Neutral Citation Number: [2012] IEHC 37

THE HIGH COURT

2010 679 COS

IN THE MATTER OF RAVENSHAW LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF SECTION 316 OF THE COMPANIES ACT 1963

ON THE APPLICATION OF DECLAN TAITE

Judgment of Miss Justice Laffoy delivered on 27th day of January, 2012.

1. The application

1.1 This application was initiated by an originating notice of motion dated 1st December, 2010, which was returnable for 7th December, 2010. In it, the applicant, Declan Taite (the Receiver), who is the Receiver and Manager of Ravenshaw Limited (the Company), sought the following reliefs:

(1) directions pursuant to s. 316 of the Companies Act 1963 (the Act of 1963), as amended, including the following:

(a) directions as to the validity of a debenture dated 23rd May, 2001 made between the Company of the one part and First Active Plc of the other part (the 2001 Debenture);

(b) directions as to the validity of the Receiver's appointment as such Receiver and Manager of the Company pursuant to the 2001 Debenture; and

(c) without prejudice to the generality of paragraphs (a) and (b), a direction that the 2001 Debenture, the appointment of the Receiver and the interest of Ulster Bank Ireland Ltd. (the Bank) as mortgagee and chargee of any property comprised in the 2001 Debenture are not invalidated by any alleged breach of s. 60 of the Act of 1963;

(2) if necessary, an order compelling the directors of the Company, namely, Lynette Williams and Edward Fahy (Mr. Fahy) to deliver up to the Receiver the books and records of the Company; and

(3) if necessary, an order directing Lynette Williams and Mr. Fahy to permit the Receiver entry to the premises known as "Barry's Hotel", located at 1, Great Denmark Street, Dublin, 1.

1.2 By way of explanation, prior to the application the interest of First Active Plc in the 2001 Debenture had been transferred to the Bank pursuant to S.I. No. 481/2009. Reference in this judgment to "the Bank" hereafter means First Active Plc or Ulster Bank Ireland Ltd., where relevant.

1.3 The application came on for hearing on 15th December, 2010, the real protagonists being the Receiver and Mr. Fahy, each party being represented by senior counsel. After hearing, *inter alia*, legal submissions from senior counsel for the Receiver, the application was adjourned to the following day, 16th December, 2010, to be resumed. On that day, the Court was informed that agreement had been reached between the Receiver and Mr. Fahy. Thereupon, an order was made by the Court with the consent of the parties, which included the following declarations:

(a) that the 2001 Debenture is a valid Debenture; and

(b) that the appointment of the Receiver as Receiver and Manager of the Company pursuant to the 2001 Debenture is a valid appointment.

Having recited that there was "no issue in relation to s. 60 of the [Act of] 1963 referred to in paragraph 1(c) of the notice of motion", it was further ordered that the directors of the Company, Lynette Williams and Mr. Fahy, on or before 17th December, 2010 deliver to the Receiver the books and records of the Company. The balance of the application was adjourned until 18th January, 2010.

1.4 What the Court is now concerned with is paragraph 3 of the notice of motion in which the Receiver has sought an order directing the directors of the Company to permit the Receiver entry on to the premises known as "Barry's Hotel". As the factual basis for claiming that relief has evolved in a rather tortuous manner, it is necessary to trace its history at some length.

2. The factual background to the hearing in December 2010

2.1 The 2001 Debenture was given by the Company to the Bank on foot of the loan offer dated 21st March, 2001 from the Bank to the Company, which offered three facilities referred to as Facility A, Facility B and Facility C in amounts which aggregated €2,794,993 to the Company. The purpose of Facility A (IR£1,883,930) and of Facility B (IR£661,063) was expressed to be to take over existing borrowings of the Company's subsidiary, White Lace Limited (White Lace). The purpose of Facility C (IR£250,000) was to assist with the cost of renovations to "Barry's Hotel". The security which the Bank was to get from the Company was a mortgage debenture "giving a floating charge over company assets generally". The Bank was also to get security by way of a guarantee from White Lace, which was to be secured by a first fixed charge over "Barry's Hotel", and personal guarantees from Mr. Fahy and his wife, Mrs. Jane Fahy, the directors of the Company, which was also to be secured in the manner stipulated. The form of acceptance of the loan offer was executed by Mr. Fahy and Mrs. Jane Fahy, who were described as directors of the Company.

2.2 The 2001 Debenture was under the seal of the Company and the seal was affixed in the presence of Mr. Fahy and Mrs. Jane Fahy, who were described as "both directors". The 2001 Debenture appears to have been in the Bank's standard form and in it the Company charged all its undertaking and assets by way of first floating charge in favour of the Bank as security for all monies and liabilities. There was also a specific charge by way of first fixed charge on the Company's goodwill and uncalled capital for the time being and on its right to use the name "Barry's Hotel".

2.3 The Receiver was appointed Receiver and Manager of the assets of the Company by the Bank by deed dated 23rd November,

2010 on foot of the powers contained in the 2001 Debenture, with power to enter upon and take possession of the assets of the Company.

2.4 In consequence of the making of the consent order of 16th December, 2010, the validity of which has not been challenged on any ground on which such challenge might be mounted by Mr. Fahy, the issue of the validity of the 2001 Debenture is *res judicata*. The issue of the validity of the appointment of the Receiver as Receiver and Manager thereunder is also *res judicata*. Notwithstanding that, because of the grounds on which Mr. Fahy seeks to resist the Receiver taking possession of "Barry's Hotel", it is necessary to explore to some extent the arguments advanced on behalf of Mr. Fahy in support of his challenge to the validity of the 2001 Debenture and the validity of the appointment of the Receiver.

