Neutral Citation [2012] IEHC 420

THE HIGH COURT

[2012 No. 85 COS]

IN THE MATTER OF OCEAN POINT DEVELOPMENT COMPANY LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF THE ASSETS OF MR. FRANCIS DOOLEY

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

AND

IN THE MATTER OF SECTION 316(1) OF THE COMPANIES ACT 1963 (AS AMENDED)

Judgment of Ms. Justice Laffoy delivered on 12th day of October, 2012.

The application and the parties thereto

1. On this application the applicant, Martin V. Ferris (the Receiver), who is the Receiver appointed by ACC Bank Plc (the Bank) of Ocean Point Development Company Limited (the Company) and of certain assets of Mr. Francis Dooley (Mr. Dooley) seeks the directions of the Court pursuant to s. 316(1) of the Companies Act 1963 (the Act of 1963), as amended, and under its inherent jurisdiction. The directions sought relate to the treatment of deposits paid by purchasers in respect of two units in the development known as Ocean Point, Courtown Harbour, County Wexford, which was intended to be a mixed retail and apartment development and which was constructed on land owned by Mr. Dooley and developed by the Company. In the case of each of the units there were two agreements: an agreement for sale between Mr. Dooley and the purchaser in respect of the site; and a development/building agreement between the Company and the purchaser in relation to the development which was to take place on the site.

2. The notices parties on the application were the purchasers under the agreements, namely:

> (a) Mr. John Boyle (Mr. Boyle), the purchaser of a retail unit, Unit 11, who was represented by solicitor and counsel at the hearing of the application; and
>
> (b) Mr. Sean Roche (Mr. Roche) and Mr. Michael Carroll (Mr. Carroll), the joint purchasers of an apartment unit, Unit 17.

Mr. Carroll appeared in person at the hearing. However, he did not make any legal submissions.

3. For the record I should also record that Mr. Dooley appeared at the hearing. However, I ruled that he had no standing in the matter and could not be heard by the Court.

4. Although, as I understand the position, the sales of some of the units in Ocean Point were completed by the Receiver, the sale of Unit 11 and the sale of Unit 17 have not been, and apparently will not be, completed. The reason it has been necessary for the Receiver to seek the directions of the Court is due to what counsel for the Receiver realistically characterised as a "serendipitous" factor. Notwithstanding the provisions of the agreements entered into between the parties, which I will outline later, at the time the Receiver was appointed by the Bank the solicitors who acted for Mr. Dooley and the Company in relation to the sales of Unit 11 and Unit 17 held the deposits paid by those purchasers under both the agreements for sale of the sites and the development/building agreements. In the case of Unit 11 the deposits paid aggregated €119,900 and in the case of Unit 17 they aggregated €33,000. Following the appointment of the Receiver, by letter dated 25th March, 2009, the Solicitors for Mr. Dooley and the Company, Denis McSweeney, sent those deposits to the solicitors acting for the Receiver. In broad terms, the position adopted on behalf of the Receiver on the hearing of the application was that the money representing the deposits is captured by the security documents held by the Bank from Mr. Dooley and the Company, in consequence of which the Receiver, on behalf of the Bank, is entitled in priority to Mr. Boyle in relation to the deposits paid in respect of Unit 11 and to Mr. Roche and Mr. Carroll in relation to the deposits paid in respect of Unit 17.

The Bank's securities and the appointment of the Receiver

5. By virtue of an indenture of mortgage/charge (the Mortgage) dated 3rd August, 2006 made between Mr. Dooley of the one part and the Bank of the other part, Mr. Dooley mortgaged and charged the "Secured Property", as defined, in favour of the Bank as continuing security for payment and discharge of the "Secured Liabilities", as defined. The Secured Property was defined as meaning certain registered and unregistered land set out in the schedule to the Mortgage. For present purposes I am assuming that the site of Ocean Point came within the property described in the schedule, although I cannot identify it as such. Moreover, as continuing security, in Clause 4.1.7 Mr. Dooley assigned unto the Bank –

