Neutral Citation: [2013] IEHC 652

THE HIGH COURT

[2013 No. 5608 P]

BETWEEN

PAUL MCCANN

AND

PATRICK DILLON

AND BY ORDER

BANK OF SCOTLAND PLC

PLAINTIFFS

AND

THE TRUSTEES OF THE VICTORY CHRISTIAN FELLOWSHIP

BEING

BRENDAN HADE, SHEILA HADE AND GERRY BYRNE

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 29th day of November, 2013

Introduction

1. This is an action on the part of the Bank of Scotland plc (hereafter "the Bank") for judgment on foot of borrowings made by the defendants, Mr. Brendan Hade, Mrs. Sheila Hade and Mr. Gerry Byrne, in their capacity as trustees of the Victory Christian Fellowship. The first and second plaintiffs in this action are Mr. Paul McCann and Mr. Patrick Dillon, partners in the firm Grant Thornton, who are acting as receivers appointed by the Bank over certain properties owned by the Victory Christian Fellowship which formed part of the security over the debt owed by the latter to the Bank. The receivers also seek permanent injunctive relief restraining the defendants from interfering with the three charged properties.

2. As of 31st October, 2013, the debt owed to the Bank by the defendants stands at €18,583, 175.38. Bank of Scotland plc is the successor of Bank of Scotland (Ireland) Ltd which merged with the former company on 31st December, 2010. Bank of Scotland plc does not hold a banking licence in Ireland.

3. On 29th May, 2013, the Bank appointed receivers over three properties owned by the defendants which were mortgaged to the Bank by a deed of mortgage and charge dated 16th July, 2007. The first of the three properties is situate at Killininny House, Firhouse Road, Dublin 24 (hereafter "Firhouse"). The second property is situate at 35 Westland Row, Dublin 2 (hereafter "Westland Row"). The third property is located at Kilmacud House, Kilmacud Road Upper, Stillorgan, Dublin (hereafter "Kilmacud").

4. The court has had the benefit of hearing oral evidence from a number of parties; Mr. Chris Arkinson, Director at Bank of Scotland plc within the Corporate Real Estate and Business Support Unit (Ireland) and case manager for the defendant's file, Mr. Alan Hession of Certus who also dealt with the defendant's case on behalf of the Bank, Mr. Brendan Hade, Mrs. Sheila Hade and Mr. Gerry Byrne on behalf of the defendant trust and Mr. Frank Lafferty, forensic accountant and member of the Institute of Bankers as an expert witness on behalf of the defendants. The defendants do not dispute that they are indebted to the third named plaintiff in the sum of €18,583,175.38.The actions of an accountant retained by the defendants to negotiate on their behalf with the Bank from November, 2012 until the appointment of the receivers is a central issue in this case. However, since the professional (accountant) in question was neither a party to this case nor a witness the court will not identify him in this judgment.

5. The defendants are trustees of the Victory Ireland Christian Fellowship (hereafter "the Fellowship"). The principal aim of the Fellowship is the promotion of the Christian Faith. It maintains local prayer groups and bible groups, distributes Christian literature, conducts weddings and other services and provides counselling facilities. The Fellowship has operated since 1994 in Ireland and has increased in size since that time. Apart from a base in Dublin it also has branches in Galway and Carlow. Mr. Brendan Hade is Senior Pastor and a founding member of the Fellowship. The other trustees of the Fellowship are the wife of Mr. Hade, Mrs. Sheila Hade and another founding member of the Fellowship, Mr. Gerry Byrne.

6. Mr. Brendan Hade gave evidence that the Fellowship began life with meetings taking place in the Hade family home. By 2005 the Fellowship was outgrowing the Westland Row premises to which it had moved in the early 1990s and formed the wish to construct new premises. The Fellowship entered talks with the Bank for a loan in 2006 for the construction of a new Church on a 12.5 acre site at Firhouse which had been purchased a few years previously by the Fellowship. The borrowings negotiated in 2006 also covered existing bank debt of the Fellowship owed to the Bank of Ireland at that time.

7. The third property which is the subject of these proceedings, Kilmacud House, is used as a direct provision centre for persons seeking asylum in Ireland. The property at Kilmacud was purchased after the property at Firhouse. The property at Firhouse was also initially used as a centre for direct provision for persons seeking asylum. At some point a decision was taken to construct a building, which is now the Victory Church, at the Firhouse site and funding was sought for the development of that project.

8. A facility letter was issued on 3rd November, 2006, providing for a loan of €12.2m from the Bank to the Fellowship. The loan was for a term of 15 years with interest only to be serviced for the first three years of that term, and interest and the principal to be serviced for the remaining 12 years. The terms of this facility letter were accepted on 30th November, 2006, by the defendants. A

deed of mortgage and charge was then entered into by the Fellowship which mortgaged the three properties at issue in these proceedings to the Bank on 16th July, 2007.

