Neutral Citation [206] IEHC 438

**THE HIGH COURT**

**COMMERCIAL**

**[2015 No. 6144 P]**

**BETWEEN:**

**ELEKTRON HOLDINGS LIMITED AND ANN KEANE**

**PLAINTIFFS**

**-AND-**

**KENMARE PROPERTY FINANCE LIMITED AND PAUL MCCANN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Twomey delivered on the 25th day of July, 2016.**

**Introduction**

1. The first named plaintiff, Elektron Holdings Limited ("Elektron") owns Aberdeen Lodge, a hotel in Sandymount, Dublin 4. The second named plaintiff, Ms. Keane, is a director of that company and alleges that she has a right to reside in the hotel. The first named defendant, Kenmare Property Finance Limited ("Kenmare") is the owner of the loan, originally lent by Irish Nationwide Building Society ("INBS"), which is secured on Aberdeen Lodge.

2. The second named defendant, Mr. McCann, has been appointed as a receiver over Aberdeen Lodge. The appointment of the receiver was confirmed by the High Court and a Possession Order was granted in his favour, in respect of Aberdeen Lodge and both orders were affirmed by the Supreme Court. In these proceedings, which were issued by plenary summons on the 29th July, 2015, ("the July 2015 Proceedings") the plaintiffs challenge the validity of the appointment of the receiver and are seeking to restrain him from taking possession of Aberdeen Lodge. The application by the plaintiffs before this Court is an interlocutory application for an injunction to prevent the execution of that Possession Order pending the determination of the July 2015 Proceedings. For their part, the defendants seek to have to have the July 2015 proceedings struck out on the grounds that they are frivolous, vexatious, an abuse of process and are bound to fail.

3. Since the interlocutory application by the plaintiffs will have no relevance if the proceedings are struck out on the application of the defendants, this Court will consider first the abuse of process claim. The essence of the abuse of process claim is that in previous proceedings (referred to below as "the s. 316/Possession Proceedings") two orders were made by the High Court, one confirming that the receiver was validly appointed over Aberdeen Lodge and the second, a Possession Order in his favour in relation to Aberdeen Lodge. Both those orders were appealed to, and subsequently affirmed by, the Supreme Court. Nonetheless, the plaintiffs in these proceedings now claim, on separate grounds not considered by the High Court or the Supreme Court, that the receiver was not validly appointed. These new grounds are referred to below as the s. 31 Claim and the Loan Sale Claim. On this basis, they seek interlocutory relief in these July 2015 Proceedings preventing the Supreme Court orders being executed. The defendants allege that since the s. 31 Claim and the Loan Sale Claim, which challenge the validity of the appointment of the receiver, could and should have been made in the s. 316/Possession Proceedings, the plaintiffs are guilty of abuse of process by instituting these July 2015 proceedings and, as such, they should be struck out. This is the key issue for consideration in this case.

4. For the reasons set out in this judgment, this Court finds that the s. 31 Claim and the Loan Sale Claim could and should have been raised by the plaintiffs in the s. 316/Possession Proceedings and therefore it is an abuse of process for them to be litigated in these July 2015 Proceedings which should therefore be struck out.

**Background**

5. In addition to being a hotel which is currently operated by Elektron, Aberdeen Lodge is also the home to Ms. Keane, her partner Mr. Patrick Halpin ("Mr. Halpin") and their two children. Mr. Halpin is the sole shareholder in Elektron and Ms. Keane is a director of that company. Elektron owns one of the two issued shares in a company called Crossplan Investments Limited ("Crossplan"). The other share is held by Mr. Halpin. It is relevant to note that the plaintiffs claim that the share held by Mr. Halpin is held legally and beneficially by Mr. Halpin, although INBS (the original lender of funds to Elektron and also the lender of funds to Crossplan) was advised by Elektron's auditors that this share was held on trust for Elektron, which would mean that Crossplan was a wholly owned subsidiary of Elektron. The issue of whether Crossplan is a wholly owned subsidiary of Elektron or simply a related company (i.e. 50% owned by Elektron) is relevant to the s. 31. Claim. This is because guarantees were given by Elektron to INBS in respect of Crossplan's borrowings and the question of whether Crossplan was or was not a subsidiary of Elektron is relevant to the issue of whether those guarantees by Elektron are void under s. 31 of the Companies Act, 1990 (the "1990 Act").

6. These proceedings stem from a dispute regarding credit facilities provided by INBS to Elektron and Crossplan, as well as guarantees made by Elektron in respect of the borrowings of Crossplan. Elektron provided security to INBS over Aberdeen Lodge as collateral for the loans Elektron obtained from INBS as well security for the guarantees that Elektron gave to INBS in respect of Crossplan's borrowings. The total borrowings of Elektron and Crossplan from INBS amount to approximately €26 million.