> ". . . the full benefit of all covenants, agreements, charges, indentures, acknowledgements and undertakings in favour of the Borrower as are contained in the title deeds and other documents of title relating to the Secured Assets together with and without prejudice to the generality of the foregoing the full benefit of:-
>
> (a) any covenant, agreement or undertaking for road making or the provision of services or for the payment of road charges or expenses incurred with or in connection with the provision of services or the like in respect of the Secured Assets and any indemnity against payment of any such charges or expenses;
>
> (b) any other covenants, agreement, undertaking, charge, right, remedy or indemnity in relation to the Secured Assets and any rent or payment in the nature of a rent payable thereout or charged thereon and any service charges, management charges, fines, insurance and other premiums and other monies payable out of any lease, tenancy or licence of any part of the Secured Assets, whether such lease, tenancy or licence is created prior to or subsequent to this Mortgage/Charge;
>
> (c) all rights of the Borrower to be paid or receive compensation under any statute or enactment by reason of any

> compulsory acquisition or other exercise of compulsory or similar powers in relation to the Secured Assets by any local or other authority or government agency or body or any refusal, withdrawal or modification of any planning permission or approval relative thereto or any control or limitation imposed upon or affecting the use of the Secured Assets and so that the production of this Mortgage/Charge to the authority, body or person liable to pay such compensation or other payment shall be a sufficient authority to it or him to pay such compensation and/or other monies to the Bank."

The position of the Receiver is that the deposits paid in respect of Unit 11 and Unit 17 under the respective agreements for sale were captured by Clause 4.1.7 and, in particular, by reference to the assignment to the Bank of "agreements" relating to the Secured Assets in that provision. The expression "Secured Assets" was defined as meaning all assets, rights and property the subject of the security created, expressed or intended to be created by the Mortgage.

6. By deed dated 5th March, 2009 the Bank, in pursuance of the powers contained in the Mortgage, appointed the Receiver to be receiver and manager of all the property of Mr. Dooley referred to, comprised in and charged by the Mortgage and to enter upon and take possession of same. No issue as to the validity of the appointment of the Receiver over the property secured by the Mortgage was raised by the notice parties.

7. By a debenture dated 15th May, 2007 (the Debenture) made between the Company of the one part and the Bank of the other part, the Company mortgaged and charged certain unregistered freehold and registered property and created fixed charges over other specific property in favour of the Bank as continuing security for the Secured Liabilities, as defined. However, the provision on which the Receiver relies in relation to the deposits is Clause 4.1.14 under which, as continuing security, the Company charged –

> "unto the Bank by way of first floating charge all the undertaking, property, rights and assets of the Company whatsoever and wheresoever both present and future, including but not limited to the stock-in-trade, work-in-progress and cash-in-hand of the Company wheresoever, not effectually subject to any fixed security hereby created."

8. By deed of appointment dated 5th March, 2009, in pursuance of the power given in the Debenture, the Bank appointed the Receiver to be receiver and manager of the Company and all undertaking, property, rights and assets of the Company. On this application the notice parties have not raised any issue as to the validity of the appointment of the Receiver.

Mr. Boyle's contracts

9. The agreement for the sale of the site between Mr. Dooley and Mr. Boyle was dated 12th February, 2008 (the 2008 Contract for Sale). It provided for a purchase price of €260,708, of which €26,000 was to be paid by way of deposit. It was in the form of the Incorporated Law Society General Conditions of Sale (2001 Edition). However, there was one condition in the special conditions, which is of particular significance for present purposes. That was condition 11, which dealt with the deposit and provided:

> "The deposit payable hereunder shall be released to the Vendor on the signing hereof provided Premier Guarantee Initial Certificate is available. The provisions in the general conditions in respect of stakeholder deposit do not apply."

Although there was some confusion about this initially in the Receiver's affidavit evidence, Premium Guarantee, an insurance entity, issued an initial certificate in relation to Unit 11 on 30th June, 2008, having already issued a final certificate on 23rd June, 2008. On 24th June, 2008 Mr. Dooley's Solicitors, Denis McSweeney, furnished what purported to be a copy of the initial certificate to Mr. Boyle's solicitors. It was, in fact, the final certificate dated 23rd June, 2008. However, as I have stated, it is now clear that the initial certificate issued on 30th June, 2008. On the evidence, I am satisfied that after 30th June, 2008 Mr. Dooley was entitled to have the deposit of €26,000 released to him by Denis McSweeney.