9. During the course of 2007 construction of the new Church building at the Firhouse property continued. The costs of this construction appear to have overrun the estimated cost and a second facility letter was issued by the Bank on 18th December, 2007, providing for an additional €5.42m of debt finance. €4.16m of this figure was in the form of a 24 month bridging loan for the property situate at Westland Row. There was an additional €1.07m of financing provided for the Firhouse property in relation to the costs of the construction work. €185,000 was also provided for use as an interest roll-up. This development was completed in 2011.

10. In oral evidence Mr. Brendan Hade stated that it was the original plan of the Fellowship to sell the properties at Kilmacud and Westland Row in order to reduce the overall indebtedness of the defendant trustees to the Bank once the construction works at Firhouse had been completed. To Mr. Hade's mind this would have reduced the amount of the debt which the Fellowship owed to the Bank to €3-4m, a serviceable figure according to Mr. Hade. However for economic reasons, which are known to all and which do not need to be rehearsed in this decision, this plan was not capable of being enacted.

11. These two facilities of November, 2006 and December 2007, taken together with arrears and interest, amount to the total debt of approximately €18.5m sought by judgement in these proceedings. The defendants fell into arrears on both facilities. The bridging loan expired. The Bank first sent a reservation of rights letter to the defendants on 17th August, 2011, in relation to the arrears which had built up on the debt owed by them to the Bank. On 7th June, 2012, the Bank sent a second reservation of rights letter noting that arrears of €337,000 were owed at that time.

12. On 5th October, 2012, the defendants notified Certus, which acts on behalf of the Bank in relation to the management of its loan book in Ireland, of the appointment of an accountant, who between October, 2012 and May, 2013 acted as the primary contact between the Bank and the defendants and who negotiated on behalf of the defendants in their relations with the Bank. He was engaged in that capacity from the date of the letter of 5th October, 2012, until 29th May, 2013. Emails and minutes record his presence and contribution at a number of meetings between the parties.

13. There were a number of meetings between the parties to discuss the debt position. On 20th November, 2012, there was a meeting in Firhouse, attended by Mr. Alan Hession and Ms. Niamh O'Grady from Certus and a representative of the Bank, Ms. Claire Wrightson as well as the defendant trustees and their accountant. In 2013, Mr. Chris Arkinson, a director at Bank of Scotland plc within the Corporate Real Estate and Business Support Unit (Ireland), took over the management of the Bank's relationship with the defendants in this case. Mr. Arkinson attended a meeting at the Firhouse premises on 8th January, 2013. This meeting was attended by the defendant's accountant as well as Mr. Alan Hession and Ms. Niamh O'Grady of Certus, the defendant trustees and Mr. Arkinson on behalf of the Bank. There was another meeting between Mr. Arkinson of the Bank, Mr. Hession and Ms. O'Grady of Certus and the defendant's accountant on 1st March, 2013. The defendants did not attend this meeting. The subject of these meetings is accepted by the parties to have been the possible refinancing and management of the defendant's debt to the Bank. The exact conclusion reached at certain of these meetings was somewhat in dispute between the parties at the commencement of these proceedings, particularly in relation to the question of whether any formal agreement as to the relationship between the Bank and the defendants was reached at any of these meetings. In the course of oral evidence given by various witnesses a clearer picture of what actually occurred at these meetings has emerged. Mr. Brendan Hade, on behalf of the trustees affirmed to the court in the course of his oral evidence that no actual agreement as to the consensual resolution of the differences between the parties was concluded at any of these meetings.

14. On 13th March, 2013, the Bank sent a further reservation of rights letter to the defendants pointing out that the arrears on the debt at that time came to almost €1.5m. The Bank then received a report from the defendant's accountant setting out a proposal for a solution of the difficulties which existed between the parties in relation to the debt. This report was dated 21st March, 2013.

15. Mr. Arkinson attended another meeting with Mr. Hession and Ms. O'Grady of Certus, the defendant trustees and their accountant at the Firhouse premises on 26th March, 2013. A number of emails sent after that meeting between Mr. Arkison and the defendant's accountant were opened in evidence to the court. Those emails, particularly one of 27th March, 2013, from Mr. Arkinson to the defendant's accountant, demonstrate that the subject of discussion at those meetings was the refinancing of the debt owed by the defendants and the possibility of debt forgiveness. It appeared at the outset of these proceedings that the outcome of this particular meeting was one of the main issues in dispute between the parties, in particular in relation to whether any formal agreement, in the nature of forbearance on the part of the Bank as regards the servicing of the debt so as to allow the defendants to put together and enact a strategy to manage their liability to the Bank, was concluded or not. This email of 27th March, 2013, makes clear that there were discussions between the parties, at the meeting of 26th March, 2013, on the possibility of reaching a consensual solution between the parties and that a proposed strategy for resolution had been left in the hands of the defendants to enact. It is expressly noted in that email that the outcome of this meeting was that "if the Bank and borrower cannot agree on a number for a consensual sale or funding/refinance is not concluded within say 3/4months, the Bank will require to explore other options and this could involve taking control of the assets though an insolvency process." In addition, the first line of the attendance note produced by Certus in relation to this meeting of 26th March, 2013, specifically states that no conclusive decision could be taken in relation to the defendants' case in Ireland. The court is prepared to accept this, and the general tenor of the oral evidence given to the court by Mr. Arkinson, as indicative of what actually occurred at the meeting of the 26th March, 2013, between the parties. No agreement was concluded but a consensual resolution strategy was discussed.

