Neutral Citation Number: [2012] IEHC 452

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1163 J.R.]

BETWEEN

R.J.G. (HOLDINGS) LIMITED

APPLICANT

AND

THE FINANCIAL SERVICES OMBUDSMAN

RESPONDENT

AND

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

NOTICE PARTY

JUDGMENT of Mr. Justice Herbert delivered the 31st day of October 2012

In the *ex parte* application made by the applicant seeking leave to apply for judicial review the statement required to ground application for judicial review, dated the 7th December, 2011, described the applicant as engaged in the business of property holding through its subsidiaries, Celts Hostel Limited and Braybourne Properties Limited. In that Statement of Grounds the applicant sought judicial review in the form of an order of *certiorari,* setting aside a finding by the respondent made on the 10th June, 2011, and, in the form of an order of *mandamus*, directing the respondent to hold an oral hearing in respect of a complaint of the applicant or certain portions thereof. The applicant also sought judicial review in the form of declarations that it was entitled to an oral hearing before the respondent in respect of all or a portion of its complaints and declarations that the decision of the respondent that the rescission of an agreement for lease was valid, was erroneous in law, unreasonable and irrational. In a verifying affidavit sworn by Mr. Raymond Gannon on the 7th December, 2011, he stated that he was a director of the applicant company and made the affidavit on its behalf. No minute of the board of directors of the applicant authorising the commencement and prosecution of the application for judicial review was exhibited in that affidavit.

In this verifying affidavit, Mr. Gannon stated that on the 23rd March, 2010, the applicant had made a number of complaints to the respondent pursuant to the provisions of Part VIIB of the Central Bank Act 1942, as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004. Common to each of these complaints were the following facts. On the 1st August, 2009, prospective tenants had entered into a written agreement with the applicant to take a lease of premises at 32 and 33 Blessington Street in the City of Dublin conditional upon the notice party giving its consent within 21 days of that date. The consent of the notice party was not given until the 7th September, 2009, and, in the meanwhile the prospective lessees had purported to rescind the agreement for lease on the 4th September, 2009. The applicant had acquired these properties in May 2008, by purchasing the shares in Braybourne Properties Limited and Celts Hostel Limited with the assistance of a loan from the notice party based upon a Facility Letter dated the 7th April, 2008. This loan was secured by a Deed of Debenture made on the 21st May, 2008, and registered on the 26th May, 2008.

In its complaint to the respondent the applicant claimed:-

> "That Ms. McDonagh, an officer of the notice party, had been expressly advised of this condition. It was further claimed that Mr. Gannon had spoken to Mr. Sean Lenihan, an officer of the notice party on the 2nd September, 2009, and the 4th September, 2009, and to Mr. Gordon Bothwell also an officer of the notice party, on the 3rd September, 2009, in an attempt to procure the necessary consent of the notice party to the proposed lease;
>
> That in June, 2009, the notice party had unilaterally altered the repayment terms of the loan agreement to provide for capital and interest repayments despite an express oral representation made to Mr. Gannon by Mr. Bothwell that repayments would be on an interest only basis for the first year of the loan and, that thereafter repayment terms would be reviewed by mutual agreement;
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> That the notice party had wrongfully refused to release a deposit of €100,000 despite an oral agreement between Mr. Gannon and Mr. Bothwell that this sum would be placed on deposit with the notice party until renovation works had been completed on the premises at 32 and 33 Blessington Street, and that the claim by the notice party that this sum had been placed on deposit by the applicant for the duration of the loan was incorrect."

By a letter dated the 19th May, 2010, the notice party replied to the respondent putting in issue each of these complaints made by the applicant. By a letter dated the 31st May, 2010, the applicant informed the respondent that it did not accept the response of the notice party. By a letter dated the 3rd June, 2010, the respondent sought the applicant's comments on the contents of the letter from the notice party to the respondent, dated the 19th May, 2010. This response was furnished by the applicant on the 23rd June, 2010. By a letter dated the 29th June, 2010, the respondent invited the applicant to submit the dispute to mediation. By a letter dated the 5th July, 2010, the applicant agreed to mediation. By a letter dated the 7th February, 2011, the notice party responded to a number of queries raised by the respondent in relation to the dispute. By a letter dated the 17th February, 2011, the notice party responded to a number of queries raised by the respondent in relation to the matters at issue in the dispute and in which it continued to deny the complaints made by the applicant. By a letter dated the 18th February, 2011, the respondent invited the applicant to make further submissions in the light of these responses from the notice party. A further submission was made by the applicant on the 1st March, 2011. A further submission was made by the notice party dated the 22nd March, 2011. By a letter dated the 25th March, 2011, the respondent invited the applicant to make submissions in reply. These further submissions were made on the 31st March,

2011.