10. There were two further special conditions in that contract which require to be noted. Condition 22 provided that the developers' architect, which I assume means the Company's architect, would apply for planning permission for change of use of Unit 11 to a licensed betting office within four weeks from the date thereof. It continued:

> "This Agreement is subject to satisfactory Planning Permission to Change of Use issuing from the relevant Planning Authority or on appeal to An Bord Pleanála within nine months of the lodgment of the application by [the developers' architects] with Wexford County Council. In the event that the planning permission is refused by An Bord Pleanála then this agreement shall be at an end and [Mr. Boyle] shall be entitled to a refund of [his] deposit without any payment of interest or deductions."

Condition 23 made the contract conditional upon a certificate of suitability of the premises issuing to enable Mr. Boyle to obtain a "Bookmaking Licence" for Unit 11 and went on to provide that, in the event of such certificate not being available on the date of the completion of the shell and core works, the contract should be rescinded and the deposit returned to Mr. Boyle without any deductions, interest, costs or expenses.

11. Condition 12 of the special conditions is also of relevance in that it provided as follows:

> "The completion of this contract is dependant upon the completion of the Development Agreement of even date and made between [the Company] and [Mr. Boyle] and this contract cannot be completed without at the same time completing the Development Agreement, or if this contract is rescinded for any reason, then the Development Agreement will likewise be rescinded."

12. In his grounding affidavit the Receiver has averred that the relevant planning permission was not applied for within the time period stipulated in Condition 22 and, in fact, was never obtained.

13. The so-called Development Agreement between the Company and Mr. Boyle also bears the date of 12th February, 2008 (the 2008 Development Agreement). The consideration thereunder was €939,292 (plus VAT thereon) and in the definition clause the Deposit was stated to be –

> "the sum of €93,900 payable on the signing hereof by [Mr. Boyle] to the [Company] which said deposit is to be held is to be released to the [Company] on the signing hereof".

It was submitted on behalf of the Receiver that the inclusion of the words "is to be held" in that definition was a typographical error and that the definition should be construed as meaning that the deposit was to be released to the Company on the signing thereof. Counsel for Mr. Boyle, properly in my view, did not contest that construction. Therefore, I am satisfied that under the 2008 Development Agreement, the Company was entitled to have the deposit of €93,900 released to it on the execution thereof. However,

the 2008 Development Agreement was subject to Condition 12 of the 2008 Contract for Sale referred to at para.11 above.

14. Following the appointment of the Receiver, on 11th March, 2009 Mr. Boyle's solicitors wrote to Denis McSweeney, referring to Condition 22, and confirming that both agreements he had entered into were being rescinded and seeking return of the deposits paid by Mr. Boyle. A copy of that letter was furnished to the Receiver on 14th April, 2009 and it was again asserted that the contracts had been rescinded and the deposit monies should be returned to Mr. Boyle immediately. Counsel for the Receiver emphasised the chronology of the events in March 2009: the Receiver was appointed on 5th March, 2009: the notification by Mr. Boyle's solicitors of rescission was dated 11th March, 2009: and the deposits were remitted to the Receiver by Denis McSweeney on 25th March, 2009.

Relevant legal principles and their application to Mr. Boyle's case
15. The Court has had the benefit of helpful written legal submissions from counsel for the Receiver and counsel for Mr. Boyle to which I have had regard.

16. In addressing the issues raised on the application, I am of the view that the starting point must be consideration of the contractual terms governing payment and return of the deposits as between Mr. Dooley and Mr. Boyle and also as between the Company and Mr. Boyle without regard to the existence of the Bank's securities. The 2008 Contract for Sale as between Mr. Dooley and Mr. Boyle provided for the release of the deposit to Mr. Dooley on fulfilment of the requirement of Condition 11, which, as I have stated, occurred. The 2008 Development Agreement as between the Company and Mr. Boyle, as I have found, provided that the deposit would be released to the Company, on its execution. Therefore, as a matter of contract, Mr. Dooley and the Company were entitled to have their respective deposits paid by Mr. Boyle released to them by their solicitor, through whom they were channelled and who was their agent. That being the case, the fact that, for whatever reason, their solicitor retained and did not release the deposits is immaterial in considering the entitlement of Mr. Boyle against them.