16. The court was then referred to a number of other emails, phone calls and correspondence between Mr. Arkinson and the defendant's accountant. Mr. Arkinson sent an email on 24th April, 2013, complaining of the failure on the part of the defendants to enact the proposed strategy which had been discussed by the parties at the three meetings outlined above. The court was told that on 25th April, 2013, there was a phone call between the defendant's accountant and Mr. Arkinson and there is an email of the same date from Mr. Arkinson to the accountant which summarises the contents of this phone call. The accountant appears to have assured, in the course of that call, the representative of the Bank that progress was being made in relation to the production of a business plan for the sourcing of refinancing from an alternative lending institution. An attendance note of this phone call, on which the defendant's accountant as well as Mr. Arkinson, Mr. Hession and other representatives of Bank of Scotland and Certus participated, also makes clear that the accountant had told the Bank that the process of securing funding was relatively slow moving and indicates that the Bank was already aware at this stage, and probably at an earlier stage, that there was a concern over the charitable status of the Fellowship evident from the interest shown by the Revenue Commissioners in the business of the Fellowship. On 3rd May, 2013, Mr. Arkinson phoned the defendant's accountant and asked him again whether there was any news of developments in relation to the proposals made by the defendants to manage their liability to the Bank. An attendance note of this call, which was opened to the court, indicates that the defendant's accountant was told that the Bank was continuing to explore the option of appointing a receiver. It also appears from oral evidence that little further progress had been made in relation to securing alternative finance from Bank of Ireland.

17. In relation to the question of alternative debt financing, an email of 3rd August, 2012, from Mr. Paul Horan of Bank of Ireland to the defendant's accountant, setting out the documents required for the making of any refinancing proposal to Bank of Ireland was opened to the court. This email notes that a number of documents such as audited accounts for the Fellowship for the past four years, projected accounts for the next three to five years, recent valuations of the Victory Centre at Firhouse, confirmation of the tax status of the Fellowship and other documents were required by the Bank of Ireland in order to consider any refinancing proposal. This document was put to Mr. Gerry Byrne and Mrs. Sheila Hade by Counsel for the plaintiffs in the course of their oral evidence. It is clear from oral evidence given by these witnesses that, not only were some of these documents still unavailable to the defendants at the time of the appointment of the receivers but that there was no reasonable prospect of them becoming available within a reasonable period of time thereafter due to the delay in auditing the accounts of the Fellowship which Mrs. Hade referred to in her evidence. In addition, it was clear from the oral evidence of these witnesses that no proposals had in fact been made to the Bank of Ireland at the time of the appointment of the first and second named plaintiff as receivers over the three charged properties the subject of this dispute.

18. One of the key events in the facts of this case occurred on 14th May, 2013, when the Revenue Commissioners wrote to the defendants indicating that the charitable tax exemption status of the Fellowship was to be withdrawn retrospectively from 1st January, 2009. Mr. Hade and Mr. Byrne in the course of their evidence to the court stated that the significance of this fact was minimal as regards the financial situation of the Fellowship and that it should not be overestimated as it related only to donations received by the Fellowship and did not effect other revenue streams from which the Fellowship benefited. However, it is clear that on any reading of the situation this change in status exposed the defendants to significant liabilities and altered the nature of their financial situation. This is borne out by the evidence of Mrs. Hade to the effect that the Fellowship had to have its accounts for 2010 and 2011 audited again and re-submitted to the Revenue Commissioners as a result of this revocation of its tax exempt status, a significant undertaking. The Bank learned of the letter revoking the charitable status of the Fellowship when the accountant for the defendants sent an email to Mr. Arkinson on 17th May, 2013. The accountant withdrew his report of 21st March, 2013 due to this development citing the fact that the report and its proposals could no longer be seen as accurate given this change in circumstances.

19. Mr. Arkinson asked the defendant trustees to partake in a conference call on 29th May, 2013. The defendants refused to participate. At 10 o'clock a.m. on 29th May, 2013, a letter of demand was issued by Arthur Cox Solicitors on behalf of the Bank for the full amount of the debt, including the principal, interest and arrears. The first and second named plaintiffs accepted their appointment as receivers of the three charged properties set out above at 16.05pm on the same day.