2.5 Before the initiation of this application, James G. O'Mahony, Solicitors, who named their clients as Mr. Fahy, Mrs. Jane Fahy, the Company and White Lace, in a letter of 25th November, 2010 disputed "the validity of the mortgage debenture of 23rd May, 2001, along with the mortgage debentures provided by its subsidiary", that is to say, White Lace, "on the grounds that they were in breach of s. 60 of the Act of 1963" and that the Company and its subsidiary "have vitiated the mortgage debentures in question". On the same basis, the appointment of the Receiver was also disputed. It was the position adopted by James G. O'Mahony on behalf of their clients, including Mr. Fahy, which gave rise to the application under s. 316, the Receiver understandably taking the view that he was left with no choice but to seek the directions of the Court.

2.6 Mr. Fahy swore two affidavits in response to the application before the December 2010 hearing. The first was sworn on 8th December, 2010. In it, he averred that the Company was incorporated on 21st April, 1999 and shortly thereafter sought to purchase "Barry's Hotel" as a going concern. At the time the hotel was the sole asset of White Lace, a company which was owned by two individuals, Mr. Deane and Mr. Cassidy. Mr. Deane and Mr. Cassidy agreed with Mr. Fahy for the sale of Barry's Hotel as a going concern for IR£3,150,000. The thrust of the affidavit was that the Company was going to finance the purchase of the property from White Lace with the aid of a loan of IR£2.7m from the Bank. However, the Company was advised, according to Mr. Fahy by an employee of the Bank, that, rather than purchasing the property and incurring stamp duty at the rate of 9%, it would be more efficient for the Company to purchase all the shares in White Lace, in which case the transaction would attract a lower rate of stamp duty, that is to say, 1% on the transfer of the shares. On 24th August, 1999 the Bank issued a loan offer to White Lace which comprised two facilities aggregating IR£2,700,000, which he exhibited. That loan offer was expressed to be in lieu of previous loan offers dated 13th July, 1999 and 20th August, 1999 to the Company, and its purpose was expressed to be to assist with the purchase of "Barry's Hotel". Mr. Fahy averred that on 2nd September, 1999, the then directors of White Lace, Mr. Deane and Mr. Cassidy, resigned and Mr. Fahy and his co-director, meaning I assume Mrs. Jane Fahy, became directors of White Lace. White Lace then executed a mortgage debenture in favour of the Bank on 2nd September, 1999 (the 1999 Mortgage Debenture), a copy of which was exhibited by him, which incorporated a mortgage in fee of "Barry's Hotel" to the Bank. The seal of White Lace was affixed thereto in the presence of Mr. Fahy and Mrs. Jane Fahy as directors. Mr. Fahy averred that no special resolution in accordance with s. 60(2) of the Act of 1963 was executed by White Lace in relation to the 1999 Mortgage Debenture.

2.7 Mr. Fahy further averred that after September 1999 the Bank, on a number of occasions, had sought to "mend its hand" by seeking the perfection of the security. In particular he referred to the loan offer dated 21st March, 2001 to the Company (referred to at para. 2.1 above). He averred that neither he, nor any of his fellow directors, nor the Company nor White Lace sought funding in 2001 and that that letter was issued by the Bank of its own initiative. However, as I have pointed out above, the loan offer was accepted by Mr. Fahy and Mrs. Jane Fahy as directors of the Company. Mr. Fahy averred that the 2001 Debenture was "a sham". As I have already pointed out, Mr. Fahy consented to the order made by the Court on 16th December, 2010 which declared that the 2001 Debenture was valid.

2.8 Mr. Fahy also averred in that affidavit (para. 17) as follows:

> "I say that as appears from the foregoing it is [White Lace] that owns and operates Barrys Hotel and not [the Company] and that therefore the Receiver's assertion to the contrary . . . is incorrect. [The Company] merely has an investment (by way of shares) and is not a trading Company."

That averment was disputed in an affidavit sworn on 13th December, 2010 by Margaret Sweeney, an officer of the Bank, who averred that it was the Bank's belief that the Company operated the business of Barry's Hotel, which had been previously operated by Archester Ltd., which was then in liquidation. Ms. Sweeney put forward two bases for the Bank's belief. The first was that the intoxicating liquor licence in relation to "Barry's Hotel" was in the name of the Company, trading as "Barry's Hotel". The second was that in the exhibited Reports and Financial Statements of White Lace for the year ended 31st March, 2009, which were signed by the directors of White Lace on 17th November, 2010, and which were lodged in the Companies Registration Office (CRO) on 22nd November, 2010, it was stated that White Lace had no trade for 2008 and 2009. Indeed, for that year the profit and loss account showed no turnover, whereas the balance sheet showed the hotel as a fixed asset. Ms. Sweeney in her affidavit also addressed an implication in Mr. Fahy's affidavit that the loans advanced to White Lace in September 1999 were "simply taken over" by the Company in 2001, pointing out that the facilities advanced to White Lace in 1999 were repaid in full on 23rd May, 2001 and "new monies" were drawn down by the Company, the relevant bank statements being exhibited.

2.9 In his second affidavit sworn on 15th December, 2010, Mr. Fahy disputed Ms. Sweeney's averments, averring (at para. 4) as follows:

> "I say and believe and reiterate that as of the date of swearing the initial replying affidavit, [the Company] is not a trading company. From in or around the time that [the Company] acquired the shares in [White Lace], the hotel was let to a company known as Archester Ltd. which operated the hotel for some ten years until it went into liquidation in or around 2009. I say that for a short period thereafter, [the Company] was the holder of the licence but since August this year, the hotel has again been let to Mark Ralphe & Partners who are now running the business of the hotel."

There was no mention of Mark Ralphe & Partners subsequently in the affidavits sworn by Mr. Fahy in the second round of the application which is now before the Court. However, it appears from the affidavit of Niall Ledwidge referred to at para. 3.1 below that by March 2011 the licence was held by White Lace under an *ad interim* transfer from Archester Limited (in liquidation).

2.10 Before going on to consider what led to the second round, it is convenient to consider what the searches in the CRO which were put before the Court in December 2010 manifested, in so far as is relevant to the issues before the Court.