17. Counsel for the Receiver relied on a passage from Wylie on *Irish Conveyancing Law* (2nd Ed.), which is to be found at para. 10.25 and addresses the capacity of a deposit holder. Having adverted to the distinction between payment of a deposit to a person as agent for the vendor and as stakeholder, Wylie set out the significance of the distinction as follows:

> "If the deposit is paid to the vendor's agent, e.g., his auctioneer or solicitor acting in that capacity, the agent is liable to pay it to the vendor on demand. . . . If the sale falls through, the purchaser can sue the vendor only, not the agent, for recovery. The advantage from the vendor's point of view is that he can demand the deposit immediately and use it, e.g., in connection with some other transactions such as the purchase of a new house. . . . On the other hand, it is settled that, if the deposit is paid under the contract to the vendor's agent, the purchaser has a lien on the vendor's land for its return, and in this respect the purchaser is better off than he would be if the deposit were paid to a stakeholder."

As regards Mr. Boyle's contractual relationship with Mr. Dooley and the Company, the relevant contracts expressly provided for the release of the deposits and it is not necessary to rely on the first sentence in the quotation.

18. However, in essence, the last sentence in the quotation addresses the position of a purchaser vis-à-vis a vendor who is the owner of the land in sale. Wylie cites as authority for the principle stated in that sentence the decision in *Whitbread & Co. Ltd. v. Watt* [1902] 1 Ch. 623. The same principle was reiterated by the Supreme Court, albeit obiter, in one of the authorities put before the Court by counsel for Mr. Boyle: *In Re Barrett Apartments Ltd*. [1985] I.R. 350. At the commencement of his judgment in that case, Henchy J. stated (at p. 357) that the rationale behind allowing a purchaser a lien on the purchased property in respect of a deposit paid to the vendor is that, by paying the deposit in pursuance of the contract, the purchaser acquires an equitable estate or interest in the property and therefore should be allowed to follow that estate or interest by being accorded a lien on it, citing *Rose v. Watson* (1864) 10 HLC 672, *Whitbread & Co. Ltd. v. Watt, and Tempany v. Hynes* [1976] I.R. 101. Later in the judgment, Henchy J. quoted the following passage from the judgment of Lord Cranworth in *Rose v. Watson*, which had been cited with approval by Kenny J., when giving the majority judgment of the Supreme Court in *Tempany v. Hynes*:

"There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent."

On the facts in the *Barrett Apartments Ltd*. case, the issue before the Court centred on booking deposits, which Henchy J. stated clearly did not give rise to a purchaser's lien.

19. As regards the 2008 Contract for Sale between Mr. Dooley and Mr. Boyle for the purchase of the site of Unit 11 by Mr. Boyle, there is absolutely no doubt but that Mr. Boyle, on payment of the deposit of €26,000, became entitled to a lien for that amount over Unit 11. However, as regards the deposit of €93,900 paid by Mr. Boyle to the Company, that deposit was towards part-payment by Mr. Boyle for the development works which the Company contracted to carry out on foot of the 2008 Development Agreement. The evidence indicates that the title to the site of Unit 11 was vested in Mr. Dooley solely, not in the Company. Assuming that to be the case, Mr. Boyle did not become entitled to a lien on the site of Unit 11 in respect of the deposit paid by him to the Company.

20. Aside from the involvement of the Bank and the Receiver, if Mr. Boyle was, as a matter of contract, entitled, as he claimed, to return of the deposits he had paid to Mr. Dooley under the terms of the 2008 Contract for Sale and to the Company under the 2008 Development Agreement, he would have had a right of action against those parties. Additionally, he could have enforced the lien against the site of Unit 11 for the deposit paid to Mr. Dooley, the owner, under the 2008 Contract for Sale, but not for the deposit paid to the Company under the 2008 Development Agreement. That is the position notwithstanding that condition 12 in the 2008 Contract for Sale between Mr. Dooley and Mr. Boyle, which I have quoted at para. 11 above, links the two contracts entered into by Mr. Boyle, in that it makes completion of one dependent on completion of the other.