20. There ensued some difficulties in relation to the securing of the premises. The plaintiff receivers attended at the charged properties in order to secure them in the normal way. The receivers met with some resistance in this regard. The plaintiffs applied to this Court (Ryan J.) for an interim injunction restraining the defendants from interfering with the securing of the premises by the plaintiffs and were granted an interim injunction to that effect on Friday 31st May, 2013. The plenary summons could not be issued until Tuesday 4th June, 2013, due to the June Bank Holiday on 3rd June, 2013. The defendants did not comply with the interim order. This Court (Laffoy J.) granted liberty to issue a motion for attachment on 7th June, 2013. This Court (Laffoy J.) then granted liberty to issue an attachment order on 12th June, 2013. The contempt of court on the part of the defendants caused by their non compliance with the interim order of Ryan J. was dissipated on 14th June, 2013 before this Court and on that day the court noted the apology of the defendants and the purging of their contempt.

21. There then followed an exchange of affidavits following which the interlocutory injunction came before this Court for hearing and was compromised on 25th July, 2013. The court then directed the accelerated exchange of pleadings and the matter came on for hearing on 29th October, 2013.

The disclosure of certain issues to the Bank by the defendant's accountant

22. The main issue in dispute in these proceedings is the precipitating event leading to the appointment of the first and second named plaintiffs as receivers. The evidence of both Mr. Arkinson and Mr. Hession is to the effect that the key reason for the appointment of the receivers was the existence of the accumulated debt amounting to €18.5m, including interest and arrears, and the Bank's frustration with the defendant trustees' lack of progress in reducing their liability to the Bank. However Counsel for the defendants stated that it was in fact two other factors which were decisive in the Bank's appointment of receivers; that is the awareness of the Bank that the charitable status of the Fellowship had been withdrawn by the Revenue Commissioners with retrospective effect from 1st January, 2009, and the allegations, as yet unproven, made against the defendant trustees that a number of fraudulent invoices were purportedly presented for payment to the Bank during the construction of the Victory Centre by a party connected to the Fellowship. The Revenue Commissioners issued a letter on 14th May, 2013, which notified the defendants of the revocation of the charitable status of the Fellowship. This letter was enclosed in an email to Mr. Arkinson on 17th May, 2013.

23. It is clear from the oral evidence of Mr. Arkinson of Bank of Scotland plc and Mr. Hession of Certus that the accountant for the defendants had engaged in discussions with both of these parties in relation to these two issues. It appears that the accountant disclosed this information to both of these parties at various meetings and phone calls after 27th March, 2013.

24. It appears from an attendance note of 22nd April, 2013, recording a discussion between Mr. Arkinson, the accountant, and Mr. Hession of Certus from 18th April, 2013, that the Bank had been informed at this stage of the interest that the Revenue Commissioners were taking in the business of the Fellowship. It was remarked during this call that a request from the Revenue Commissioners for sight of the bank statements of the Fellowship for the previous five years was a highly unusual request. This had come on foot of a Profile Interview held by the Revenue Commissioners in respect of the business of the Fellowship on 13th March, 2013. The request was formally made by letter from the Revenue Commissioners to the Fellowship on 1st May, 2013. It was also noted, and this was reiterated in oral evidence by Mr. Arkinson and Mr. Hession, that the accountant for the defendants wished to preserve his anonymity in passing on details of the potential revocation of the charitable status of the Fellowship and the potential fraud event involving the Fellowship to the Bank. It was said in evidence by Mr. Hade that this information was given by the accountant to the plaintiff Bank and Certus without the authorisation of the principal, in this case the defendants, and therefore was given in breach of the confidence which the accountant owed his clients. It is argued by Counsel for the defendants that the decision to appoint the receivers was taken by the Bank as a result of this information. It is however clear from the evidence that the accountant was authorised to tell the Bank of the withdrawal of the charitable status of the Fellowship prior to the appointment of the Receivers on 29th May, 2013. This authorisation came on 28th May, 2013, as indicated by minutes of a meeting which took place at the Victory Centre, Firhouse between the trustees, their accountant and other advisors on that date. A memorandum relating to a phone call on 28th May, 2013, between Mr. Arkinson and the defendant's accountant was also opened to the court in which the accountant again, but with the authorisation of the defendants on this occasion, alerted the Bank to the revocation of the charitable status of the Fellowship. The importance of the disclosure in relation to the revocation of the tax exemption status of the Fellowship is therefore of minimal importance. It does appear, however, that the accountant was not at any stage authorised by the defendants to make known the existence of the potential fraud event to the Bank.

25. In his oral evidence to the court, Mr. Hession stated that on 22nd April, 2013, the defendant's accountant contacted him by phone at his office in Certus and requested a meeting. This phone call occurred at approximately 2.30pm on the date in question, the accountant then arranged to meet Mr. Hession 15 minutes later at the Certus offices in Dublin and it was during this meeting that Mr. Hession says the matter of the false invoicing was disclosed to him by the accountant. Mr. Hession then arranged to hold a conference call between himself, the accountant and Mr. Arkinson of the Bank at 15.45pm on the same date. Mr. Hession confirmed in his evidence to the court that during this phone call Mr. Arkinson was informed of the issue surrounding the allegedly fraudulent invoices.