7. On the 1st July, 2011, the business of INBS was transferred to Anglo Irish Bank Corporation Limited, subsequently Irish Bank Resolution Corporation ("IBRC"). In March 2014, IBRC sold the underlying loans to Kenmare. Hence Kenmare, as the current owner of the loans, is the first named defendant in these proceedings.

8. In relation to the primary borrowings of Elektron, by letter dated 15th February, 2012, IBRC demanded repayment in the sum of €986,397.90. With regard to the primary borrowings of Crossplan, by letter dated 15th February, 2012, IBRC demanded repayment in the sum of €25,170,660.24. Additionally, by letter dated 15th February, 2012, IBRC demanded repayment in the sum of €25,170,660.24 from Elektron in respect of the guarantees provided by Elektron with regard to the borrowings of Crossplan. Both Elektron and Crossplan failed to discharge these demands and by separate deeds of appointment dated 17th February, 2012, Mr. Paul

McCann was appointed receiver to both companies and Mr. McCann is the second named defendant in these proceedings.

**Litigation**
9. Following his appointment on the 17th February, 2012, the receiver sought possession of Aberdeen Lodge. This was resisted by Mr. Halpin and Ms. Keane and Ms. Keane asserted her personal and proprietary rights to reside in the property. The receiver instituted High Court proceedings on the 16th July, 2012, under s. 316 of the Companies Act, 1963 ("s. 316 Proceedings") to determine the entitlement of Mr. Halpin and Ms. Keane to withhold possession of the property. These proceedings were entitled *In the Matter of Elektron (in receivership) and Crossplan (in receivership), Paul McCann (applicant) v. Patrick Halpin and Ann Keane (respondents)* 2012/411COS. The receiver simultaneously instituted special summons proceedings seeking possession of the property (the "Possession Proceedings"). These special summons proceedings were entitled *Paul McCann (plaintiff) v. Patrick Halpin and Ann Keane (defendants)* SP379 2012. Both matters were listed for hearing on the 5th December, 2012 (the "s. 316/Possession Proceedings) and were heard on the 24th September, 2013. On the 29th November, 2012, before the hearing of the s. 316/Possession Proceedings, which was due to commence some days later on the 5th December, 2012, a plenary summons was issued by Elektron and served on the defendants (the "November 2012 Proceedings"). These proceedings were entitled *Elektron Holdings v. Paul McCann, The Irish Bank Resolution Corporation, Ireland and the Attorney General No: 2012/12134P.* These proceedings sought, *inter alia,* a declaration that the appointment of Mr. McCann as the receiver of Elektron was unlawful. This summons was withdrawn three weeks after its issuance. After a number of adjournments, the s. 316/Possession Proceedings were heard on the 24th September, 2013. At that hearing, Ms. Keane and Mr. Halpin argued that the receiver had been invalidly appointed at 4 p.m. on 17th February, 2012. They argued that his appointment was invalid on the grounds that the letter of demand specified repayment by close of business on that day, which was sometime after 4 p.m., in their view, and not at 4 p.m., as happened. In his judgment of 8th November, 2013, Peart J. upheld the validity of the appointment of the receiver.

10. On 17th December, 2013, an order of possession was granted to the receiver in respect of the property. This order was stayed until 1st February, 2014, with liberty to Ms. Keane and Mr. Halpin to apply for a further extension. Such extensions were sought and granted and on the 30th March, 2014, Peart J. granted a final stay, to expire on the 27th June, 2014.

11. On the 19th June, 2014, Ms. Keane and Mr. Halpin appealed to the Supreme Court both the orders in the s. 316/Possession Proceedings. These proceedings sought a stay on the order of the High Court pending the hearing of appeals lodged by them in relation to the s. 316/Possession Proceedings. A stay was granted pending the determination of the appeals. The hearing of the Supreme Court appeal took place on the 17th February, 2016. Between the lodging of the appeal in the Supreme Court in June of 2014 and the hearing of the appeal in February 2016, these July 2015 Proceedings were issued in the High Court by Elektron and Ms. Keane challenging the appointment of the receiver based on the s. 31 Claim and the Loan Sale Claim. The decision of the Supreme Court was handed down on the 11th March, 2016. In that decision, both appeals were dismissed and the Order of Possession was upheld subject to a stay granted by the Supreme Court until 6th May, 2016.