21. The next step in resolving the issues raised by the Receiver as to Mr. Boyle's entitlement to the return of the deposits is to ascertain the impact of the existence of the Bank's securities and the fact that the Receiver was appointed on foot of those securities on the contractual position as between Mr. Boyle, on the one hand, and Mr. Dooley and the Company, on the other hand. I propose to consider the effect of the appointment of the Receiver on foot of the Debenture over the Company's assets first. 22. Counsel for the Receiver referred the Court to the decision of the High Court (Blayney J.) in *Re Tullow Engineering* (*Holdings) Ltd. (In Receivership*) [1990] 1 I.R. 142. The issue in that case was the impact of the appointment of a receiver over the company named in the title on foot of a debenture containing a floating charge on an option which had been granted to a purchaser to purchase shares owned by the company in another company before the appointment of the receiver. What is relevant for present purposes is that

Blayney J., having decided that, at the date of the appointment of the receiver, the company still owned the shares, held that the effect of the crystallisation of the floating charge which occurred was that there was an immediate equitable assignment of the shares to the debenture holders, so that, in equity, they became the owners of the shares. Thereafter, the company could not enter into a contract to sell the shares to the purchaser in pursuance of the option which it had granted. Blayney J. cited the following passage from the judgment of Romer J. in *Robson v. Smith* [1895] 2 Ch. 118 at p. 124 as supporting the conclusion at which he had arrived:

> "So long as the debentures remain a mere floating security, or, in other words, the licence to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture-holders, provided that the dealing be completed before the debentures cease to be merely a floating security."

Applying that principle to a hypothetical situation to illustrate its application, if the Company had some interest in the site of Unit 11, and again it must be emphasised that there is no evidence that it had, so that Mr. Boyle had a lien on that interest for the deposit of €93,900 paid to the Company, which I understand it did not have, as the lien had not been enforced prior to the appointment of the Receiver, it could not be enforced thereafter because the title to the interest in question would have passed to the Bank upon the crystallisation of the floating charge by the appointment of the Receiver.

23. That principle would have had the same application in another hypothetical situation. If the deposit had been released by its solicitors to the Company prior to the appointment of the Receiver and it had remained in an identifiable state, for example, to use the metaphor used by counsel for Mr. Boyle, by "being kept in a shoe-box", on the appointment of the Receiver, the money in the shoe-box would have been assigned in equity to the Bank and the Receiver would have been entitled to possession of it. Similarly, and to bring the matter full circle, as the deposit held by the Company's solicitors, as a matter of contract between Mr. Boyle and the Company, was the Company's money, on the crystallisation of the floating charge on the appointment of the Receiver it was assigned to the Bank and the Receiver became entitled to it. However, the extent to which the Receiver, on behalf of the Bank, is entitled to retain that money is an imponderable at this stage.

24. Different considerations apply to the deposit of €26,000 paid by Mr. Boyle to Mr. Dooley under the 2008 Contract for Sale. Assuming for present purposes that, as a matter of contract between Mr. Dooley and Mr. Boyle, that sum has become repayable to Mr. Boyle by reason of non-compliance by Mr. Dooley with Condition 22 of the special conditions, and again it is necessary to emphasise that no finding has been made to that effect, the Receiver having been appointed, the core issue is who is entitled to that sum, whether it is the Receiver on behalf of the Bank, or Mr. Dooley, or Mr. Boyle by virtue of his claim for return of the deposit against Mr. Dooley. That is a difficult issue and it has to be acknowledged that Denis McSweeney acted prudently in remitting money to the Receiver. It is also an important issue, because it is unquestionably the case that the Bank's charge has priority over Mr. Boyle's purchaser's lien, so that, assuming there would be no surplus after the discharge of Mr. Dooley's liabilities to the Bank, Mr. Boyle's only prospect of recovering the deposit is dependent on the serendipitous factor, namely, that the deposit had not been released to Mr. Dooley by his solicitors.