26. The defendants submitted in addition that it was this issue which was pushed up the line of command within the Bank and which gave rise to the imperative for the appointment of a Receiver rather than the accumulated debt and unpaid arrears as noted in the reservation of rights letter of 13th March, 2013. None of this was disclosed to the defendants. The Bank was on notice that an agent of the defendants was acting without the instructions of the defendants. This is clear both from the oral evidence given to the court by Mr. Hession and Mr. Arkinson and also by the notes of the phone calls between the accountant, Mr. Hession and Mr. Arkinson on both 22nd April, 2013, and 28th May, 2013.

27. It must be stated that at the conclusion of the evidence in this case the court cannot say what was in the mind of the accountant in question or what would be considered to be normal practice for a professional in his position conducting negotiations of the nature at issue in the present case with a Bank on behalf of a borrower. It must also be emphasised that the accountant in question was not a party to this case and was not a witness in this case and therefore the court is unaware of his understanding of the reasons behind any disclosure which he made to the Bank.

28. The court can make a number of conclusions on the facts of this aspect of the case. The charitable status issue clearly had to be disclosed at some stage. The court has no evidence to indicate the status of the appeal against the revocation decision of the Revenue Commissioners of 14th May, 2013. Neither Mr. Hade nor Mr. Byrne nor Mrs. Hade nor their expert witness, Mr. Lafferty, was able to point adequately to a date by which this appeal would be heard. The revocation decision was disclosed to the Bank, without the authorisation of the defendants, by their accountant prior to the 23rd May, 2013, when the decision to appoint the receiver was taken. But an authorised disclosure, on 28th May, 2013, of this information from the accountant also came before the final appointment of the receivers on 29th May, 2013, even though it was after the decision to appoint which was taken on 23rd May, 2013, by the Credit Committee of the Bank of Scotland plc. It is difficult to see how the defendant trustees could have avoided disclosing this information. It is also difficult for the court to accept the evidence given to the court by Mr. Hade and particularly Mr. Gerry Byrne to the effect that the consequences of the revocation of the charitable status on the financial position of the Fellowship have been overstated. This is particularly difficult to accept given the position of the trustees at the time of the revocation, their being extensively in arrears in relation to the loan and being at a particularly delicate stage of the negotiation process with the Bank.

29. This Court is willing to accept the general tenor of the evidence given by Mr. Alan Hession and Mr. Arkinson to the effect that the primary reason behind the appointment of a receiver was the outstanding arrears on the debt and the lack of any progress in relation to the sourcing of alternative finance from the Bank of Ireland or in relation to the realisation of other elements of the consensual solution strategy which had been outlined by the parties at the meeting of 20th November, 2012. Even if the potential fraud event was taken into account by the Bank it could only have been of minor importance and cannot outweigh the fact that the Bank was increasingly frustrated by the existence of mounting arrears on the debt owed by the defendants, which amount stood at almost €1.5m on the date of the last reservation of rights letter of 13th March, 2013, sent by the Bank to the defendants. This frustration is expressed in a number of emails from Mr. Arkinson to the defendant's accountant and in the general tone of the oral evidence given to the court in the course of these proceedings. I am satisfied that while the Bank may have placed some reliance on the existence of this potential fraud event, it was not a significantly precipitating factor in the decision of the Bank to appoint the receivers.

30. It is also clear to this Court that there was no realistic prospect, on the evidence as presented, of an alternative source of financing coming from the Bank of Ireland as suggested by the defendants.

31. While a number of other points were raised, the conclusion of this judgment comes down to a decision based on the disclosure by the accountant of the aspect of the potential fraud.

Submissions of the Plaintiff

32. The Bank's case is that from 29th May, 2013, €18.5m was due and owing by the defendants to the Bank and that the Bank had valid security and was entitled to appoint the first and second named plaintiffs as receivers and that this was done lawfully and validly and as a consequence the Bank and its receivers are entitled to the judgment and the permanent injunctive order sought on this application.

33. Counsel for the Bank, Mr. Fanning, opened the defence and counterclaim to the court. The defence and counterclaim pleads that the defendant trustees agreed a strategy with the Bank for the consensual resolution of the dispute between the parties but that this agreement was breached by the Bank's premature appointment of a receiver. Counsel for the plaintiff stated that there was no agreed strategy made on good consideration between the plaintiffs and the defendants. As set out above this argument fell away during the course of the proceedings.

34. Counsel also submitted that it is not possible to say that the plaintiffs acted to the detriment of the defendant in relation to the proposed strategy for resolution of the debt situation by the early appointment of the receivers. It is clear from the evidence that there was no reasonable possibility of alternative financing being secured by the defendants from the Bank of Ireland within any commercially reasonable period of time, which was a required element of any such strategy. This is particularly true given that none of the documents, as set out in the email from Mr. Paul Horan of the Bank of Ireland to the defendants of 3rd August, 2012, which were required for a proposal to be made to the Bank of Ireland for alternative financing were available to the defendants at the time of the appointment of the Receiver. The charitable status of the defendant trust was revoked by the Revenue Commissioners on 14th May, 2013, and Counsel for the plaintiff submits, and it is accepted by the court that this would have had to have been declared to the Bank within a reasonable period of time.