**Relevance of previous abuse of process finding against Mr. Halpin**
12. Although Mr. Halpin is not a party to these proceedings, it is relevant to refer to his role in other proceedings in view of the comments of the Supreme Court that Mr. Halpin's actions in previous litigation, which involved similar issues, amounted to an abuse of process. Before doing so, it is important to note that this Court is being asked to find that Elektron and Ms. Keane are guilty of abuse of process by instituting the July 2015 Proceedings. One might legitimately ask what relevance to a claim of abuse of process against Party B and Party C, is it that Party A was found to have abused process. The answer is that in this case, the circumstances and the relationship between the parties is such that it is relevant. First, there is the fact that Mr. Halpin has been found guilty of abuse of process in relation to the same borrowings from IBRC and the appointment of the same receiver over the assets of Elektron, as are the subject of this abuse of process claim against Elektron and Ms. Keane. Secondly, the proceedings in which it is alleged, by the defendants in this case, that the s. 31 Claim and Loan Sale Claim should have been made, rather than in these proceedings, were proceedings in which Mr. Halpin was a co-party with Ms. Keane (i.e. the s. 316/Possession Proceedings). Thirdly, one party against whom the abuse of process claim is being made in this case, Elektron, is wholly owned by Mr. Halpin, and thus controlled by him. Fourthly, the other party against whom the abuse of process claim is being made, in this case, Ms. Keane, is Mr. Halpin,, with whom she lives, together with their children.

13. For these reasons, this Court can conclude that Mr. Halpin would have had a direct role in deciding whether or not to include the s. 31 Claim and the Loan Sale Claim in the previous s. 316/Possession Proceedings, since he was a party to those proceedings, and he is likely to have had an indirect role in deciding whether or not to base these July 2015 Proceedings on the s. 31 Claim and the Loan Sale Claim (in view of his connection to Elektron and Ms Keane). Mr Halpin, therefore, though not a party to these proceedings, looms large in the consideration of the alleged abuse of process against Elektron and Ms. Keane.

14. Accordingly, although it is not a determinative factor for this Court in this case, it is relevant to note that the Supreme Court has found Mr. Halpin guilty of abuse of process in relation to circumstances which are common to the circumstances of this case, namely the borrowing of funds from IBRC and the appointment of a receiver over the assets of Elektron.

15. The finding of abuse of process against Mr. Halpin arose from a District Court summons issued on the 5th March, 2012, against Ms. Mary Kelly and Mr. Declan Buckley, an employee and former employee of IBRC. This emanated from complaints made by Mr. Halpin as a common informer. The summonses alleged offences of dishonesty under s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. It was alleged that Ms. Kelly and Mr. Buckley had induced Mr. Halpin to retain the services of an accountant to attend a meeting on 17th February, 2012, while allegedly being aware a receiver was to be appointed. As already noted, Mr. McCann was appointed on the 17th February, 2012, to Elektron. The Supreme Court found that the District Court proceedings constituted an abuse of process by Mr. Halpin. It was stated by Clarke J. at para 9.11 of his judgment:-

> "I am satisfied that the uncontroverted evidence to which I have referred leads only to the inference that Mr. Halpin was not motivated by a genuine desire to invoke the now very limited role of a private individual in the prosecution of criminal offences, but rather was motivated by a desire to secure, by whatever means possible, the attendance of Ms. Kelly and Mr. Buckley as accused persons before a criminal court. On that basis, I am satisfied that the commencement of these particular proceedings was an abuse of process, and on that ground also I would propose that the summonses be quashed."

The fact that Mr. Halpin has been found to have abused process in relation to the same borrowings and the appointment of the same receiver to the same property is relevant to a claim of abuse of process in relation to, essentially, the same dispute against Elektron, since he controls that company and against Ms. Keane, since he is her partner.

**Analysis of abuse of process claim**
16. In reliance on the rule from the case of *Henderson v. Henderson* [1843] 3 Hare 100, the defendants claim that these proceedings

should be struck out. In reaching its decision in this regard, this Court relies on the judgment of McGovern J. in *Vico v. Bank of Ireland* [2015] IEHC 525 regarding the manner in which the rule in *Henderson v. Henderson* is to be applied in the Irish Courts. This case establishes that the onus is on the defendants in this case to satisfy the Court that the claim of the plaintiffs could and should have been raised in the earlier s. 316/Possession Proceedings. In applying these principles, this Court must analyse the two main claims by Elektron and Ms. Keane in the current proceedings, which the defendants allege could and should have been raised in the earlier proceedings.