25. The resolution of the issue turns on whether the deposit was captured by Clause 4.1.7 of the Mortgage, as counsel for the Receiver contended it was. Counsel for Mr. Boyle correctly submitted that Clause 4.1.7 only captures assets which fall squarely within its provisions and that it is not in the nature of a floating charge over the assets of a company which would capture all of the assets of the company when it crystallises.

26. As a matter of construction of Clause 4.1.7, the opening lines whereby the "full benefit" of certain instruments, including agreements, "as are contained in the title deeds and other documents of title relating to the Secured Assets", suggest that what is covered are deeds and other documents in existence at the date of the Mortgage. Of the additional assigned rights which are specified at paragraphs (a), (b) and (c) of Clause 4.1.7, only the matters set out in paragraph (b) would appear to be sufficiently non-specific to capture an entitlement of Mr. Dooley to a benefit created by an agreement for sale of part of the property charged in favour of the Bank, for example, Unit 11. In paragraph (b) monies payable out of any lease, tenancy or licence of the Secured Assets are assigned, irrespective of whether the lease, tenancy or licence in question was created prior to or subsequent to the Mortgage. That raises the question whether the rights and benefits assigned at the commencement of paragraph (b) are limited to rights in existence at the date of the Mortgage. I have come to the conclusion that they are not. It must have been intended by the parties to the Mortgage that paragraph (b) would capture every right and benefit in relation to the property specifically charged and mortgaged in favour of the Bank accruing after the creation of the Mortgage. Once a receiver was appointed under the Mortgage, the Receiver was entitled to those rights and benefits insofar as Mr. Dooley had not already taken control of them in a manner in which they were no longer identifiable. Therefore, I have come to the conclusion that the Receiver was entitled to the deposit of €26,000 on behalf of the Bank to be used to meet the Secured Liabilities of Mr. Dooley.

The Roche/Carroll contracts and the application of the principles to them

27. The provision in the agreement for sale between Mr. Dooley as vendor, and Mr. Roche and Mr. Carroll, as purchasers which was dated 22nd March, 2007 (the 2007 Contract for Sale) in relation to the deposit payable thereunder is more explicit than special condition 11 of the 2008 Contract for Sale between Mr. Dooley and Mr. Boyle, although the import is the same. It was explicitly provided that on delivery of the "Premier Guarantee Initial Certificate" –

> ". . . all and every part of the purchase price (including any booking deposits, deposits paid before, on or after the exclusion hereof) paid to such Agent or Solicitor shall be deemed held by such person as Agent for the Vendor only and upon such delivery the said Agent and/or Solicitors are hereby irrevocably authorised to release same to the Vendor without any liability therefor as soon as this Agreement is signed for and on behalf of the Vendor."

On 13th February, 2008, the solicitors acting in the purchase on behalf of Mr. Roche and Mr. Carroll were furnished with a copy of the Premier Guarantee Initial Certificate and were informed by Denis McSweeney that the deposit would be released to the client of Denis McSweeney. What has been exhibited by the Receiver is a copy of the final certificate, which was dated 7th August, 2008. No replying affidavit was filed in respect of Mr. Roche and Mr. Carroll and the fact that the initial certificate issued is not disputed. Accordingly, I consider that it is reasonable to infer that the initial certificate did issue and was furnished with the letter of 13th February, 2008, as averred to by the Receiver. The deposit paid by Mr. Roche and Mr. Carroll to Mr. Dooley under the 2007 Contract for Sale was €19,039.50.

28. I am satisfied that the same principles apply to the ultimate destination of that deposit as have been outlined in relation to the deposit paid by Mr. Boyle to Mr. Dooley. Accordingly, I am satisfied that the Receiver was entitled to receive the deposit of €19,039.50 from Denis McSweeney on behalf of the Bank as part of the Secured Assets under the Mortgage to be treated as such.

29. The building agreement between Mr. Roche and Mr. Carroll of the one part and the Company of the other part was in the form of the Law Society of Ireland (2001 Edition) building agreement and was also dated 22nd March, 2007 (the 2007 Building Agreement). Clause 3 thereof dealt with the method of payment of the contract price, which was €139,605. It was provided that a deposit of €13,960.50 was to be paid on the signing thereof and the balance on the closing day. I am satisfied that the deposit so paid via the Company's solicitors, was paid to the Company's solicitors as agent on behalf of the Company.

30. The same principles apply to that deposit paid under the 2007 Building Agreement as applied to the deposit paid by Mr. Boyle to the Company under the 2008 Development Agreement. Accordingly, I am satisfied that the deposit paid by Mr. Boyle and Mr. Roche was assigned to the Bank in equity on the crystallisation of the floating charge contained in the Debenture on the appointment of the Receiver and that it was properly received by the Receiver on behalf of the Bank as part of the property captured by the floating charge.

31. Unlike the position which prevailed in relation to the deposits paid by Mr. Boyle, which I have considered on the assumption that they may have become repayable to Mr. Boyle prior to the appointment of the Receiver by reason of non-compliance with Condition 22 and the effect of Condition 12 in the 2008 Contract for Sale between Mr. Dooley and Mr. Boyle, it is not possible to reach any conclusion on the evidence as to whether Mr. Roche and Mr. Carroll were at any time entitled to terminate their contracts with Mr. Dooley and the Company and to demand the return of the deposits paid by them, as their solicitor has been pressing for since June 2010.

Other imponderable

32. Apart from the matter addressed in the next preceding paragraph, there is another fundamental matter on which the Court cannot form a view on the basis of the evidence and, in any event, could not form a view because of the absence of Mr. Dooley and the Company on this application. That is whether, as between Mr. Dooley and the Company, on the one hand, and the Bank, on the other hand, the Bank is entitled to retain the entirety of the deposits to meet the "Secured Liabilities", as defined in the Mortgage and the Debenture, of Mr. Dooley and the Company respectively to the Bank. However, the manner in which the relief sought on the notice of motion is framed, which seeks directions as to the "treatment" of the deposits enables the Court to give directions without that imponderable having to be resolved. The orders outlined below will not impinge on any issue which may arise as between those parties, because the Receiver will have to apply the monies in accordance with the contractual arrangements between those parties.

Orders

33. There will be an order under the Court's inherent jurisdiction that the following monies be treated by the Receiver as assets assigned to the Bank pursuant to the Mortgage by way of security for the Secured Liabilities, as defined in the Mortgage, that is to say:

(a) the sum of €26,000 paid by Mr. Boyle by way of deposit under the 2008 Contract for Sale; and

(b) the sum of €19,039.50 paid by Mr. Roche and Mr. Carroll by way of deposit under the 2007 Contract for Sale.

34. There will be an order pursuant to s. 316 of the Act of 1963 that the following monies be treated by the Receiver as having been assigned in equity to the Bank on the crystallisation of the floating charge contained in the Debenture on the appointment of the Receiver and as being security for the Secured Liabilities as defined in the Debenture, that is to say:

(a) the sum of €93,900 paid by way of deposit by Mr. Boyle pursuant to the 2008 Development Agreement; and

(b) the sum of €13,960.50 paid by Mr. Roche and Mr. Carroll by way of deposit pursuant to the 2007 Building Agreement.

35. Obviously, one has sympathy for the notice parties. However, the position in which they find themselves was predicted in as long ago as 1996, in the second edition of Wylie's *Irish Conveyancing Law*, which has been relied on by counsel for the Receiver, and reiterated in Wylie and Woods *Irish Conveyancing Law* (3rd Ed.) At para. 11.17 of the second edition the author pointed to the pitfalls in paying a deposit directly to a vendor/builder in relation to a property in the course of construction. He cited *the Barrett Apartments Ltd.* case and the decision of the High Court (Barrington J.) in *Desmond v. Brophy* [1985] I.R. 449, which, as I understand it, related to the same development as the *Barrett Apartments* case, in support of the observation that "in the event of the builder's insolvency, the purchaser will suffer the shock of finding that the bank claims not only the site but also any partly-built or wholly-built house on it". Wylie recorded that at the time, under the HomeBond Scheme, there was some limited cover for payments known at the time as "staged payments". I assume that the Premier Guarantee for Ireland Scheme is designed to deal with similar risks to the risks covered by the HomeBond Scheme. It may be that the notice parties have some redress under the Premier Guarantee Scheme. However, that is a matter for them.