35. Counsel further submits that the main submission of the defendant in reality amounts to an argument that the plaintiff Bank is in a more prejudicial position because of the information it obtained, whether inappropriately or otherwise, from the defendant's accountant in relation to the potential fraud and the charitable status revocation, than the plaintiff would have been in without such information and acting in reliance solely on its legal right to appoint a receiver due to the arrears on the debt. Counsel submits that this is illogical and that it would amount to giving the court jurisdiction similar to that which it has in the public law arena in judicial review matters. Counsel termed this an "unspecified roving" jurisdiction to supervise receivers.

36. Counsel also submits that the court cannot, in the main because the accountant in question was neither a party to nor a witness

in the case, come to a concluded opinion as to the matters which Counsel for defendants prays in aid, namely the purported breach of a duty of confidence by the accountant. In any case the revocation of the defendant's charitable status is not, according to Counsel for the plaintiffs, a matter which could have been concealed or is confidential in nature, but was rather a matter of public record.

37. It was submitted by Mr. O'Reilly for the defendant that the information in relation to the existence of the fraudulent invoices was material to the appointment of the receivers and that such information had not, at the time of the making of the *ex parte* application for an interim injunction to Ryan J, been disclosed to the court in any of the affidavits produced by the plaintiff. However the court is prepared to accept the explanation of Counsel for the plaintiff to the effect that any affidavit sworn in that application on behalf of the plaintiff would have been in response to affidavits sworn by the defendants and would have been limited to the application at hand and therefore would not have been required to include an in depth explanation of the reasons behind the appointment of the receiver.

38. In relation to the substantive arguments put forward by the defendant as regards the alleged breach of confidence by the trustee's accountant, Counsel for the plaintiff made a number of submissions. It was submitted that only one of the authorities relied on by the defendants is related to a receivership scenario and that the other authorities were only relevant to the public law context in which they were decided. In relation to the *Attorney General v. Guardian Newspapers (No2)* [1990] 1 A.C. 109, the Spycatcher case, Counsel for the plaintiff stated that this could be distinguished from the present situation as it dealt with the granting of an injunction to prevent the publication of secrets related to national security and had not been decided in a commercial context but rather in a public law matter and therefore its reasoning should not be applied in this instance. Only one of the authorities relied upon by the defendants relates to a receivership and that is *Downsview Ltd v. First City Corporation Ltd* [1993] A.C. 295. Counsel for the plaintiff submits that this case is not relevant since it deals not with a breach of confidence *per se* but a breach of duty by the debenture holder since the receiver in that case was appointed not to secure the interests of the debenture holder but merely to disrupt another debenture holder. The factual matrix of this decision is not on all fours with that at issue in the present proceedings. It is also a decision of the Privy Council and therefore only of persuasive authority.

Submissions of the Defendant

39. Mr. O'Reilly for the defendant submits that the court cannot permit the appointment of the first and second named plaintiffs as receivers in this case despite the apparent legal entitlement of the Bank to do so because of the receipt by the Bank of confidential information wrongly disclosed to it by the agent of the defendants, such information being information which the Bank knew should not have been disclosed. The defendants were in a process of resolving their difficulties with the Bank but before it had reached a conclusion, it was interrupted by the disclosure of material information to the Bank by the defendant's accountant. This information was a decisive reason, if not the sole decisive reason, for the appointment of the receivers by the Bank and it was known to the Bank that this information had been received by it in breach of confidence by the agent of the defendants.

40. Counsel relies on a number of authorities in support of this overriding submission. A number of passages from Aplin, Bently, Johnson and Malynicz Ed. *Gurry on Breach of Confidence* 2nd Ed. (Oxford University Press, 2012) were opened to the court in this regard. Counsel for the defendant suggested that the following passage at para. 4.05 of *Gurry* should be the guiding principle for the court's decision in this case:

> "In the case of third parties, it would make a mockery of the law if a breach of a confidential relationship could be easily circumvented by handing…information to a third party. As Lord Griffiths in [*Attorney General v. Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109] *Spycatcher* observed [at p. 268]:
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> > 'If this was not the law the right would be of little practical value: there would be no point in imposing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner in the marriage. When trade secrets are betrayed by a confidant to a third party it is usually the third party who is to exploit the information and it is the activity of the third party that must be stopped in order to protect the owner of the trade secret.'
>
> It may be argued, therefore, that in restraining third parties who have received confidential information, the courts are seeking to reinforce the confidential relationship between the confider and confidant. In other words, it is the reposing of confidence that is regarded as important."

41. Counsel for the defendant further submits that *Gurry* is correct in stating at para. 4.09 that "the action for breach of confidence is *sui generis* in nature and that it is difficult to confine the action exclusively within one conventional jurisdictional category". Counsel submits that this case is an example of tension between the legal right of the Bank to appoint the receiver based on its deed of mortgage and charge and an equitable right of the defendants to have this appointment set aside for breach of a duty of confidence owed to them by their accountant.