*The s. 31 Claim*

17. The first challenge to the receiver being allowed to execute the Possession Order affirmed by the Supreme Court in relation to Aberdeen Lodge, is the claim by the plaintiffs that Elektron's guarantees of the loan by INBS to Crossplan are void under s. 31 of the 1990 Act (the "31 Claim"). The plaintiffs allege that these guarantees, by Elektron of Crossplan's borrowings, are void as transactions between connected persons since Crossplan was not a subsidiary of Elektron when the guarantees were executed and thus did not benefit from the exemption for group company transactions in s. 34 of the 1990 Act. This claim is being made by the plaintiffs, in spite of the fact that Elektron, through its directors, Ms. Keane and Mr. Halpin, represented to INBS that Crossplan was in fact a subsidiary of Elektron, e.g. on the 17th July, 2009 when they both signed a Corporate Certificate addressed to INBS to the effect that the guarantee by Elektron of Crossplan's borrowings was not prohibited by s. 31, as Elektron was able to avail of the exemption under s. 35 of the 1990 Act (i.e. that Crossplan was a subsidiary of Elektron). In this sense therefore, in the July 2015 Proceedings, Elektron and one of its directors, Ms. Keane, are seeking to benefit from the previous misrepresentation of the directors of Elektron on behalf of that company that Crossplan was a subsidiary, by claiming now that this representation was false and on this basis saying that the guarantees are void. If correct, it means that Elektron is not liable on those guarantees to INBS (and its successor, Kenmare). It is also worth noting that evidence was provided that Elektron benefited from being taxed as a group for VAT purposes, and so it seems that a similar representation was made to the Revenue that Crossplan was its subsidiary. In all of the affidavit evidence provided in this case, the plaintiffs give no explanation for this false representation by Ms. Keane and behalf of Elektron that Crossplan was its subsidiary. Instead they argue that even if misrepresentations were made, s. 31 is a mandatory section and the only issue is whether Crossplan was a subsidiary or not and if it was not, then the guarantees are voidable. Pursuant to s 38 of the Companies Act, 1990 a guarantee entered into, in breach of s 31, is voidable at the instance of the company entering the guarantee. This Court has been advised on behalf of the plaintiffs that the guarantees by Elektron in respect of Crossplan's borrowings were duly avoided by board resolution on the 15th September, 2014..

18. It is clear that there is a very significant financial benefit for Elektron in successfully arguing that these guarantees are void. This is because it will result in Elektron's liability to Kenmare, which is secured on Aberdeen Lodge, being reduced from €26 million approx. to just €1 million approx., since Elektron would cease to be liable to Kenmare on the guaranteed sum but remain liable only for the direct loans to it of €1 million approx. The Court was also advised on behalf of the plaintifss that Elektron had recently secured the offer of funding from a third party lender to provide it with €1 million in return for a charge over Aberdeen Lodge. Accordingly, Elektron is claiming that its liability to Kenmare is now only €1 million, and that it is entitled to pay back the €1 million, have the receiver removed and regain possession of Aberdeen Lodge. For their part, the defendants have submitted that Aberdeen Lodge, as a hotel in Dublin 4, which was their security for the €26 million in loans to Elektron and Crossplan, is worth many multiples of €1 million.

19. It does seem remarkable that company A could procure borrowings for a sister company, company B, from a bank on the security of a guarantee by company A (on the basis of representations from company A that company B was in fact a subsidiary of company A) and then subsequently that company A could, by the passing of a resolution, unilaterally terminate the guarantee on the basis that the representations were false and that as company B was not in fact a subsidiary, the guarantee was void. It would appear to be a novel, yet very neat, way for companies to avoid their liabilities as guarantors to banks. It could certainly lead to the risk of considerable abuse by borrowers, if this were the case, yet this appears to be the effect of the plaintiffs' substantive case, which it wishes to have heard at a plenary hearing. However, this is not a matter for consideration by this Court at this juncture. What this Court is being asked to decide in this abuse of process case is whether the claim that the guarantees are void could and should have been advanced in the earlier s. 316/Possession Proceedings.

20. In this regard, the plaintiffs issued these July 2015 Proceedings on the 29th July, 2015, which was after the High Court judgment in the s. 316/Possession proceedings on the 8th November, 2013, but while the appeal to the Supreme Court was pending (which was heard on the 17th February, 2016). It took them seven months to issue the statement of claim on the 2nd March, 2016, which was after the Supreme Court hearing of the appeal, but before the judgment of the Supreme Court on the 11th March, 2016. Key to the defendants' argument that these proceedings amount to an abuse of process is the fact that Elektron actually did make the very same arguments contained in these July 2015 Proceedings regarding s. 31 at an earlier stage (prior to the hearing of the s. 316/Possession Proceedings in the High Court on the 24th September, 2013), but then withdrew them.