At para. 19 of his verifying affidavit sworn on the 7th December, 2011, in the application for leave to seek judicial review, Mr. Gannon makes the following averment:-

> "At this stage I anticipated that there would be a conflict of fact between the Applicant's version of events and the version put forward by the Bank. In offering to swear on oath as to the veracity of the Applicant's version, I recognised that such a conflict of fact (as to recollection of oral communications) could only properly be resolved by way of oral hearing."

Similarly at para. 22, of this verifying affidavit, Mr. Gannon makes the following statement:-

> "I say and believe that at this point it was patently clear that there existed serious and significant conflicts of fact between the applicant and the Bank in relation to what was said, when it was said and the effect that such statements had on the obligations of the parties."

At para. 33 of this verifying affidavit Mr. Gannon accepts that on or about the 14th June, 2011, he received a copy of the finding of the respondent dated the 10th June, 2011. The respondent did not uphold the complaints of the applicant. The finding by Mr. Tom Comerford, Deputy Financial Services Ombudsman concluded as follows:-

> "Conclusion
>
> The complaint is not substantiated pursuant to Section 57CI(2) of the Central Bank and Financial Services Authority of Ireland Act 2004.
>
> **The above Finding is legally binding on the parties' subject only to an appeal to the High Court within 21 calendar days."**

At paras. 34 and 35 of his verifying affidavit Mr. Gannon states as follows:-

> "34. I say that I was surprised that the complaint was determined without first holding an oral hearing to resolve the multitude of factual conflicts between the parties.
>
> 35. Upon reviewing the finding of the FSO, I was particularly surprised to discover that the FSO purportedly resolved these conflicts of fact on the basis of the various letters it had requested from the parties."

At paras. 37 and 38 of this verifying affidavit under a section heading, "BASIC UNFAIRNESS OF THE FINDING", Mr. Gannon states as follows:-

> "37. In my view, this method of conflict determination was wholly inappropriate to the circumstances of the Applicant's case. In particular, it is patently clear from the correspondence referred to above that the central conflicts of fact revolved around disputed conversations I had with representatives of the Bank. The only material before the FSO contained a stark conflict between the parties in relation to various conversations I had with representatives of the Bank. I am at a loss to understand how the FSO could possibly resolve these conflicts without first holding an oral hearing to examine and if necessary, cross-examine, the various witnesses under oath.
>
> 38. In particular, it is clear that the FSO rejected the Applicant's version of various conversations had with representatives of the Bank and preferred the version of events proffered by the Bank in this regard. Given the nature of the conflict of evidence involved – namely, disputes as to oral communications – I say and believe that in preferring the Bank's version of events, without holding an oral hearing to test those assertions, the Applicant was denied a fair hearing. Indeed, I say and believe that it was impossible for the FSO to come to a fair determination on the issues in dispute between the parties without an oral hearing."

At para. 23 of his Grounding Affidavit in the present application which was sworn on the 13th February, 2012, Mr. Comerford states that it is his belief that the applicant's complaint about his failure to provide an oral hearing is without merit, particularly as the applicant did not request such a hearing during the course of the investigation by the Financial Services Ombudsman.

Following receipt of the finding of the Financial Services Ombudsman, by a letter dated the 27th June, 2011, Mr. Gannon, on behalf of the applicant wrote to Mr. Comerford expressing dissatisfaction with that finding. In this letter Mr. Gannon complained that Mr. Comerford had ignored his statement that oral discussions had taken place between him and Mr. Sean Lenihan and Mr. Gordon Bothwell on behalf of the notice party on the 2nd and 3rd September, 2009, and had accepted the contention of the notice party that no such oral discussions had taken place. Mr. Gannon charged that Mr. Comerford had failed to exercise his power to arrange an oral hearing which would have allowed him to properly test the evidence on this issue of oral discussions. Mr. Gannon complained that Mr. Comerford had ignored his statement that oral discussions had taken place between him and Mr. Bothwell on behalf of the notice party at which the period was clarified for which the deposit of €100,000 was to be retained by the notice party, and that a later oral discussion had taken place between them at which Mr. Bothwell had requested that the retention period be extended for a further three months. Mr. Gannon complained that Mr. Comerford had chosen not to compel oral evidence on these issues.