2.11 As regards the Company, the directors were named as Mr. Fahy and Lynette Williams, who, presumably, replaced Mrs. Jane Fahy as a director sometime after 2001. Two charges were registered. One was a Guarantee and Indemnity dated 2nd September, 1999 in

favour of the Bank, which is not before the Court, the amount secured being IR£2,700,000 and the secured property being the assets of the Company, including, *inter alia*, its shareholding in White Lace. The other was the 2001 Debenture.

2.12 As regards White Lace, the directors were named as Mr. Fahy and Sinead Fahy, whom I assume is a different person to Mrs. Jane Fahy and replaced her as a director of White Lace sometime after 1999. The 1999 Mortgage Debenture appeared on the search as a charge in favour of the Bank, with no record of satisfaction appearing on the search, as did a mortgage debenture created on 23rd May, 2001 in favour of the Bank, which is not before the Court, which was stated to secure IR£2,795,000 on all the assets of White Lace and, in particular, "Barry's Hotel", and which is not before the Court.

3. Events since December 2010 and factual background to the current application.

3.1 What remained to be determined of the application in the notice of motion after 16th December, 2010 together with the issue of costs of the December 2010 hearing was adjourned from time to time from 18th January, 2011. Eventually an affidavit was sworn on 12th July, 2011 by Niall Ledwidge, a manager in the accountancy firm RSM Farrell Grant Sparks, who was assisting the Receiver in relation to the receivership of the company. In the affidavit, Mr. Ledwidge explained that in December 2010 the Receiver was not in a position to provide the Court with evidence of the entitlement of the Company to possession of "Barry's Hotel". While he had been able to produce licensing searches which indicated that the Company was the holder of the intoxicating liquor licence, he was not in a position to provide any documents evidencing the Receiver's entitlement to possession, such as a lease or a licence agreement.

3.2 Mr. Ledwidge obviously believed that by 12th July, 2011 that problem had been resolved by virtue of an agreement described as a "Short Term Business Letting Agreement" dated 4th July, 2011 (the Tenancy Agreement) made between White Lace, as landlord, and the Company in receivership, as tenant, whereby White Lace demised "Barry's Hotel" to the Company for a term of four years and nine months at an annual rent of €200,000. The copy of the Tenancy Agreement which was exhibited in the affidavit of Mr. Ledwidge did not show its date or the date of the commencement of the term, nor did it show details of having been stamped. However, there is now exhibited in the affidavit of the Receiver sworn on 22nd August, 2011 referred to at 3.11 below a copy of the executed Tenancy Agreement which shows that it has been duly stamped. It created a term of four years and nine months from 4th July, 2011.

3.3 The manner in which the Receiver procured the execution of the Tenancy Agreement by White Lace in favour of the Company, which it is contended has given the Company the right to possession of "Barry's Hotel", was explained by Mr. Ledwidge comprehensively. What follows is a summary of what happened. The starting point was that it was assumed that the Company was the 100% shareholder of White Lace, that is to say, its sole member. On 7th March, 2011 the Receiver in his capacity as receiver and manager of the Company (the 100% shareholder) appointed three new directors to White Lace, Mr. Ray Byrne, Mr. Ray Hingston, and Mr. Malcolm Martyn (the Receiver's directors). The persons whom the Receiver understood to be the other directors of White Lace, Mr. Fahy and Sinead Fahy, were given notice of the appointment by letter dated 8th March, 2011. The relevant Form B10 was lodged in the CRO on 24th March, 2011.

3.4 Immediately, the solicitors for Mr. Fahy, James G. O'Mahony, disputed the validity of the appointment of the Receiver's directors in a letter of 10th March, 2011. On the same day, 10th March, 2011, there was lodged in the CRO a Form B10 recording the appointment of Michael Clavin and Monika Tupa as directors of White Lace, that form having, apparently, been signed by Mr. Fahy and dated 2nd February, 2011. Approximately a fortnight later a further Form B10 was lodged in the CRO recording the appointment of Gregory Fahy and Jane Fahy as directors of White Lace. That Form B10 was signed by Mr. Fahy and dated 22nd March, 2011. So, apart from the Receiver's directors, Mr. Fahy's position was that there were now six directors of White Lace, although the Receiver's position was that the purported appointment of Gregory Fahy and Jane Fahy was not valid.

3.5 According to Mr. Ledwidge, by written resolution dated 22nd March, 2011, the articles of association of White Lace were varied to provide that the Receiver's directors would each have five votes, whereas Mr. Fahy and Mrs. Fahy and Mr. Clavin and Ms. Tupa would have one vote each. At that stage, the Receiver obviously was unaware of the purported appointment of Gregory Fahy and Jane Fahy as directors of White Lace. Mr. Fahy's solicitors continued to contend that the Receiver's directors were not validly appointed. Moreover, in a letter of 23rd March, 2011, James G. O'Mahony sought evidence to vouch that the Company is the 100% shareholder in White Lace.

3.6 An extraordinary general meeting of White Lace was held on 28th April, 2011 pursuant to a resolution passed at a meeting of the Board of Directors of White Lace, convened by one of the Receiver's directors and held on 23rd March, 2011. It was attended by a representative of the Company (in receivership). At the meeting, resolutions were passed removing Mr. Fahy, Sinead Fahy, Mr. Clavin and Ms. Tupa as directors of White Lace.