21. This is because on the 29th November, 2012, Elektron issued the November 2012 Proceedings against IBRC, the owner of the loan at that stage, in which it sought:-

> "A declaration that the appointment by the second named Defendant [IBRC] of the first named Defendant [Paul McCann] as receiver of the plaintiff is unlawful.
>
> […]
>
> A declaration that the security provided by the Plaintiff [Elektron] to the second named Defendant [IBRC] other than for loans of the Plaintiff and/or in so far as it secured the liabilities of a third party limited liability company (Crossplan Investments Limited) are of no effect and are void."

As is clear from the foregoing, the very core of these aborted proceedings is a challenge to the validity of the receiver's appointment and thus his entitlement to possession of Aberdeen Lodge. The foregoing paragraph of the General Indorsement of Claim is a clear reference, in this Court's view, to the guarantee of Crossplan being void and is being made in the context of a claim that the appointment of the receiver was invalid. Yet, even though this very same matter, the validity of the appointment of the receiver, was the subject of the s. 316/Possession Proceedings (which had been instituted on the 16th July, 2012 and in connection with which, Ms Keane filed an affidavit dated 23rd July, 2012) , these November 2012 Proceedings were withdrawn three weeks later by Elektron. More to the point, this issue of the validity of the guarantees under s. 31 which was clearly a live issue for Elektron in November 2012, was never raised in the s. 316/Possession Proceedings during the remainder of 2012 or up until the High Court hearing on the 24th September, 2013. Nor indeed up until the hearing in the Supreme Court on the 17th February, 2016, was any claim made in the appeal of the s. 316/Possession Proceedings regarding the validity of the guarantees under s. 31.

22. Yet, after the High Court had determined that the receiver had been validly appointed and that he was entitled to possession of

Aberdeen Lodge, this s. 31 Claim became an issue once again. This is because the plaintiffs issued the proceedings which are now before this Court in July of 2015 and in those proceedings, the plaintiffs seek the following order:-

> "A declaration that a purported guarantee/s (hereinafter "the guarantee") entered into between the first named Plaintiff [Elektron] and the Irish Nationwide Building Society, later the Irish Bank Resolution Corporation (IBRC) and thereafter acquired by the first named Defendant [Kenmare], whereby the first named Plaintiff purported to guaranteed the liabilities of Crossplan Investments Limited to the Irish Nationwide Building Society are void and of no effect."

This Court can see little or no difference between the relief which Elektron initially claimed in the withdrawn November 2012 Proceedings and the relief which Elektron and Ms. Keane now claim in the July 2015 Proceedings. It is not significant, in this Court's view, that one of the defendants in the July 2015 Proceedings is Kenmare, but in the November 2012 Proceedings, it was IBRC, since Kenmare is the successor in title to IBRC as the lender of the funds to Elektron. Nor indeed is it significant that the plaintiff in the November 2012 Proceedings is Elektron and the plaintiffs in the July 2015 Proceedings are Elektron and Ms. Keane, since the subject matter is the same and the addition of Ms. Keane as a plaintiff (which seems to relate to the fact that she alleges that she has a right to reside in Aberdeen Lodge which was granted to her by Elektron) does not alter the substance of the July 2015 Proceedings which relate to a dispute between the borrower/guarantor of a loan (Elektron) and the owner of Aberdeen Lodge (Elektron) on the one hand, and the lender and its receiver on the other hand.

23. As noted by Somervell L.J. in *Greenhalgh v. Mallard* [1947] 2 All ER 255 at 257, abuse of process may arise where:-

> "issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of process of the court to allow a new proceeding to be started in respect of them."

24. The issues raised in the November 2012 Proceedings are, in this Court's view, part of the subject matter of the s 316/Possession Proceedings, since they both deal with the question of the validity of the appointment of the same receiver, Mr. McCann, over the same property, Aberdeen Lodge. In light of the similarity between the s. 31 Claim in the November 2012 Proceedings and the s. 31 Claim in the July 2015 Proceedings, it is difficult for this Court to avoid the conclusion that the withdrawal of the November 2012 proceedings was a tactical decision on the part of the plaintiffs. This Court is of the view that on the balance of probability that this withdrawal of the November 2012 Proceedings was done at that time by Elektron to hold in reserve the s. 31 Claim to the validity of the appointment of the receiver, in case the High Court and Supreme Court in the s. 316/Possession Proceedings upheld the validity of the receiver's appointment, as both courts duly did.