42. It is further submitted that the jurisprudence dealing with breach of confidence also covers a situation such as that at issue in this case where it is a third party who acts on information which is knowingly received in breach of confidence rather than a party to the relationship of confidence itself which acts in breach thereof. As it is stated in *Gurry* at para. 7.103 the doctrine "covers the situation where A discloses confidential information to B, who then, without authorisation, passes it to C".

43. Counsel for the defendants also relied on a statement of Lord Keith of Kinkel in the *Spycacher* case at p. 260 to the effect that "It is a general rule of law that a third party who comes into possession of confidential information which he knows to be such may come under a duty not to pass it on to anyone else". Counsel stated that, applying those principles to this case, the Bank had information which it knew was obtained in breach of trust and it used that information to its own benefit and the court cannot condone such an unlawful act. The Bank cannot, in equity and on the basis of this unlawful act, be permitted to maintain the receivership.

44. The question then arises as to whether there has been dishonesty on the part of the third party, the Bank, in its acquisition and use of the information in relation to the potential fraud event in this case. In relation to the test of dishonesty *Gurry* sets out at para. 7.111 that dishonesty is not a requirement for establishing third party liability in a breach of confidence situation but that such a factor may assist the court in establishing actual knowledge of the breach of confidence sufficient to impose liability on the third party. *Gurry* relies on the authority of *Prince Albert v. Strange* (1849) 1 Mac & G 25in this regard. This was a case where the claimant sought to prevent two third parties, Judge and Strange, from using confidential information in relation to a number of etchings which the claimant had made and entrusted to a printer in order to make impressions. An employee of the printer took copies of the impressions and gave them to a third party, Judge, who intended to publish them. The court granted an injunction preventing the third party from exhibiting the impressions. It was held that since the third party had knowingly participated in the breach of

confidence by the employee, equity would intervene to prevent the third party from benefiting from the confidential information obtained by the breach.

45. Counsel also relies on *Attorney General v. Guardian Newspapers (No 2)* [1990] 1 A.C. 109 in support of his submissions. Counsel cited the following extracts from the speech of Lord Griffiths at p.268 in the House of Lords in that case:

> "Although the terms of a contract may impose a duty of confidence the remedy is not dependent on contract and exists as an equitable remedy. Megarry J. identified the three essentials to found the duty in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47:
>
> > 'Three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene MR. in the *Saltman* case [(1948) 65 RPC 203, 215] must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly there must be unauthorised use of that information to the detriment of the party communicating it.'
>
> The first of these elements will not normally be present if the information is in the public domain…information may lose its original confidential character if it subsequently enters the public domain. If the confider publishes the information this releases the confidant from his duty of confidence…The duty of confidence is, as a general rule, also imposed on a third party who is in possession of information which he knows is subject to an obligation of confidence: see *Prince Albert v Strange* (1849) 1 Mac & G 25…If this is not the law the right would be of little practical value: there would be no point in imposing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner in the marriage. When trade secrets are betrayed by a confidant to a third party it is usually the third party who is to exploit the information and it is the activity of the third party that must be stopped in order to protect the owner of the trade secret."

46. Counsel also cited *dicta* from the decision of Fennelly J at p. 382-385 in *Mahon v Post Publications Ltd* [2007] 3 I.R. 338 in support of his submission that the Bank had acted improperly by relying on the information given in breach of the duty of confidence owed by the accountant to the defendants in this instance.

> "114. The law with regard to confidential information is of comparatively modern origin. It was above all developed to regulate the behaviour of private parties and was based on the doctrine of trust. It is independent of contract. A recipient of a confidence must not breach it by communicating the confidential information to third parties. It is, of course, capable of application both to purely personal and to non-commercial information. The case of *Prince Albert v. Strange* [1849] 1 Mac. & G. 25 concerned drawings and etchings made by Queen Victoria and Prince Albert of subjects of private and domestic interest to themselves. Certain plates had been confided to a printer for the purpose of printing impressions for private royal use. They had found their way by surreptitious means into the hands of persons wishing to publish a catalogue of them. An injunction was granted based on breach of confidence and trust…
>
> 115. The law of confidence has, however, developed more generally in a commercial context. Dismissed or defecting employees have not infrequently purloined their former master's technical or commercial information. While employees can be restrained in contract without resort to the equitable doctrine, the latter becomes relevant when the information is conveyed to third parties who are on notice of the confidential character of the information. A more specific type of application of the equitable principle has arisen where information has been conveyed during negotiations for the establishment of a joint commercial venture. Many of the cases have arisen from cases of failed negotiations. The recipient of the information is deemed to have received the confidential information on trust solely for the purposes of the intended joint venture. If the negotiations fail, that recipient will, if necessary, be restrained from using it or authorising use of it without permission, for his own purposes. Kelly J. cited a passage from the judgment of Megarry J. in *Coco v. Clark (A.N.) (Engineers)* [1969] R.P.C. 41 at p. 47. It neatly encapsulates the requirements for a successful action based on breach of confidence, at least in a commercial setting. He said:-
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> > 'In my judgment three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in [*Saltman Engineering Co. v. Campbell Engineering Co.* [1948] R.P.C. 203] on p. 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'
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> 116. Megarry J. gave further thought to the test for establishing the confidential character of information:-
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> > 'First, the information must be of a confidential nature. As Lord Greene said in [*Saltman Engineering Co. v. Campbell Engineering Co.* [1948] R.P.C. 203] at p. 215, 'something which is public property and public knowledge', cannot *per se* provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts.'
>
> 117. In the first case on this topic in this jurisdiction, *House of Spring Gardens v. Point Blank* [1984] I.R. 611, Costello J. reviewed, in great detail, the English decisions commencing with *Prince Albert v. Strange* [1849] 1 Mac. & G. 25. He was dealing with a case of the failed joint venture type. His analysis of the law was approved by this court. He cited, in particular, two passages from English decisions on the circumstances from which an obligation of confidence may be deduced. In *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.* [1960] R.P.C. 128, Roxburgh J. stated (as reported on pp. 1317 to 1318 of *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 W.L.R. 1293):-
>
> > 'As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.'

Costello J. at pp. 661 to 662 cited with approval a very similar *dictum* of Lord Denning M.R. in *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923 at p. 931:-

> 'The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent. The principle is clear enough when the whole of the information is private. The difficulty arises when the information is in part public and in part private.

118. From all of these cases, the contours of the equitable doctrine of confidence can be described sufficiently for the purposes of this appeal, as follows:-

> 1. the information must in fact be confidential or secret: it must, to quote Lord Greene, "have the necessary quality of confidence about it";
>
> 2. it must have been communicated by the possessor of the information in circumstances which impose an obligation of confidence or trust on the person receiving it;
>
> 3. it must be wrongfully communicated by the person receiving it or by another person who is aware of the obligation of confidence…

120. An important point is, however, made by the defendant, namely that the confidence is vested in those who have created the information or, as may in this case, have provided it to the tribunal. The defendant relies on a decision of the court of Appeal in England in *Fraser v. Evans* [1969] 1 Q.B. 349. In that case, a public relations consultant to the Greek government under a contract expressly imposing on him the duty never to reveal any information about his work made a written report to that government. A version of the report in an English translation was surreptitiously obtained, and came into the hands of journalists from the *Sunday Times*, who proposed to publish an article based on the report. The consultant obtained an interim and an interlocutory injunction. The latter was set aside on appeal. Lord Denning M.R. referred to the cases on the issue of breach of confidence. At pp. 361 to 362, he proceeded as follows:-

> 'Those cases show that the court will in a proper case restrain the publication of confidential information. The jurisdiction is based not so much on property or on contract as on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so…'"

49. This last point is of relevance in this instance as the court is unable to decide, on the facts and evidence as before it, whether the accountant did have just cause for the disclosure of the information in question. It is also not possible for this Court to say what the nature of the duty owed by the accountant to his clients was in this instance and whether that duty was in fact breached at all.

50. Mr. O'Reilly also placed reliance on the duty of full disclosure in relation to the grant of an interim injunction as outlined by Clarke J in *Bambrick v. Cobley* [2005] IEHC 43, [2006] 1 ILRM 81 by way of analogy to the situation at issue in the present case. However, the jurisprudence in relation to the duty of full disclosure in such circumstances is closely linked to the nature of an interim injunction application and therefore the analogy is of limited application in the circumstances of the present case. In any event the application for interim relief was made by the first and second named plaintiffs acting on their own behalf in their capacity as duly appointed receivers.

51. The court is unable to conclude, even if the jurisprudence in relation to the breach of confidence were to apply in such a case as this, that the accountant acted in breach of this duty. The defendant's agent was not a party to this case and was not a witness and as was stated above the court does not have a clear view of what would be normal practice for such a professional attempting to negotiate with a Bank and maintain good relations with a Bank on behalf of his clients. The court does not know what was in the mind of the agent in question. The expert evidence of Mr. Frank Laverty, a forensic accountant, did not specifically address this issue and therefore did not give the court a sufficiently clear understanding of the position of such an agent in order to conclude that his actions were in any way improper. Such a conclusion would also be inappropriate as this Court should not in my view make a finding against the accountant as he is not a party to these proceedings and the court has not had the opportunity of hearing his evidence or observing and considering his demeanour. The court cannot reach such a conclusion on the facts of this case and therefore the issue of whether the jurisprudence in relation to a breach of confidence would actually apply in a situation such as this, and it is not clear to me that it would, does not in fact arise. Even if the jurisprudence in relation to the duty of confidence is applicable in this jurisdiction and to the circumstances of this case, it is not possible for the court to find that the accountant's behaviour was unconscionable and in breach of that duty on the evidence as before the court.

52. In conclusion, the court grants the order for judgment in the sum sought by the plaintiffs and grants the permanent injunctive relief restraining the defendants from interfering with the three properties the subject of this application, and will hear the submissions of counsel as to the form of the order to be made.