3.7 Another event which occurred between December 2010 and July 2011 which is of relevance was that the Annual Return (Form B1) in relation to White Lace covering its financial year ending on 31st March, 2010 was filed in the CRO on 1st March, 2011. The return disclosed that the total number of issued shares was one hundred and that the Company was the owner of all of the issued shares. The Form B1 was signed by Mr. Fahy and Sinead Fahy. Those facts were pointed to by the solicitors for the Receiver in responding to the letter of 23rd March, 2011 referred to at 3.5 above. Also filed were the Reports and Financial Statements for White Lace for the year ended 31st March, 2010, which were signed by Mr. Fahy and Sinead Fahy on 25th January, 2011, having been prepared by the auditors of White Lace, Bergin & Associates, who also were the auditors for the year ended 31st March, 2009. I have compared the Financial Statements for the two financial years and, with one variation, the statements for the financial year ended 31st March, 2010 are a carbon copy of the statements for the previous year. The sole variation is that the value of the fixed assets for the financial year ended 31st March, 2010 is shown as €1m rather than €6m in the previous year. As was the case for the financial year ended 31st March, 2009, the profit and loss account shows no turnover. The principal activity of White Lace is described as "holding investment company" and it is stated that White Lace did not trade during the financial year in question. As regards directors' interests in shares, it is disclosed that Mr. Fahy had a "nil" interest in the shares of White Lace. As regards the shares in the Company, it is disclosed that Mr. Fahy held ninety nine ordinary shares and that Sinead Fahy held one ordinary share, which I assume is the entire issued share capital of the Company.

3.8 The response to Mr. Ledwidge's affidavit was contained in an affidavit sworn by Mr. Fahy on 5th August, 2011, in which he contended that Mr. Ledwidge's affidavit had not established that the Company had an entitlement to possession of "Barry's Hotel". For the first time, Mr. Fahy asserted on affidavit that the Company is not the 100% shareholder of White Lace. Mr. Fahy advanced the following two bases on which he contended that the Company owns less than 100% of the issued share capital of White Lace:

> (a) Mr. Fahy averred that in 1999 the Bank advanced IR£2,700,000 to White Lace, which was used by White Lace to buy its own shares from Mr. Deane and Mr. Cassidy and that, thereafter until 2001 the repayments to the bank on foot of the loan, consisting of capital and interest, were made by White Lace until 2001. When the Company took the replacement loans from the Bank in 2001, it did not reimburse to White Lace the repayments which had been made by White Lace. On that basis, Mr. Fahy contended "that White Lace, retains at the very least, an equity

share in itself".

(b) Mr. Fahy averred that the total amount paid by him ("by me") to Mr. Deane and Mr. Cassidy was IR£3m and he exhibited a letter dated 4th August, 2011 signed by Mr. Deane and Mr. Cassidy confirming that they sold their shares in White Lace on 2nd September, 1999 for a consideration of IR£3m. Mr. Fahy's affidavit is quite confusing but I consider that the gist of it is that he has sworn that he put up the sum of IR£300,000, being the difference between the purchase price of IR£3m and the loan of IR£2,700,000 which White Lace obtained from the Bank and that, accordingly, having provided 10% of the purchase money for the purchase of the shares from Mr. Deane and Mr. Cassidy, he is a 10% shareholder in White Lace. Mr. Fahy averred that to the best of his knowledge he received funding from the Bank, secured on his family home, in the sum of IR£500,000 out of which the IR£300,000 to fund the balance of the purchase price of the shares came. He exhibited a short typed unsigned document headed "Details of Loan" on the Bank's letter heading, which names Mr. E. Fahy and Mrs. J. Fahy as "Mortgagor" and states that the loan amount approved was IR£500,000, the loan start date being 25th August, 1999 and the term of the loan being one year. There is no other evidence that the loan was drawn down and, if so, when, or what it was used for, nor, although it is really of no relevance, is there any evidence that security was given for the loan.

3.9 Having regard to the foregoing matters, Mr. Fahy averred that he remains a minority shareholder in White Lace and that the assertion that the Company is the sole shareholder in White Lace is incorrect. On that basis, he contended that all of the actions which have been taken by the Company acting by the Receiver after December 2010, as outlined by Mr. Ledwidge, were not validly effected.

3.10 In his affidavit Mr. Fahy revisited the issue of s. 60 of the Act of 1963 and exhibited what he swore was the minute of a resolution which he averred was passed by "all" its members at an extraordinary general meeting of White Lace held on 20th December, 2010 (just four days after the consent order of 16th December, 2010 was made) in the following terms:

> "That the apparent share transfer of shares in White Lace Limited as apparently previously executed and registered is hereby declared null and void".

While I am satisfied that Mr. Fahy and Sinead Fahy, who are recorded as the persons having attended the extraordinary general meeting, were the directors of White Lace at the time, they were not shareholders of White Lace as the form of consent to the convening of the meeting at short notice, also exhibited by Mr. Fahy, suggested. Moreover, I am at a total loss to understand how the special resolution could have been "passed by all the Members" of White Lace, as the minute states, when the sole member, as recorded in the Form B1 referred to at para. 3.7 above is the Company, of which the Receiver was receiver and manager at the time. By way of general observation, the affidavits sworn by Mr. Fahy are replete with inaccuracies, contradictions, inconsistencies and non-sequiturs, which the Receiver has had to address.

3.11 For example, in a further affidavit sworn by him on 22nd August, 2011, the Receiver exhibited copies of the Annual Returns (Forms B1) and Abridged Financial Statements of White Lace for nine years starting on 1st April, 1999 and ending on 31st March, 2008. As the Receiver averred, all of those annual returns indicate that the Company is the 100% shareholder of White Lace. For instance, the Annual Return (Form B1) for the financial year to 31st March, 2000, which was filed in the CRO on 1st July, 2003, discloses that the issued share capital was IR£100 made up of one hundred shares of IR£1 each and that on 2nd September, 1999, forty shares were transferred by John Deane to the Company and sixty shares were transferred by Donal Cassidy to the Company, so that the Company was the owner of the entire issued share capital in White Lace. Similarly, the Abridged Financial Statements for the year ended 31st March, 2008 (at note 8 on page 8) stated:

> "White Lace Limited is a 100% subsidiary of Ravenshaw Limited".

In the notes to the Abridged Financial Statements for the financial year ended 31st March, 2009 and for the financial year ended 31st March, 2010, which have already been referred to, there is a similar statement, albeit with a typographical error, in that the words "as" appears instead of "is".

3.12 In his affidavit the Receiver justifiably expressed doubts as to whether the extraordinary general meeting averred to by Mr. Fahy as having taken place on 20th December, 2010 actually took place. He noted that there is no record of the special resolution averred to by Mr. Fahy in the CRO, as required by s. 143(1) of the Act of 1963. While the Receiver has raised doubts about the credibility of Mr. Fahy's evidence, the reality of the situation, as will be illustrated later, is that such resolution, if it was purported to be passed by Mr. Fahy and Sinead Fahy, could have been nothing short of a nonsensical contrivance.

3.13 Finally, in a further affidavit sworn by him on 30th October, 2011 the Receiver exhibited the share purchase agreement dated 2nd September, 1999 made between Donal Cassidy and John Deane of the one part and the Company of the other part, which had come to hand. This agreement effected a sale in consideration of IR£3m by Mr. Cassidy and Mr. Deane, named as the vendor, to the Company, named as the purchaser, of the entire issued share capital in White Lace, 60% of which was held by Mr. Cassidy and 40% of which was held by Mr. Deane. The share purchase agreement was a typical share purchase agreement which contained the usual warranties and indemnities. The common seal of the Company was affixed to a deed of indemnity embodied in it in the presence of Mr. Fahy, as director and secretary, and Mrs. Jane Fahy, who was a director before, apparently, she was replaced by Lynnette Williams. The affixing of the common seal of the Company to the main part of the agreement was witnessed by Mr. Fahy, who was described as director and secretary, and Mrs. Jane Fahy, who was described as a director. In the body of the share purchase agreement, in clause 3.1, the purchase consideration for the shares was stated to be IR£3m. It was stated that the vendor, that is to say, Mr. Deane and Mr. Cassidy, authorised the purchaser, that is to say, the Company to pay the purchase consideration to the vendor's solicitors whose receipt should be sufficient evidence of payment and should operate as a good discharge to the purchaser. It is reasonable to assume that this was done. The share purchase agreement, in which Mr. Fahy participated as a director of the Company, makes it clear that the purchase consideration was being paid by the Company. Accordingly, it must be assumed that the title to the shares in White Lace passed from Mr. Deane and Mr. Cassidy to the Company. The proposition that Mr. Deane and Mr. Cassidy could still have title to the shares in White Lace over twelve years later by reason of the resolution of 20th December, 2010 is utterly absurd.

3.14 The most significant factual matter which occurred before the second round of the application was heard on 24th November, 2011 was that, following the execution of the Tenancy Agreement, Mr. Fahy refused to relinquish possession of "Barry's Hotel" to the Receiver on being requested to do so and persisted in that refusal.

4. The basis on which Mr. Fahy has refused to relinquish possession to the Receiver
4.1 The only evidence before the Court is the affidavit evidence which I have outlined above. No oral evidence was adduced and neither side sought to cross-examine the deponents of the other side. The Court required outline legal submissions in writing from both Mr. Fahy and the Receiver and they were furnished. In addition, supplemental submissions were furnished on behalf of Mr. Fahy. Some of the assertions made by Mr. Fahy in the affidavits sworn by him were not pursued in the legal submissions. Essentially in the written submissions Mr. Fahy advanced three grounds by reason of which he contended that the Receiver is not entitled to possession of "Barry's Hotel".

4.2 First, despite the fact that the order dated 16th December, 2010 which was made with the consent of Mr. Fahy, who had the benefit of legal advice, records that there was no issue in relation to s. 60 of the Act of 1963, as regards, *inter alia*, the interest of the Bank as mortgagee and chargee of the property comprised in the 2001 Debenture (*i.e.* the shares in White Lace), Mr. Fahy sought to argue that the share transfer of the shares in White Lace to the Company had been in breach of s. 60 of the Act of 1963 and was voidable at the instance of White Lace, which had "vitiated" the transaction by the special resolution passed on 20th December, 2010. As developed in the supplemental submissions made on behalf of Mr. Fahy, it was made clear that his contention was that the Company did not get title to the shares from Mr. Deane and Mr. Cassidy because of the infringement of s. 60.

4.3 Secondly, while it was made clear that the primary focus of Mr. Fahy's response to the Receiver's claim for possession was his reliance on s. 60, as a "fallback" it was submitted on behalf of Mr. Fahy, albeit subject to the variations outlined later, that Mr. Fahy together with his wife, Mrs. Jane Fahy, had acquired a 10% beneficial interest in White Lace, because, in order to fund the purchase of the shares in White Lace, not only did White Lace raise finance from the Bank, but, additionally, Mr. Fahy and Mrs. Fahy contributed IR£300,000 to the purchase price, which they borrowed from the Bank as part of the loan of IR£500,000 referred to at para. 3.8 above. The only evidence in support of that submission is the evidence contained in Mr. Fahy's affidavit of 5th August, 2011, which I have summarised at (b) in para. 3.8 above. The varied emphasis in the legal submissions was on Mrs. Jane Fahy solely having a 10% beneficial interest, rather than on Mr. Fahy and Mrs. Jane Fahy jointly, or Mr. Fahy solely, having such an interest. The contention that White Lace had retained "an equity share in itself", which is outlined at (a) in para. 3.8 above, was not pursued.

4.4 The third ground raised in the written submissions was that the resolution passed on 7th March, 2011 referred to at para. 3.3 above leading to the appointment of the Receiver's directors was "*ultra vires*". However, that argument was not pursued at the hearing and it is not necessary to address it.

4.5 The case made at the hearing was that, because of the matters referred to at paras. 4.2 and 4.3 above, the Tenancy Agreement was not validly created on 4th July, 2011 by White Lace in favour of Company, so that the Receiver, standing in the shoes of the Company, is not entitled to possession of "Barry's Hotel".

5. Conclusions on Mr. Fahy's resistance to the Receiver's claim to possession
5.1 The approach adopted by Mr. Fahy in resisting the Receiver's claim for possession, having regard to the consent order made on 16th December, 2010, was wholly contrived and unmeritorious. That consent order established the validity of the 2001 Debenture, on foot of which the Receiver was appointed Receiver and Manager by the Bank over the assets of the Company, and it established the validity of such appointment. That being the case, in essence, on 16th December, 2010 Mr. Fahy accepted that the Bank had good security over the shares in White Lace which are owned by the Company.

5.2 While I am satisfied that Mr. Fahy was estopped from raising the issue of the application of s. 60 of the Act of 1963 so as to challenge the validity of the Bank's security over the assets of the Company because of the existence of the consent order of 16th December, 2010, given the amount of the Receiver's time and the amount of Court time taken up with the arguments advanced in opposition to the Receiver's claim for possession, I propose to demonstrate that Mr. Fahy's revisiting of s. 60 and his reliance on it is totally misconceived, in that it fails to take account of what actually transpired between White Lace, the Company and the Bank in 1999 and 2001 and is based on a fundamental misunderstanding of the application of the provisions of the Act of 1963 and the Companies Act 1990 (the Act of 1990).

5.3 While I consider it unnecessary to address the various authorities on s. 60 relied on by counsel in their written submissions, in the interests of clarity I propose recording the essential elements of s. 60. Sub-section (1) of s. 60 provides:

> "Subject to subsections (2), (12) and (13), it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company, or, where the company is a subsidiary company, in its holding company."

It is common case that the requirements of sub-section (2) and the succeeding sub-sections of s. 60 which must be complied with in order to validate a transaction within the ambit of subs. (1) were not complied with in connection with the borrowing by White Lace from the Bank in 1999 and the giving of security in relation thereto by White Lace to the Bank at that time to fund the purchase by the Company of the shares in White Lace. Sub-section (14) of s. 60 sets out the civil law consequences of a breach of s. 60 and provides:

> "Any transaction in breach of this section shall be voidable at the instance of the company against any person (whether a party to the transaction or not) who had notice of the facts which constitute such breach."

5.4 While it is understandable that in 1999, with a view to mitigating the stamp duty exigible on the transaction, a decision was made that the Company would acquire the shares of White Lace rather than take a conveyance of "Barry's Hotel" from White Lace, it is very difficult to understand why, given the manner in which the borrowing from the Bank of the purchase price and the putting in place of security for that borrowing was structured, the prohibition contained in s. 60 was not to the forefront of the minds of the personnel and legal advisers of the Bank and the Company and, in particular, why those involved were not astute in ensuring full and strict compliance with the requirements of subs. (2) to (11) of s. 60. An extraordinary feature of the loan offer of 24th August, 1999 was that it contained the following provision in bold print:

> "The Borrower will ensure that there will be compliance of the Companies Act 1993 (*sic*)."

5.5 Despite some averments by Mr. Fahy to the contrary, what clearly happened in 1999 was that White Lace borrowed IR£2,700,000 from the Bank and gave the Bank the 1999 Mortgage Debenture as security for that money. White Lace then obviously made that money available to the Company, which purchased the shares in White Lace from Mr. Deane and Mr. Cassidy for IR£3m. For the reasons outlined at para. 5.7 below, I have come to the conclusion that the Court is entitled to assume, for present purposes, that there was a breach of s. 60 in September 1999 when White Lace borrowed, gave security for and then advanced the sum of

IR£2,700,000 to the Company by way of financial assistance for the purchase by the Company of the shares in White Lace and that the civil remedy provided for in sub-section (14) of s. 60, in my view, was available to White Lace at that stage. However, Mr. Fahy is under a serious misapprehension as to what that entitled White Lace to do.

5.6 First, the completion of the share purchase agreement and the transfer of the shares in White Lace by Mr. Deane and Mr. Cassidy to the Company was not voidable at the instance of White Lace. As McCracken J. stated in explaining the effect of s. 60(14) in *C. H. (Ireland) Inc. (in liquidation) v. Credit Suisse Canada* [1999] 4 I.R. 542 (at p. 556):

> "A transaction in breach of the section must be one which is in breach of sub-s. (1), which is the giving of financial assistance for the purpose of or in connection with the purchase or subscription of shares. Furthermore, it must be a transaction whereby the company gives the financial assistance. Furthermore, the use of the word 'transaction' in the sub-sections dealing with the making of a declaration by the directors refers in both sub-ss. 4 and 5 to 'the company having carried out the transaction whereby such assistance is to be given'. In my view the only transaction which can be attacked under sub-s. (14) is a transaction directly involving the company."

The submission made on behalf of Mr. Fahy that the completion of the share purchase agreement by the transfer of the shares in White Lace by Mr. Deane and Mr. Cassidy to the Company was a "transaction directly involving the company", meaning White Lace, discloses a fundamental misunderstanding of that passage and the meaning of s. 60(14). A transaction is the action of conducting business which involves exchange or interaction between parties. The completion of the share purchase agreement, the payment of the purchase consideration, and the taking of the transfer of the shares in White Lace was carried out on the one side by Mr. Deane and Mr. Cassidy and on the other side by the Company. It was not carried out by, nor was it a transaction directly involving, White Lace. Apart from that, even if it could be proved that Mr. Deane and Mr. Cassidy, as one side of the transaction involving the transfer of the shares, had actual notice of the facts which constituted the breach of s. 60(1), as required by s. 60(14), which seems highly unlikely, it simply defies reason and common sense to suggest at this remove that any benefit could be gained by any person, natural or corporate, on Mr. Fahy's side of the transaction by seeking to have the transfer of the shares to the Company made void, which would result in the shares reverting to Mr. Deane and Mr. Cassidy, presumably on return of the IR£3m purchase consideration by them.

5.7 Secondly, while, in the light of the position adopted by the Receiver at the December 2010 hearing and the November 2011 hearing, for present purposes, the Court is entitled to assume that the 1999 Mortgage Debenture was voidable at the instance of White Lace in 1999, that is immaterial because the Receiver does not seek to rely on the 1999 Mortgage Debenture. In the legal submissions filed on behalf of the Receiver for the November 2011 hearing, it was stated that it appeared that the loan advanced to White Lace in 1999 fell within s. 60 of the Act of 1963 and that the validation procedure provided in s. 60 was not carried out. However, the 1999 loan was repaid by White Lace in 2001, and neither it nor the security given by White Lace in respect thereof is at issue in these proceedings. I have also reviewed the written submissions filed for, and my notes on, the 2010 hearing and, in particular, the legal submissions made on behalf of the Receiver. Essentially the line of argument which had been pursued on behalf of the Receiver was that the financial assistance from White Lace to the Company had stopped in 2001, when the 2001 transactions were put in place. The new loans advanced by the Bank to the Company and the security given by the Company to the Bank (*i.e.* the 2001 Debenture) were not unlawful under s. 60. In the oral submissions on behalf of the Receiver at the December 2010 hearing one "*caveat*" was mentioned in relation to what happened in 2001, which I understood to amount to a reservation on the part of the Receiver that, to the extent that White Lace gave collateral security to the Bank in May 2001 for the borrowings of the Company, that collateral security was tainted by s. 60. However, it was made clear that the Bank had no intention of enforcing the collateral security, so that the Court does not have to determine whether s. 60 was infringed in connection with it. It is important to emphasise that in demonstrating that the focus of the Receiver has, at all times, been on the validity of the 2001 Debenture, the foregoing observations are academic because Mr. Fahy is bound by the consent order, which declared the validity of both the 2001 Debenture and the appointment of the Receiver.

5.8 Thirdly, on the assumption that there was a breach of s. 60 in 1999 and that White Lace could have taken steps to have the 1999 Mortgage Debenture declared void, the reality of the situation is that White Lace did not seek to avoid that transaction but instead steps were taken in 2001 to rectify the breach of s. 60 by unravelling the process whereby the Company used money borrowed by White Lace from the Bank and secured by White Lace in favour of the Bank to purchase the shares in White Lace. The evidence before the Court establishes that in May 2001 White Lace ceased to be the borrower of the funds which were used by the Company to purchase the shares in White Lace.

5.9 In summary, it is obvious that by March 2001, if not earlier, the Bank was aware of the fact that there was a problem arising out of the fact that White Lace had given financial assistance to the Company in September 1999 to enable it to purchase the entire issued share capital in White Lace from Mr. Deane and Mr. Cassidy, because the validation process provided for in subs. (2) to (11) of s. 60 had not been implemented. The borrowing from the Bank was restructured at that stage, so that the Company became the primary debtor and gave the 2001 Debenture to the Bank as security for that debt. It is on the foot of that security that the Receiver has been appointed. The loan offer of 21st March, 2001, the terms of which are summarised at para. 2.1 above, acceptance of which was executed by Mr. Fahy, make it clear that the purpose of two of the facilities offered was so that the Company could take over the existing borrowings of White Lace. That is what happened. It is clear from the Bank statements exhibited by Ms. Sweeney in her affidavit referred to at para. 2.8 above that on 23rd May, 2001 Ravenshaw drew down sums of IR£1,866,273.66 and IR£654,959.29 from the Bank and that precisely the same sums, which it is reasonable to infer were advanced by the Company to White Lace, were credited to the two accounts of White Lace with the Bank on the same day by way of repayment, which resulted in the indebtedness of White Lace to the Bank being fully discharged. The amounts in question were slightly larger than the amounts mentioned in the loan offer of 21st March, 2001, presumably, because further interest had accrued on the sums due by White Lace to the Bank in the intervening two month period. It is not clear from the documentation before the Court whether at that stage the 1999 Mortgage Debenture which had been given by White Lace to the Bank was formally released by deed and, as I have previously noted, no record of satisfaction appears in the CRO. In any event, once the indebtedness of White Lace was discharged, the 1999 Mortgage Debenture ceased to be of relevance. Vis-à-vis the Bank, there was no longer a transaction dating from 1999 which White Lace needed to seek to avoid, because White Lace had ceased to be indebted to the Bank.

5.10 As I have stated, at the November 2011 hearing, counsel for Mr. Fahy did not pursue the line taken by Mr. Fahy on affidavit that, by reason of the repayments made by White Lace to the Bank between September 1999 and May 2001, White Lace has retained "an equity share in itself". It is clear from the statements exhibited by Ms. Sweeney that monthly repayments were made, presumably by White Lace, on the two loan accounts in its name which were created when White Lace drew down the facilities sanctioned in August 1999, that is to say, the facilities which aggregated IR£2,700,000. Presumably, there was an arrangement between White Lace and Ravenshaw in relation to those payments, although no evidence of such arrangement or of the discharge of any obligations of the Company thereunder has been put before the Court. However, I do not consider that that is a bar to the Receiver being granted the relief he seeks.

5.11 In relation to the contention that Mrs. Jane Fahy has a beneficial interest in White Lace, I agree with the submission made by counsel for the Receiver that there is an evidential deficiency in relation to Mr. Fahy's contention that Mr. Fahy and Mrs. Jane Fahy advanced IR£300,000 to facilitate the purchase by the Company of the shares in White Lace. It is clear that, in addition to the sum of IR£2,700,000 which the Company obviously obtained from White Lace, it also obtained a further sum of IR£300,000 from somewhere to make up the balance of the purchase money of IR£3m paid to Mr. Deane and Mr. Cassidy. However, apart from the rather limp averment of Mr. Fahy, to which I have referred earlier, and the exhibited "Details of Loan" referred to above, in which the start date of the loan was almost contemporaneous with the loan offer to White Lace dated 24th August, 1999, as I have already indicated, there is no evidence, and, in particular, no documentary evidence, that Mr. Fahy and Mrs. Jane Fahy actually borrowed from the Bank to participate in the purchase of the shares in White Lace from Mr. Deane and Mr. Cassidy on their own behalf or to make IR£300,000 available to the Company for that purpose.

5.12 Even if IR£300,000 was made available by Mr. Fahy and Mrs. Jane Fahy to the Company to make up the purchase consideration expressed in the share purchase agreement dated 2nd September, 1999, that does not mean that the well established equitable principle of the presumption of a resulting trust where there is a purchase of property in the name of another applies, so as to render Mr. Fahy or Mrs. Jane Fahy or both the beneficial owners of 10% of the shares in White Lace. Counsel for Mr. Fahy relied on the exposition of that equitable principle in Hanbury & Martin on *Modern Equity* (17th Ed., 2005) at para. 10 – 035 to the following effect:

> "The general principle is that the legal title is held on trust for the purchasers in the proportions in which they contributed to the purchase price, although in some circumstances the Court may be able to infer an agreement (giving rise to a constructive trust) to hold in shares which are not proportionate to the contributions. The purchasers thus have a concurrent interest and can claim the due proportion of the proceeds on any eventual sale of the property to include a proportion of any increase in the value of the property."

Mrs. Jane Fahy is not before the Court. The claim to a 10% beneficial ownership in the shares of White Lace was made on her behalf by Mr. Fahy. However, the claim that Mr. Fahy and Mrs. Jane Fahy are, or either of them is, beneficial owner of 10% of the shares in White Lace by reason of a resulting trust is wholly inconsistent with the participation by Mr. Fahy and Mrs. Jane Fahy, as directors of the Company, in the share purchase agreement and with the subsequent filings on behalf of White Lace in the CRO, which, commencing with the Annual Return (Form B1) made for the financial year from 1st April, 1999 to 31st March, 2000, named the Company as the transferee of all of the shares transferred by Mr. Deane and Mr. Cassidy. While that Annual Return was not filed in the CRO until 1st July, 2003, and it was Sinead Fahy, not Mrs. Jane Fahy, who was named as a director of White Lace therein, it appears from the CRO search that there was a considerable amount of corporate activity taking place in relation to White Lace at the beginning of July 2003, in that notice of change to a single member company and of change of director, were also filed on 1st July, 2003. Having regard to all of the evidence before the Court, it is reasonable to infer that Mrs. Jane Fahy did not claim to be the beneficial owner of 10% of the shares in White Lace at any time and that the claim was conjured up by Mr. Fahy in July 2011.

5.13 The emphasis placed on Mrs. Jane Fahy's alleged 10% shareholding in White Lace at the November 2011 hearing has been noted at para. 4.3 above. Mr. Fahy appears to have recognised the significance of the application of s. 53 of the Act of 1990 to himself as a director of White Lace, but not the significance of its application to Mrs. Jane Fahy, in connection with an interest in, or beneficial ownership of, shares in White Lace. Counsel for the Receiver surmised, probably correctly, that Mr. Fahy was advised that breaches of the Companies Acts prevented him acquiring a beneficial interest in White Lace. If, as he contended in his affidavit evidence was the case, Mr. Fahy acquired a 10% beneficial interest in the shares in White Lace jointly with Mrs. Jane Fahy in September 1999, he would have been under a statutory duty (s. 53 of the Act of 1990) to notify White Lace of the acquisition of that interest and the directors of White Lace would have been under a duty to record the interest in the register kept for that purpose and to disclose it in the directors' annual report (ss. 59 – 63). It would appear that Mr. Fahy did not comply with any of those obligations, if indeed he acquired a beneficial interest in the shares of White Lace, which, on the evidence, I consider to be highly unlikely.

5.14 Having regard to the manner in which the 1999 Mortgage Debenture was executed by White Lace, it must be assumed that Mrs. Jane Fahy was a director of White Lace and, as such, would have been under a similar obligation to disclose any beneficial interest she acquired in the shares of White Lace, which, again, apparently, was not done either. For completeness, it is worth recording that, despite the Receiver's solicitors having sought inspection of the register of interests required to be maintained pursuant to s. 59 of the Act of 1990, they received no response from Mr. Fahy. In any event, as counsel for the Receiver pointed out, s. 64 of the Act of 1990 extends the obligation created by s. 53 to "an interest of the spouse of a director or secretary of a company (not being himself or herself a director or secretary thereof)". Therefore, whether or not Mrs. Jane Fahy was a director of White Lace, the duty under s. 53 to disclose an interest in the shares in White Lace acquired by her applied to her and, if she became the beneficial owner jointly with Mr. Fahy of 10% of the shares in White Lace, that should have been disclosed in accordance with s. 53.

5.15 The consequence of non-disclosure by a director of becoming interested in the shares of a company as required by s. 53 is dealt with in sub-section (3) of s. 58 of the Act of 1990, which provides that where a person fails to fulfil, within the proper period, an obligation to which he is subject by virtue of s. 53, no right or interest of any kind whatsoever in respect of the shares concerned shall be enforceable by him, whether directly or indirectly by action or legal proceeding. Accordingly, even if she was before the Court and could furnish satisfactory evidence to the Court that she was the beneficial owner of an interest in the shares in White Lace, Mrs. Jane Fahy could not enforce that interest by reason of non-compliance with the requirements of the Act of 1990.

5.16 For the reasons outlined above, I have come to the conclusion that, just as the purported resolution of 20th December, 2010 was no more than a nonsensical contrivance by Mr. Fahy, his contention that he and Mrs. Jane Fahy jointly are, or, alternatively, