and the receiver, dated 17th December, 2013. Mr. Cunningham avers that it was only at this point that it became apparent to him that the directors of the Company at the time the indenture of July 1997 was entered into, were Assumpta Kenny and Jacqueline Cleary and that he and Richard Barrett were only appointed on either 4th September, 1997 or 13th March, 1998, well after the date of the mortgage. It is the position of the first named respondent, Bank of Scotland, that Mr. Cunningham cannot plausibly claim that such facts only came to his attention after receipt of the deed of conveyance of December, 2013 since he was at all times a principal of the Company and knew its transactions intimately and further, that Mr. Cunningham cannot but have known at the time of the execution of the facility letter and the mortgage that he represented to the Bank's predecessor, Equity Bank Limited, that he, Mr. Barrett and Mr. Ronan were directors of the Company. Mr. Cunningham, in response, avers that he signed the documentation in question without reading it and on the instructions of his then legal advisors. He states that he became aware of the defects in the mortgage document following a change of legal advisor.

21. According to correspondence from the third respondents' solicitors dated 28th May, 2013, on 23rd May, 2014 the applicants' solicitor spoke to the solicitors of the third named respondent asserting that his client was in occupation of the Moore Lane properties on the basis of a thirty five year lease. Correspondence from the applicants' solicitor to the solicitor for the third respondent (dated 18th August, 2014) asserted that such a conversation was without prejudice and off the record and that the third respondent's solicitors' account of such conversation was inaccurate. According to the same correspondence from the solicitors for the third respondent, the applicants' solicitor wrote to the third respondents' solicitor on 26th May, 2014 asserting that his client was in occupation of the premises on the basis of a lease of 4 years 9 months. This letter is not exhibited. However a letter of 26th May, 2014, is exhibited in which solicitors on behalf of Kendlebell Mid-West Limited declined to respond to the queries raised by the applicants' solicitor in his letter of 15th May on the basis that Mr. Cunningham had no interest in the property and reserved their right to issue proceedings. On 28th May, 2014, Mr. Cunningham's solicitor wrote to Kendlebell requesting sight of the deed on the basis of which ownership was asserted and asserting that the power of attorney on which the receiver relied in the creation of such a deed was not validly created and that as such, the possession notice was invalid. None of the letters from the applicants' solicitor which are exhibited refer to any assertion on the part of the applicant that he holds a lease over the premises in question. On the same day, the solicitors acting for Kendlebell reiterated their position that the premises were not subject to any lawfully granted lease or licence. The letter also made reference to a discrepancy in the description of the alleged lease by Mr. Cunningham's solicitor as described above. Mr. Cunningham's solicitor was invited to give an undertaking on behalf of both himself and his client, to desist from interfering with Kendlebell's enjoyment of the property and to acknowledge that Mr. Cunningham had no interest in same. By reply, dated 18th August, 2014, Mr. Cunningham's solicitor refuted the content of his conversation with a member of the solicitor's firm representing Kendlebell, which he further asserted to have been "*off the record*" and did not respond to the requests contained in the letter of 28th May, 2014.

22. On 30th June, 2014, the first and second named applicants' solicitor wrote to Mr. Kavanagh, the receiver, to inform him of his clients' position that the mortgage debenture of 31st July, 1997 was invalid as a matter of law since it was not executed in accordance with the memorandum and articles of association of the applicant Company, on the basis that neither Mr. Brian Cunningham nor Mr. Richard Barrett, who purported to execute the debenture, were directors of the Company at that time. This letter also informed the receiver of the applicants' intention to make an application to this Court under s. 316 of the Companies Act 1963 if satisfactory response was not received within seven days. On 3rd July, 2014, the solicitors acting for the receiver responded, refuting the applicants' claim as to the validity of the debenture and confirming their satisfaction that their client had been validly appointed on foot of the mortgage. The receiver's solicitors repeated such assertions in further correspondence to the applicants' solicitor, dated 9th July, 2014. On 14th July, 2014, the applicants' solicitors wrote to the first and second named respondents to inform them of their intention to issue an application pursuant to s. 316. On 6th August, 2014, solicitors acting for the first named respondent, Bank of Scotland, wrote to the applicants' solicitors enclosing copies of documents, including resolutions of the board of the applicant Company, wherein Mr. Barrett and Mr. Cunningham were listed as directors. On 26th September, 2014, LK Shields entered an appearance for the first and second named respondents. On 15th February, 2015, Mr. Cunningham avers that an article appeared in

the Sunday Times which suggested to him that Kendlebell's directors were business associates of former officers of Keelgrove and/or Treasury Holdings. This was denied by the solicitors acting for Kendlebell, in a letter dated 25th February, 2015, in which they informed Mr. Cunningham's solicitor that they had been instructed that Kendlebell's directors and shareholders had no connection to Treasury Holdings.

23. The first named applicant, Mr. Cunningham, avers that the receiver purported to sell the Moore Lane premises to Kendlebell without any prior or subsequent notice to the second named applicant, the Company, or to Mr. Cunningham as occupier. He avers that the lack of validity of the mortgage by reason of lack of due execution by the Company renders both the appointment of the receiver and the purported sale of no effect. He further avers that even if the mortgage is effective the receiver breached his duty to the Company in failing to consult or notify it in relation to the sale of the property or to exercise reasonable care to get the best price possible since it is self-evident that selling any property with vacant possession would have received a better price. Finally, Mr. Cunningham avers that the forcible possession taken by Kendlebell was invalid and ineffective by reason, *inter alia*, of his prior letting agreement with the Company, by which Kendlebell was bound.

24. The second named respondent, the receiver, does not accept that he is under any duty of consultation or notification and points to the fact that his letter to Mr. Cunningham of 11th January, 2013, was simply ignored. That letter notified Mr. Cunningham, of the receiver's appointment over the assets at 17, 18 and 19 Moore Lane. It sought certain information including details of any occupants, leases or licences affecting the premises and seeking return of any keys to the premises in Mr. Cunningham's possession. It also provided Mr. Cunningham with contact details should he wish to arrange a meeting or seek information from the receiver. The receiver refutes any suggestion by the applicants that he contravened any legal requirement or that he conducted the sale in any way other than at arm's length. He also contends that the claim that he failed to exercise reasonable care to get the best price for the property is entirely unsubstantiated. He notes that Mr. Cunningham has not sought to identify what a "better price" would be in the circumstances nor what loss accrued to Keelgrove Property Limited or to Mr. Cunningham personally as a result of the sale. He further notes that any want of vacant possession arose from Mr. Cunningham's own possession and his wrongful refusal to part with it.

25. Mr. Cunningham, in response, states that in circumstances where he does not even know the date of the agreement to sell and has not seen the contract of sale it is not possible for him to even obtain an informed valuation from a professional valuer and contends that the receiver should bear the burden of proof in this regard. The receiver responds that Mr. Cunningham at no stage sought to argue that he was not in a position to obtain expert valuation evidence and that Mr. Cunningham himself exhibited the conveyance and assignment in his first affidavit which expressly set out the sale price of the properties. He again points out that the first applicant was expressly invited in writing to contact the receiver if he had any issues relating to the receivership. He did not do so. The receiver thus states that it is simply not credible for Mr. Cunningham to advance such an argument. He complains that it is a matter of very great concern to him that very serious and damaging allegations have been made against him without any proper evidential foundation.

26. The first named respondent, Bank of Scotland, points out that Mr. Cunningham has purported to swear an affidavit on both his own behalf, and that of the applicant Company, without exhibiting any documentary evidence of the Company's board authorising its joinder to the proceedings nor authorising Mr. Cunningham to swear an affidavit on the Company's behalf. Counsel on behalf of both the first and second named respondents further point out that the Company does not have standing to bring an application under s. 316. They submit that the only party with potential standing is the first named applicant, Mr. Cunningham.

27. The first named respondent contends that though a member in respect of some or all of the issued share capital Mr. Cunningham has not demonstrated that he has any interest in the present proceedings given the insolvency of the Company. In respect of the original mortgage they submit that, regardless of the validity of the mortgage debenture of 31st July, 1997, the Company clearly agreed to provide security in respect of advances from the first named defendant's predecessor, Equity Bank Limited, such that there exists, in addition to and in parallel with the legal mortgage, valid equitable security. In such circumstances it is impossible for Mr. Cunningham, on his own behalf or on behalf of the Company, to allege that any unfair prejudice has befallen him or the Company because the first named respondent would, under the mortgage or under any equitable security, have the entitlement to sell the properties in question.

28. The first named respondent further contends that Mr. Cunningham is estopped from seeking to repudiate the mortgage by reason of his own conduct and his representations to the Bank at the time of the execution of the facility letter and mortgage that he, Mr. Barrett and Mr. Ronan were directors of the applicant Company. In relation to the lease the first named respondent states that there is no board minute or documentary evidence of any lease agreement between the Company and Mr. Cunningham and points to paragraph 7.18 of the mortgage agreement which prohibits the granting of a lease, licence or tenancy without the prior consent of the Bank. On this basis, the Bank contends that the lease is not binding on the Bank, its successors or assignees.

Decision of the Court

29. Section 316 provides a mechanism for speedy and efficient disposal of issues which arise in the course of an insolvency. Originally the process was only available to receivers, but it was later extended to other parties who might have an interest in the conduct and resolution of a particular insolvency by s. 171 of the Companies Act 1990. The process was not designed nor intended as an alternative to substantive plenary proceedings.

30. Regardless of the question of standing, the Court does not consider it appropriate to engage in an examination of the issues raised by the applicants nor of the applicants' entitlement to each or any of the thirteen reliefs sought since it appears to the Court that this matter has been brought before it by an entirely inappropriate application on the basis of a provision of law which is intended to ensure proper compliance with corporate insolvency law and not to determine substantive issues of the type raised by the applicant. In that regard, the Court notes the following remarks of Clarke J. in *Re HSS* [2011] IEHC 497 in relation to the scope of s. 316:

> *"The court enjoys a wide discretion under s. 316. It is true that the court is entitled to give directions or make orders declaring the rights of persons, as the court thinks just. However, it does not seem to me that that section confers on the court any entitlement to change the proper implementation of the regime for dealing with the assets of insolvent companies as set out in the Companies Acts. The reason why the court has been given a wide discretion is that the types of directions or orders that might be required may vary enormously depending on the facts with which the court is faced. The court is, therefore, given a very wide discretion as to the type of intervention which may be appropriate.*
>
> *However, it does not seem to me that s. 316 confers on the court any discretion to alter the legal rights of parties as determined by corporate insolvency law. The Companies Acts contain very many measures designed to determine who gets what out of the assets of insolvent companies. The court can, in an application under s. 316, decide issues that arise as to who is to get what and make whatever directions or orders are appropriate to ensure that parties get what*

they are entitled to. The section does not, however, give the court carte blanche to reassess whether the carefully crafted provisions of corporate insolvency law ought to apply".

31. Section 316 of the 1963 Act, now s. 438 of the 2014, reads as follows:

"(1) Where a receiver of the property of a 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 performance or otherwise, by the receiver, of his or her functions, that is to say:

(a)

(i) the receiver;

(ii) an officer of the company;

(iii) a member of the company;

(iv) employees of the company comprising at least half in number of the persons employed in a permanent capacity by the company;

(v) a creditor of the company; and

(b)

(i) a liquidator;

(ii) a contributory; 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.

(2) An application to the court under subsection (1), except an application under that subsection by the receiver, shall be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed act or omission of the receiver as the court may require."

32. The Courts power to grant directions or to determine rights is limited by the section to "*any matter in connection with the performance or otherwise, by the receiver, of his or her functions*". Where an applicant is not a receiver the Courts power to intervene depends on an applicant providing evidence that he/she is being unfairly prejudiced by "*any actual or proposed act or omission of the receiver"*. The wording of the section suggests to the Court that every application under s. 316 is predicated on a receiver being validly appointed. The Court's remit under the section is to consider the performance by the receiver of his/her functions. The issue of the validity of a receiver's appointment, it appears to the Court, is outside the scope of s. 316. Accordingly the Court holds that any relief which depends directly or by inference on a challenge to the validity of a receiver's appointment cannot properly be brought by means of a s. 316 application.

33. These s. 316 applicants seek thirteen substantive reliefs. In their submissions to the Court, they raise, *inter alia*, the following seven issues:

(i) Whether the deed was validly executed;

(ii) The status of the purported mortgage/debenture in law and in equity;

(iii) The validity of the appointment of the receiver;

(iv) The validity of the sale to Kendlebell;

(v) Whether the receiver had a duty to notify the Company of the intended and actual sale of its premises;

(vi) The significance of the receiver allowing the Company to defend a planning application when, as far as he was concerned, the Company did not own the premises;

(vii) Whether Kendlebell was entitled to take possession in the manner in which it did.

The first four issues all derive from and entail a challenge to the validity of the receiver's appointment and as such are not appropriate reliefs to be sought in a s. 316 application. The applicants in essence submit that if the mortgage deed was not validly executed then the receiver was not validly appointed and the sale to the third respondent, Kendlebell was invalid. For the reasons stated these are not issues appropriate for determination in a s. 316 application. Issue (v) above, whether the receiver had a duty to notify the Company of the intended and actual sale of its premises, might in certain circumstances fall to be determined in a s. 316 application but for reasons set out below the Court is not persuaded that it is required to do so in this case. Similarly, the Court is not persuaded that it is required to address the significance, if any, of the receiver allowing the Company to defend planning proceedings while maintaining that the Company had no entitlement to the property as set out at (vi) above. Finally, the issue as to whether Kendlebell was entitled to take possession in the manner in which it did, listed at (vii) above, is in the Court's view outside the ambit of the receivership and as such cannot come within the ambit of s. 316. The third respondent on the evidence was a bona fide purchaser from the second respondent, the receiver. Any issue arising between them and the first applicant (if any - the Court shares the scepticism of the respondents both as to the fact and nature of the first applicant's claimed tenancy) falls to be determined by the law of landlord and tenant.

34. Even if the Court is wrong in its view, and all the reliefs sought by the applicants can in fact be sought in a s. 316 application, the Court would still be of the view that the applicants are not entitled to succeed. The legislation provides that certain parties related to a company may apply to the court for directions and, where necessary, determinations of rights. These parties include a receiver, an

officer, a member, employees, creditors and, where the company is in liquidation, the liquidator or a contributory. The company the subject of the receivership is not a party authorised to maintain a s. 316 application. Therefore the second named applicant has no standing to maintain this application and consequently its application must fail.

35. The first applicant as a member and claimed creditor, but not in his alleged capacity as a tenant, does have potential standing to maintain an application. To succeed in his application however, the application must "*be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed act or omission of the receiver as the court may require*". In this regard the Court notes the remarks of Clarke J. in *Re HSS* at paragraph 4.10 and 4.11:

> *"…It seems to me that the prejudice that is spoken of in s. 316(1A) is prejudice to the actual rights of individuals. In other words, a creditor applying under s. 316 needs to show that that creditor's rights might be unfairly prejudiced by an action (or, indeed, inaction) of a receiver. It does not give the Court some general jurisdiction to consider whether things are fair or unfair.*
>
> *It seems to me, therefore, 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".*

36. Insofar as Mr. Cunningham's legal rights are concerned, the Court acknowledges the arguments of the applicant in relation to the validity of the mortgage but notes that even if it were to accede to the applicant's arguments on that issue, and hold that a legal mortgage was not validly created on 31st July, 1997, there is no dispute that funds were advanced and the applicant did not contest that the Company, in entering into the facility with the Bank, agreed to provide a debenture creating a fixed and floating charge over all assets of the Company including a first legal mortgage over the properties at 17, 18 and 19 Moore Lane, Dublin. As a minimum, a valid equitable mortgage subsists in favour of the Bank such that Mr. Cunningham cannot allege that any unfair prejudice has befallen him.

37. Neither has Mr. Cunningham advanced evidence sufficient to satisfy the Court of any improprieties insofar as the actions of the receiver were concerned. No evidence has been adduced to substantiate the claim that the receiver did not achieve the best price possible for the sale of the properties at Moore Lane. There has been no evidence beyond bare assertion of impropriety in the sale to the third respondent. No evidence has been offered to establish how the secured debt could have been discharged, along with the costs of the receivership, so as to leave a surplus for the benefit of other creditors. In these circumstances the Court considers that no evidence has been placed before it which would substantiate Mr. Cunningham's assertion that he has suffered unfair prejudice such as would confer standing on him to bring the present application.

38. Finally, the Court wishes to observe that quite apart from the legal issues which have arisen on this application, the application itself is entirely unmeritorious. The first applicant was given an open opportunity to engage with the receiver shortly after his appointment in December 2012. On 11th January, 2013, the receiver sent a letter to Mr. Cunningham, the first named applicant, informing him of his appointment over the assets at 17, 18 and 19 Moore Lane, seeking various information including details of any occupants, leases or licences affecting the premises and seeking return of any keys to the premises in Mr. Cunningham's possession. It also provided Mr. Cunningham with contact details should he wish to arrange a meeting or seek information from the receiver. Mr. Cunningham did nothing. He sat back and let matters take their course. Eighteen months later when the new owner of the property sought possession he decided to assert rights and to invite the Court to set aside the original mortgage, the appointment of the receiver and the sale of the property to the third respondent Kendlebell Mid-West Limited. For the reasons set out herein, the Court declines to do so.