Despite his review at paras. 33 to 36 inclusive of his verifying affidavit sworn on the 7th December, 2011, in the leave application of the findings of the respondent and, his criticism at paras. 37 to 43 thereto of what he describes as the, "basic unfairness of the finding", no mention whatsoever is made by Mr. Gannon in that verifying affidavit of this letter dated the 27th June, 2011, to Mr. Comerford, nor is it exhibited in that affidavit. Further, no reference is made to Mr. Comerford's reply dated the 11th July, 2011, (nor is it exhibited) in which he states as follows:-

> "Thank you for your recent letter in relation to the above matter, the contents of which have been noted.
>
> In accordance with the directions given in a High Court judgment involving this office, the Finding issued by this office to the parties on the 10th June, 2011, is not reviewable except on appeal to the High Court.
>
> For this reason I cannot comment further, or enter into further discussions on the merits of the case, except to say that our file is now closed."

I find on the evidence that neither of these letters was put before the Court in the course of the *ex parte* application seeking leave to apply for judicial review.

By order of this Court (Peart J.) made *ex parte* on Wednesday 7th December, 2011, the applicant was granted leave to apply for judicial review for the reliefs sought in the statement required to ground application for judicial review on all of the grounds set out therein. The notice of motion seeking such reliefs on those grounds is dated the 7th December, 2011, and, bears a return date of the 17th January, 2012, or the first available opportunity thereafter. At para. 10 of his Grounding Affidavit sworn in the present application on the 13th February, 2012, Mr. Comerford states that this notice of motion was served by the solicitors for the applicant at the office of the Financial Services Ombudsman on the 8th December, 2011, and that this was, "… the first time that this Office had heard anything about the matter since the Applicant's letter of the 27th June, 2011".

A Deed of Debenture made on the 21st May, 2008, securing the loan from the notice party to the applicant, created by way of continuing security; a first fixed charge over specific property of the applicant including, all its uncalled share capital, its goodwill, its patents, trademarks and copyrights and, all licences under the same, its freehold and leasehold property, buildings, machines, fixtures and fixed plant, 3 ordinary shares of €1.27 each in Braybourne Properties Limited, 6 ordinary "A" shares and, 200,775 ordinary "B" shares—all at €1.27 each in Celts Hostel Limited—and, the Sale and Purchase Agreements made on or about the 21st May, 2008, of those shares in Braybourne Properties Limited and the Celts Hostel Limited and assigned by Deeds of Assignment made on or about the 21st May, 2008, between the vendor, the purchaser and the applicant. This debenture also created a first floating charge over the undertaking and all the assets and property of the applicant whatsoever and wheresoever both present and future and, also over the aforementioned property in so far as the mortgages and/or charges thereon might be ineffective as mortgages and/or fixed charges.

This debenture contained an express provision enabling the notice party to appoint a receiver or a receiver and manager with widespread powers including power to take possession of, collect and get in all or any part of the property in respect of which he was appointed, to carry on or manage or develop or diversify the business of the applicant, to exercise all or any of the powers which an absolute owner would have of managing and superintending the management of the property in respect of which he is appointed and, to do all such other acts and things as might be incidental or conducive to any of these matters or powers and which he might or could lawfully do as agent of the applicant.

At para. 5 of his affidavit sworn on the 5th March, 2012, in the present application, Mr. Robert Nolan, solicitor, of Eversheds, solicitors for the respondent, avers that it was confirmed to him by Arthur Cox solicitors acting for the receiver and manager appointed by the notice party, that the receiver and manager did not authorise the applicant to bring or to maintain the application seeking leave to apply for judicial review. It will be recalled that no minute of the board of directors of the applicant authorising the commencement or prosecution of the application for leave to seek judicial review and, if granted, the application for judicial review in this case, was exhibited by the Mr. Gannon in his verifying affidavit. A Companies Registration Office search exhibited by Mr. Nolan in his affidavit sworn on the 5th March, 2012, showed Mr. Raymond Gannon and Mr. Daniel Byrne to be the sole registered directors of the applicant as of the 2nd March, 2012, and Mr. Gannon to be the registered secretary of the applicant on that date.

In an affidavit in the present application, sworn on the 5th March, 2012, and stated to be made, "for and on behalf of the Applicant with its authority"—but without exhibiting any minute of the board of directors of the applicant conferring such authority—it is contended at paras. 3 to 7 inclusive, that a Letter of Demand dated the 21st November, 2011, was sent by the notice party to the registered office of the applicant and not to the office of the solicitors for the applicant and that therefore the Deed of Appointment made on the 22nd November, 2011, whereby the notice party appointed Mr. Michael Hogan, "to be receiver and manager of the assets referred to, comprised in and charged by the debenture and to enter upon and take possession and manage the assets in the manner specified in the debenture…" is invalid. This is disputed by solicitors acting for the receiver and manager.

Paragraph 13.4.1 of the Deed of Debenture provides that any notice or demand for payment to be given or served under the debenture, "shall be in writing and shall be duly expressed to be a notice or demand under this Debenture and will be deemed duly given or served if sent by facsimile…or if posted…or if delivered by hand…to the party to whom it is to be given or served at its address set out below or such other address or facsimile number as such party may have previously communicated for such purpose by notice to the party giving such first mentioned notice or demand. The addresses and facsimile numbers of service on the parties to this debenture are:-

> "The Company Address: c/o Daniel J. Byrne and Company,
>
> Solicitors, etc."

Without prejudice to its assertion that the initial Letter of Demand was validly served, the notice party served a further Letter of Demand at the offices of the solicitors for the applicant on the 2nd December, 2011, and executed a further Deed of Appointment of a Receiver and Manager on the 7th December, 2011, in the same terms as the previous deed.

The applicant further contends that even if the appointment of Mr. Michael Hogan on the 22nd November, 2011, was valid, his appointment was as a receiver and not as a receiver and manager and was only over the assets of Braybourne Properties Limited and Celts Hostel Limited, subsidiary companies of the applicant, which hold the two adjoining properties at 32 and 33 Blessington Street, which are leased to Mr. Raymond Gannon and, not over any assets of the applicant. In the said affidavit sworn on the 5th March, 2012, it states at para. 6 that the applicant, "did not receive the second Deed of Appointment until the 9th December, 2011", and "accordingly the applicant was not in receivership at the time in which the application for leave was made". At para. 7 of the said affidavit, it is submitted that the receiver and manager had no role or function in respect of the *ex parte* application for leave to apply for judicial review. I find that the Deed of Debenture, the two Letters of Demand and the two Deeds of Appointment were not disclosed to the Court at the hearing of the *ex parte* application seeking leave to apply for judicial review.

By notice of motion dated the 13th February, 2012, the respondent now seeks an order pursuant to the inherent jurisdiction of the Court setting aside the order of this Court (Peart J.) made on the 7th December, 2011, granting leave to the applicant to apply for judicial review. This relief is sought on the following grounds:-

> "(i) Leave was sought and obtained on the basis of material non-disclosure;
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> (ii) The within judicial review proceedings are an inappropriate attempt to avoid the 21 day time limit for bringing a statutory appeal;
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> (iii) The within proceedings are bound to fail on the basis of delay in seeking leave.

(iv) The within proceedings are bound to fail on the basis that a more appropriate remedy was available but not availed of, namely a statutory appeal against the Finding."

The law governing applications to set aside orders made *ex parte* by this Court granting leave to apply for judicial review is stated by the Supreme Court in *Adam and Ors v. Minister for Justice, Equality and Law Reform and Ors* [2001] 3 I.R. 53 and *Gordon v. Director of Public Prosecutions and Anor* [2002] 2 I.R. 369. It may be summarised as follows. The High Court (and the Supreme Court) has an inherent jurisdiction to set aside a leave order made by the High Court *ex parte*, even in the absence of *mala fides*. While any order made *ex parte* must be regarded as an order of a provisional nature only, this jurisdiction should be exercised sparingly and only in very clear cases. There are otherwise no hard and fast restrictions on the exercise of this jurisdiction. The burden of proof is on the applicant to establish that leave should not have been granted and is a heavy one. Some identified instances where the jurisdiction might be exercised are:

> "If it is very plain that the applicant for leave had no sufficient interest in the matter or, in the absence of arguments concerning non-disclosure and absence of the utmost good faith, the facts put forward by the applicant for leave disclosed no arguable case or, the applicant for leave had not shown that the form of judicial review sought was the only effective remedy and was more effective than any alternative remedy applying the principles stated by O'Higgins C.J. in *State (Abenglen Properties) v. Dublin Corporation* [1984] 1 I.R. 381 at 393.
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> Where it is very clear that the Court which granted leave had been misled.
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> Where it is very clear that there had not been frank disclosure by the applicant for leave of all material matters, both of fact and of law.
>
> Where it is very clear that there had been a non-observance by the applicant for leave of the principle of utmost good faith.
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> Where there have been new and material factual developments since the date of the grant of leave.
>
> In any case, where the Court is satisfied on *inter partes* argument that the leave was one which very plainly should not have been granted."

The Court must not permit applications to set aside leave to operate as pre-emptive hearings of the substantive trial. In its approach to the application, the court must exercise particular care not to influence the result of a substantive hearing of the application for judicial review, if this is to take place.

In *Bambrick v. Cobley* [2005] IEHC 43, [2006] 1 I.L.R.M. 81, Clarke J. in the High Court, cited with approval the dictum of Sir Nicholas Brown-Wilkinson V.C., in *Tate Access Floors Incorporated v. Boswell* [1990] 3 All E.R. 303 at 316, paras. c to d where he held that:-

> "No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for *ex parte* relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the *ex parte* order and may, to mark its displeasure, refuse the plaintiff further *inter partes* relief even though the circumstances would otherwise justify the grant of such relief".

That case concerned an application to set aside, on the ground of non-disclosure, a *Mareva* injunction and an Anton Piller order granted ex parte. The non-disclosure in that case was a failure to inform the court of proceedings in other jurisdictions. Bambrick v. Cobley [2005] IEHC 43 was an application to set aside an order, made ex parte, restraining the defendant from reducing her assets within the State below €100,000. The basis for the application was lack of candour: that the applicant had failed to disclose to the court the fact that detailed discussions had taken place, (evidenced in correspondence), concerning the amount to be retained in the State and, the terms upon which it would be retained.

In *Bambrick v. Cobley* [2005] IEHC 43 Clarke J. held that the test by reference to which "materiality" for the purpose of the full disclosure rule was to be judged, was an objective one based upon reasonableness. He cited with approval a passage from the judgment of Lord O'Hagan L.C., in *Atkin v. Moran* [1871] I.R. 6 Eq. 79 at 81. That was an application to set aside an order renewing a previous order made under the provisions of s. 15 of the Chancery Regulation Act 1850, but not acted upon, for a failure to disclose that between the dates of the two orders a deed had been executed to which the Rev. Mr. Moran, Mr. Atkin and others were parties, the trusts of the deed being to pay off certain charges and to hand over the balance of the monies received to Mr. Moran. Lord O'Hagen L.C. at 80-81 held as follows:-

> "Counsel described it as an absolute nullity, but it appears to me to have been a prefect instrument, containing covenants of a very stringent kind. Be this, however, as it may, at all events Mr. Atkin having executed that instrument, it might, at least, have been a very important matter for the consideration of the Court, whatever might ultimately have been held to be the construction or effect of it. It is said that there could not have been any order except that one which was made as of course. Whether or not the statement, if it had been put forward, of the deed having been executed would have altered the judgment I cannot say; but it seems plain to me, having regard to the authorities, that that document, so executed, should have been laid before the Court in order that its character and validity might, if necessary, have been investigated. I am not now determining upon them: that may be for future consideration: at present all I can say is, that in my opinion, an order, even as of course, ought not to have been taken upon an affidavit which did not disclose to the Court all the facts of the case."

Having considered the decisions in *Holcombe v. Antrobus* 8 Bev. 412, *DeFeuchères v. Dawes* 11 Beav. 46 and, *St. Victor v. Devereux* 6 Bev. 584, Lord O'Hagan L.C. concluded his judgment as follows, the passage approved by Clarke J.:-

> "These cases all show that the party applying is not to make himself the judge whether a particular fact is material or not. If it is such as might in any way affect the mind of the Court it is his duty to bring it forward. I do not think that in the present case there was any intention to deceive or mislead. I do not decide that the deed will make any real difference in the result of the case: all I say is, that this is a matter which ought to have been referred to in the affidavit upon which the order was obtained, and therefore I am obliged to set it aside."

In *Bambrick v. Cobley* [2005] IEHC 43, Clarke J. held as follows:-

> "Therefore it seems to me that the court has a discretion, in cases where failure to disclose has been established to refuse to grant the interlocutory injunction and to discharge the already granted interim injunction but is not necessarily obliged to do so.
>
> It is therefore necessary to consider, in general terms, the criteria which the court should apply in the exercise of such discretion. Clearly the court should have regard to all the circumstances of the case. However, the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:-
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> 1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which lead to the application in the first place."

In *A.P. v. His Honour Judge Donagh McDonagh and P.P.* [2009] IEHC 316 (Unreported, High Court, Clarke J., 10th July, 2009), Clarke J. at 22 and 24, held as follows:-

> "9.1 It is well settled that a party making an ex parte application to court has an obligation to disclose any relevant material to the court. However, it is equally the case that, while relevance is to be viewed objectively (and is not based on the subjective view of the party making the application), nonetheless the court should not take an unrealistically high view of what needs to be disclosed. In particular, the consequences of the failure to disclose matters of marginal relevance should not be disproportionate. See for example *Bambrick v. Cobley* [2005] IEHC 43 and *Freney and Anor v. Freney and Anor* [2008] IEHC 330. […]
>
> 9.4 While I am not here concerned with an application for judicial review in relation to a criminal conviction (as was the case in *State (Vozza) v. O'Floinn* [1957] 1 I.R. 227, Supreme Court), nonetheless I am satisfied that it would only be proportionate and, therefore, appropriate, for the court to decline the order sought by Mr. P if there were established a significant and culpable failure to disclose at the leave stage. The matter relied on, i.e. that Mr. P had, in the course of the proceedings before the Circuit Court, been found to have been guilty of a significant failure to make proper disclosure in discovery, needs, however, to be viewed against the background of the issue which was sought to be raised in the judicial review proceedings themselves. What needs to be disclosed is any matter that might be relevant to the decision of this Court in the judicial review proceedings, and not anything that might be tangentially relevant in some other sense."

While holding that strictly speaking disclosure of the historical failure to make discovery should have been made at the leave stage, Clarke J. considered that it would have been of only marginal relevance to the issues which the High Court had to consider at the leave stage. He therefore ruled that what he found was the very small culpability in not disclosing this material would render it disproportionate to deprive Mr. P. of any relief to which he was otherwise entitled.

In *Behbehani and Ors v. Salem and Ors* [1989] 2 A. E.R. 143 the Court of Appeal, Civil Division, - Nourse and Woolf L.J.J., - considered the issue of non-disclosure of material facts and the consequences of such non-disclosure in the case of *Mareva* Injunctions and Anton Piller orders granted *ex parte*. The judgment of that Court applying the law as stated in *Brink's M.A.T. Limited v. Elcombe* [1988] 3 A.E.R. 188, per Ralph Gibson, L.J. pp. 192-3, Balcombe L.J. pp. 193-4 and Slade L.J. pp. 194-5, is well summarised in the head-note to the report as follows:-

> "In deciding whether to discharge an existing injunction and grant a fresh injunction where there had been non-disclosure of material matters the court had to consider each case on its own merits, taking into account the considerable public interest in ensuring that full disclosure was made on *ex parte* applications for *Mareva* injunctions and Anton Piller orders. The court had to assess for itself the degree and extent of the culpability of the non-disclosure and the importance and significance of the matters which were not disclosed in the light of the public interest, rather than merely determining whether the original judge who granted the ex parte injunction would have been likely to arrive at a different decision if the material matters had been placed before him or balancing the harm that could be caused to the plaintiff if a fresh injunction was not granted against the matters that were not disclosed. The fact that proceedings were taking place or were contemplated in another jurisdiction was a highly material matter to be put before the judge when applying for a Mareva injunction since the court had to be satisfied that it would not be oppressive for the defendant to be subject to Mareva-type relief in more than one jurisdiction. The plaintiffs' failure to disclose the existence of the Spanish proceedings and the settlement was sufficiently serious for a fresh injunction not to be granted against the defendants especially since the defendants were prepared to give an undertaking not to dispose of property assets within the jurisdiction without 28 day's notice to the plaintiffs. The [defendants] appeal [against the re-granting of the injunction] would accordingly be allowed."

The application for leave to apply for judicial review in the instant case did not relate to a conviction of a crime. The respondent is an independent officer established by Part VIII B of the Central Bank Act 1942, as inserted by s.16 of the Central Bank and Financial Services Authority of Ireland Act 2004, to exercise the jurisdiction conferred by that part of that act. While I accept that the respondent is incapable of suffering the sort of injury or loss which might be suffered by persons—legal or actual—consequent upon the making of an *ex parte* order affecting them, I find that the respondent is nonetheless materially affected by the making of an *ex parte* order granting leave to challenge a finding of the respondent by way of judicial review. I adopt what was held by Hardiman J. in *Adam and Ors v. Minister for Justice, Equality and Law Reform and Ors* [2001] 3 I.R. 80 where at pp. 79 to 80 he stated as follows:-

> "It is certainly true that public authorities such as those who are the respondents in the present cases cannot suffer certain types of damage which an individual or corporate defendant can. They are immune to the risks of commercial disaster and mental distress. But I do not accept that, because of that characteristic, the orders granted have no effect upon them. The applicants in the present case have secured a stay on the orders, actual or potential, for their deportation: the authorities are unable to discharge their functions in accordance with law. Moreover, I would accept the submission made on their behalf on the hearing of this appeal that the pendency of the proceedings is in itself an effect. In every case a grant of leave will give rise to the incurring of costs and to a certain generalised doubt or 'chilling effect' in relation to the discharge of the functions in question. There is a public interest in the due and rapid discharge of public duties, including duties of enforcement, which includes but is not limited to an interest in those duties being discharged

fairly.

> I cannot accept the submission that, because the proceedings in question are judicial review proceedings, they would be rapidly disposed of with a comparatively slight degree of delay and interference with the discharge of statutory functions. Judicial review proceedings, especially in recent times, are not necessarily more rapid than any other form of proceedings and can be less so. In the Toma Adam proceedings, several months were apparently occupied simply in checking the up-to-date status of the 50 odd applicants, a process which led to some 14 of them being struck out of the proceedings by consent. If the proceedings are not struck out at the present stage, there will predictably be a lengthy process of discovery, and considerable expense in the conduct of the opposition to the substantive application. For all these reasons, I consider that the grant of the leave to seek judicial review, especially when coupled with a stay, is quite sufficient to constitute the respondents as parties affected by an order. This in my view gives rise to the corollary that they must in a suitable case be entitled to attack the grant of leave."

I find that this Court must construe and apply the rules regarding non-disclosure in this case with the same rigour as in *ex parte* applications for other reliefs, including *Mareva* injunctions and Anton Piller orders. I am satisfied that this is so, even though the purpose of the requirement for leave to apply for judicial review is to prevent abuse of process by screening out trivial and unsustainable cases which would otherwise impede and obstruct public authorities in the performance of their functions, (G. v. Director of Public Prosecutions [1994] I.R. 374 at 382 per Denham J.). In order to properly and effectively discharge this function the court, on the hearing of the an application for leave to apply for judicial review, must be entitled to expect the same high degree of candour and full disclosure as in the case of *ex parte* applications for injunctions and similar reliefs.

In my judgment the failure of the applicant and its legal advisers to make disclosure of the letters of the 27th June, 2011, and the 11th July, 2011, to this Court at the hearing of the *ex parte* application seeking leave to apply for judicial review was a breach of their obligation to disclose all matters which might in any way affect the mind of the court in exercising the court's discretion to grant or to refuse leave. Though these letters postdate the finding of the respondent, they are part of the pre-application exchange of correspondence between the applicant and the respondent about that finding. An applicant for *ex parte* relief must put all such correspondence before the court or, if designated "without prejudice" inform the court of the fact —but not the contents—and the date of such correspondence. Viewed objectively I am satisfied that these letters, if disclosed, might have been material to the exercise by the court of its discretion to grant or to withhold leave to seek judicial review, as pertinent to the issue of whether the application was or was not made within time. In these circumstances, it was the duty of the applicant and its legal advisers to put these letters before the Court at the making of the *ex parte* application. However, I do not find that their failure in that regard was culpable and significant.

In my judgment the failure to disclose these letters, though blameworthy, was not a deliberate attempt on the part of the applicant to mislead the court. I am also satisfied that this non-disclosure, viewed objectively, was not significant. Counsel for the respondent submitted that they were of significant relevance to the issue of whether the application seeking leave to apply for judicial review was made "promptly". It is the general practice of this Court on hearing *ex parte* applications for leave to apply for judicial review to defer consideration of questions of timeliness and delay which almost invariably involve applications to extend time with associated issues of fact, to the substantive hearing. In addition the application for leave in the present case was brought within the time limited by o. 84, r. 21(1) of the Rules of the Superior Courts, so that it is altogether improbable that the court in such circumstances would of its own motion raise an issue as to whether the application was brought "promptly". It is therefore most unlikely—though it must be stated that this was not a matter for the applicant or its legal advisers to judge—that disclosure of these letters might have caused the court to refuse leave to apply for judicial review in this instance. In such circumstances I consider that it would be disproportionate to penalise the applicant for this non-disclosure by setting aside the order made on the 7th December, 2011. I am satisfied that this, should remain the decision of this Court despite the failure of the applicant to offer any explanation or excuse for this non-disclosure on affidavit.

I find that the failure on the part of the applicant and its legal advisers at the hearing of the application for leave to apply for judicial review on the 7th December, 2011, to disclose to the court the Deed of Debenture made on the 21st May, 2008, the Letters of Demand for Payment made thereunder, dated the 21st November, 2011, and the 2nd December, 2011, and the Deed of Appointment of a receiver and manager made on the 22nd November, 2011, was both culpable and significant. For the purpose of this application I will accept the averment in the replying affidavit sworn in this application on the 5th March, 2012, that the applicant did not receive the second Deed of Appointment of a receiver and manager made on the 7th December, 2011, until the 9th December, 2011.

No affidavit was filed on behalf of the applicant in the present application explaining or proffering an excuse for this egregious non-disclosure. In the aforementioned replying affidavit, stated to be made "on behalf of the applicant and with its authority", an argument is advanced that the receiver and manager had no role or function in respect of the *ex parte* application for leave to apply for judicial review. From this I am satisfied to infer that the non-disclosure of these matters was not *mala fides*, with the purpose of deliberately misleading the court. In the circumstances I consider it reasonable to infer that the non-disclosure was due to the applicant and/or its legal advisers erroneously deciding for the reasons now advanced that this material was not relevant. However, to recall the words of Lord O'Hagan L.C. in *Atkin v. Moran* [1871] I.R. 6 Eq. 79 at 81:-

> "The party applying is not to make himself the judge of whether a particular fact is material or not. If it is such as might in any way affect the mind of the court, it is his duty to bring it forward."

In my judgment, there can be no doubt whatever, but that this non-disclosed material might have affected the mind of the court in exercising its discretion whether or not to grant leave to apply for judicial review. If these documents had been disclosed, the court would have had to consider whether the application was lawfully before the court at all without the consent or concurrence of the receiver or receiver and manager and whether the applicant had any right or interest sufficient to confer standing. This was something which the court would be obliged to consider at leave stage and which it could not defer to the substantive hearing (*"G" v. the Director of Public Prosecutions* [1994] 1 I.R. 374).

As was pointed out by Shaw L.J. in *Newhart Developments Ltd. v. Co-Operative Commercial Bank Ltd.* [1978] 1 Q.B. 814 at 818., decisions concerning the respective rights of receivers appointed by debenture holders and the board of directors of a company in receivership with regard to the conduct of litigation can be anything but straightforward. I would also refer to the leading case of *Tudor Grange Holdings Limited and Ors v. Citibank N.A. and Anor* [1992] 1 Ch. 53. Both these cases were cited with approval by Keane J. in *Lascomme Limited v. United Dominions Trust (Ireland) Limited* [1993] 3 I.R. 412. These decisions were all concerned with the question of whether, after the appointment of a receiver by a debenture holder, the directors of a company had power to conduct legal proceedings on behalf of that company without the consent of the receiver. Moreover, in the instant case, by reference to the replying affidavit sworn in this application on the 5th March, 2012, the applicant claims, by reference to these very documents which were not disclosed to the court, that in any event the receiver and manager had not been properly appointed prior

to the 7th December, 2011.

In these circumstances I am satisfied and, I find, that these non-disclosed documents were of the utmost materiality to the just and proper determination of the application for leave to apply for judicial review. The applicant and/or its legal advisers, to borrow the words of Clarke J. in *Bambrick v. Cobley* [2005] IEHC 43 at 54:-

> "…must be regarded as significantly culpable in failing to bring the attention of the court to matters which on any objective view would have had potential to influence the court's determination."

I am satisfied that the order of this Court made on the 7th December, 2011, granting leave to the applicant to apply for judicial review, must be set aside. The material not disclosed to the Court was of the greatest relevance to the making of that decision and, it would, in my judgment, be contrary to law and to the public interest to permit an order so obtained to stand. It is not necessary for the court to express, and I do not express, any opinion on the other grounds upon which relief is sought in this application.