25. This Court is of the view that the very issue, and then the withdrawal, of the November 2012 Proceedings by Elektron is compelling evidence of the fact that Elektron could and should have advanced the s. 31 Claim in the s. 316 Proceedings (in which Elektron was the company the subject of those proceedings). As regards, Ms Keane, her partner, Mr. Halpin owned Elektron and Ms. Keane is listed in the CRO as having being a director of Elektron up to the 24th July, 2012 (when she ceased to be a director, which is the day after she swore an affidavit in the s. 316/Possession Proceedings) and she became a director again in place of Mr. Halpin on the 1st September, 2014). While, she was not a director of Elektron for all the time between the institution of the s. 316/Possession Proceedings on the 16th July, 2012 and the Supreme Court appeal hearing on the 17th February, 2016, this Court is of the view that Ms. Keane could and should have advanced the s. 31 Claim in the Possession Proceedings (in which Mr. Keane and Mr. Halpin were the defendants), in particular in the appeal which was not heard in the Supreme Court until 17th February, 2016.

26. This Court does not accept the argument of the plaintiffs that the nature of the s. 316 Proceedings was such as not to permit a claim by the plaintiffs that s. 31 impacted upon the validity of the appointment of the receiver. Section 316, by its express terms, permits the court:-

> "to make such order declaring the rights of persons before the court or otherwise, as the court thinks just."

Accordingly, this section is wide enough to deal with, not only the s. 31 Claim but also the Loan Sale Claim. Although not determinative of this issue, even if it were the case that s. 316 did not permit such a claim to be made, there was nothing to stop the plaintiffs doing what they did in November 2012 and issuing separate plenary proceedings, which could have been heard in conjunction with the s. 316 Proceedings, just as the Possession Proceedings were dealt with in conjunction with those s. 316 Proceedings.

27. This Court also does not accept the argument of the plaintiffs that Elektron could not have made the s. 31 Claim at the time of the s. 316/Possession Proceedings on the basis that the board resolution of Elektron to avoid the guarantee was only passed on the 15th September, 2014, and it was only appropriate to raise the s. 31 Claim after this resolution had been passed, as the decision to pass it was only made after Elektron had succeeded in raising funds to pay off the €1 million loan to Elektra. This Court does not accept this argument, since it was within Elektron's unilateral power to pass a resolution to purport to avoid the guarantees at any time. In this Court's view, whether it was for tactical or funding/commercial reasons is irrelevant, the important issue is that it was within Elektron's unilateral power to purport to avoid the guarantees at any time and it decided not to do so until 15th September, 2014. It cannot now seek to rely on its own unilateral actions in an attempt to say that it could not have raised the validity of the guarantees earlier in the s. 316/Possession Proceedings. In this Court's view, the critical issue is not that, Elektron chose to refrain from crystallising the avoidance of the guarantees until 15th September, 2015, by passing the board resolution at that stage, but rather the critical issue is that the question of whether the guarantees were contrary to s. 31 was a live issue for Elektron in November of 2012 and thus it should have been raised by Elektron and/or Ms. Keane in the s. 316/ Possession Proceedings dealing with the validity of the appointment of the receiver, which had been instituted on the 16th July, 2012, and heard in the High Court on the 24th September, 2013 and heard in the Supreme Court on the 17th February, 2016. For this reason, Elektron's decision to delay avoiding the guarantee until the 15th September, 2014, is not a justification for its failure to raise the s. 31 Claim in the s. 316/Possession Proceedings.

*Likely intent of the plaintiffs*

28. In considering whether the July 2015 Proceedings amount to an abuse of process, this Court also has regard to what it believes is the likely intent of the plaintiffs' decision to issue these plenary proceedings. This Court is of the view that this intent is illustrated by the true nature of the interlocutory relief which is being sought as part of these July 2015 Proceedings. There is in existence a Supreme Court Order confirming the validity of the appointment of the receiver and granting him an Order of Possession of Aberdeen Lodge. Yet, the plaintiffs seek in this interlocutory hearing an order from this Court preventing an Order of the Supreme Court from taking effect by asking this Court for an injunction which would prevent the receiver from taking possession of Aberdeen Lodge and/or putting a stay on the Supreme Court Order for possession.

29. It is arguable that this Court does not have the jurisdiction to grant the orders being sought, since it would amount to this Court effectively overriding the Order of a higher court. In any case, it is this Court's view that the very seeking of such orders from this Court is evidence of the likely intent of the plaintiffs in issuing the July 2015 Proceedings, namely that they are a final collateral attack on the entitlement of the receiver to possession of Aberdeen Lodge, even though an Order from the Supreme Court, from which there is no appeal, has been granted. By keeping in reserve the s. 31 Claim, it is this Court's view that, the plaintiffs may have felt that even if the Supreme Court confirmed the validity of the appointment of the receiver (some four years after his original appointment) and granted him an Order for Possession, they would be able to delay further their giving up of the property by pursuing the July 2015 Proceedings.

**The Loan Sale Claim**

30. The second key claim made by the plaintiffs in the July 2015 Proceedings is that the receiver was appointed before the transfer of the loan from IBRC to Kenmare and that this subsequent transfer of the loan compromises the validity of the appointment of the receiver, which appointment preceded the transfer. This Court must consider whether this "Loan Sale Claim" could and should have been made by the plaintiffs in the s. 316/Possession Proceedings.

*Status of a new matter arising since appeal*

31. The transfer from IBRC to Kenmare took place in March 2014. It was open to the plaintiffs in the s. 316/Possession Proceedings which dealt with the validity of the appointment of the receiver, which were then under appeal to the Supreme Court, to raise this point in their appeal. This is because Order 58, rule 8 of the Rules of the Superior Courts states:-

> "The Supreme Court shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by depositions taken before an examiner or commissioner. Such further evidence may be given without special leave upon any appeal from an interlocutory judgement or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought."

32. The transfer of the loans took place after the High Court hearing of the s. 316/Possession Proceedings which was held on the 24th September, 2013, and so could not have been considered by that court. Accordingly, this development falls four square within Order 58, rule 8, as it constitutes, in this Court's view, further evidence which is as to a matter *'which occurred after the decision from which the appeal is brought.'* This rule could not be clearer in its application to the plaintiffs' case and this Court concludes that the transfer of the loans and the alleged consequence for the validity of the appointment of the receiver, which was to be considered by the Supreme Court, could have been brought to the attention of the Supreme Court, pursuant to this rule. If the plaintiffs believed that the loan sale in March 2014 compromised the validity of the appointment of the receiver, which they obviously did since they instituted the July 2015 Proceedings, then they should have brought it to the attention of the Supreme Court when they appealed the s. 316/Possession Proceedings to the Supreme Court on the 19th June, 2014.

33. To not to do so, but then to use this Loan Sale Claim as a basis for the issuing of the July 2015 Proceedings which seek to invalidate the appointment of the receiver, confirmed by the Supreme Court, amounts to an abuse of process, in this Court's view.

34. It is this Court's view that on the balance of probabilities, Elektron and Ms. Keane calculated that the Loan Sale Claim could be used by them in these July 2015 Proceedings if the Supreme Court decision on the s. 316/Possession Proceedings went against Ms Keane, Mr. Halpin and Elektron (as the subject company to the s. 316 Proceedings).

*Can an appeal can only deal with matters decided by trial judge?*

35. The plaintiffs argued that they could not have raised the Loan Sale Claim in the Supreme Court on the grounds that an appeal can only deal with matters decided before the trial judge and the Loan Sale Claim was not dealt with by the trial judge, since the sale of the loan only took place after the High Court hearing on the 8th November, 2013. This argument by the plaintiffs is based on their interpretation of a statement of Finlay C.J. in *KD v. MC* [1985] IR 687 at 701, where he states:-

> "It is a fundamental principle, arising from the exclusively appellate jurisdiction of the court in cases such as this, save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried in the High Court. To that fundamental rule or principle may be exceptions, but they must be clearly required the interests of justice. This case cannot, in my view, however, provide such an exception."

36. That case involved the recognition of a foreign divorce in Ireland. In the High Court, a husband had argued unsuccessfully that his foreign divorce should be recognised on the grounds that he had not acquired a domicile of choice in England. In the Supreme Court he sought to introduce a second ground for the recognition of his foreign divorce, namely whether a real or substantial connection existed between him and the law of the country granting the divorce. This was rejected by the Supreme Court and it was in this context, i.e. of a new argument on the same facts, that the Supreme Court stated that it should not determine an issue which was not tried in the High Court. Thus, the statement of principle of Finlay C.J. was made in the context, not of a new development, but rather in the context of a new argument being put forward by the appellant that could have been made before the trial judge. This is very different from the current circumstances which concern a new development since the High Court hearing (the sale of the loan by IBRC) and which, as noted, falls four square within Order 58, rule 8 and so could have been raised by the plaintiffs before the Supreme Court.

37. It is also clear from the Supreme Court case of *Fitzgerald v. Kenny* [1994] 2 IR 383 that the plaintiffs should have raised the Loan Sale Claim before the Supreme Court. That case involved a member of An Garda Síochána who had made a personal injuries claim on the assumption he would be able to continue to work. After the High Court had issued judgment, it became clear that he would not be able to continue working and he was ultimately discharged from An Garda Síochána on medical grounds. Dealing with Order 58, rule 8 in the Supreme Court, O'Flaherty J. stated at page 392:-

> "However, in my judgement, our essential task is to determine the appeal in accordance with the set of circumstances that prevails when it comes before us. Accordingly, I hold as follows: –
>
> (a) The matter of the plaintiff's job and career loss is a completely new fact arising after the trial.
>
> (b) The evidence in regard to this matter, therefore, is to be approached as not requiring any form of special leave under the relevant rule.

> (c) Nonetheless, this Court must apply a discretion. Like any discretion, it must be exercised in a fair and just manner though it may be impossible to lay down a general rule that will cover all circumstances. Each case must be approached as requiring the exercise of the discretion in relation to its facts. In the circumstances of this case I hold that the possibility that a serious injustice would be suffered by the plaintiff must prevail over the desirability of having finality in litigation.
>
> (d) [….]
>
> (e) As regards the evidence of exacerbation of the plaintiff's physical injuries and medical condition, if they stood alone I would not allow this evidence. But it seems to me that the evidence in this regard is inextricably entwined with the evidence concerning the loss of the plaintiff's job and career in the Garda Síochána and so this new evidence should be admitted, too."

At page 391 of his judgement in the same case, Blaney J. quoted with approval the following extract from Lord Wilberforce in *Mulholland v. Mitchell* [1971] AC 666 at p. 679:-

> "Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted if some basic assumptions, common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice."

On this basis, the Supreme Court held that the loss by the garda of his job on grounds of ill health had the effect of falsifying what had happened in the High Court and so this evidence regarding the garda's loss of his job was admitted in the appeal to the Supreme Court.

38. It is this Court's view that the Supreme Court, when deciding whether the receiver was properly appointed, should have been apprised by the plaintiffs of their claim that the loan sale compromised the legality of his appointment. This is because, as is apparent from *Fitzgerald v. Kenny*, it is the Supreme Court's task to determine an appeal in accordance with the set of circumstances that exist at the time of the appeal. As such, this new circumstance of the loan sale should have been brought to the Court's attention.

*Supreme Court appeal was a one issue case*

39. In the Supreme Court hearing, the question of whether the appointment of the receiver was valid centred on the meaning of 'close of business', since the receiver to Elektron was appointed at 4 p.m., rather than at a later time in the day. On the basis that this was the only matter the Supreme Court was dealing with, the plaintiffs argued that it was inappropriate for them to raise other issues in those proceedings. This Court rejects this argument on the grounds that the validity of the appointment of the receiver was being dealt with by the Supreme Court and in this Court's view, it is irrelevant whether it was being challenged on one ground, or ten grounds. If the plaintiffs had other claims which impacted upon the validity of the receiver's appointment, they should have been raised in the Supreme Court. It is not a good answer to say that because the validity of the appointment was being challenged on this one specific point, that it was appropriate to suppress the other claims for challenging the appointment.

*Importance of finality of litigation*

40. The Supreme Court has made it clear that there is a public interest in the finality of litigation as is clear from the decision of *AA v. Medical Council* [2003] 4 IR 302 at p. 319 where Hardiman J. adopted the words of Brooke L.J. in Woodhouse v Consignia plc [2002] 1 WLR 2558 at p. 2575 that:-

> "The present litigation in my view runs foul of the rule of public policy 'based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits were one would do'."

More generally therefore, this Court cannot agree with the underlying premise of the plaintiffs' case, that in a case before the Supreme Court concerning the validity of the appointment of a receiver, that in challenging that appointment, the plaintiffs are entitled to suppress two grounds (the s. 31 Claim and the Loan Sale Claim) which they say invalidate that appointment. The Court cannot agree that the plaintiffs can instead wait until after the Supreme Court has confirmed the validity of the appointment and then seek, in the High Court, interlocutory orders restraining the Supreme Court orders pending a hearing on the two claims which they failed to rely on in the Supreme Court. This would amount to a clear abuse of process in this Court's view, amounting as it does to seeking to endlessly litigate the same issue and also in seeking to make a collateral attack on an Order of the Supreme Court.

**Conclusion**

41. For the reasons set out above, it is this Court's view that the claims set out by the plaintiffs in the July 2015 Proceedings could and should have been brought by them in the earlier s. 316/Possession proceedings, whether before the High Court or on appeal in the Supreme Court. It is this Court's view that it is likely that a tactical decision was taken by the plaintiffs to hold the s. 31 Claim and the Loan Sale Claim in reserve so as to seek to make a collateral attack on the Supreme Court decision, if, as turned out to be the case, the appointment of the receiver was upheld by the Supreme Court. As is evident from *Vico v. Bank of Ireland*, it is an abuse of process for a party to litigation to bring a claim in later proceedings that could and should have been brought in earlier proceedings. The subject matter of the July 2015 Proceedings could and should have been brought in earlier proceedings by plaintiffs and so this Court finds that the plaintiffs are guilty of abuse of process and strikes out the proceedings on that basis.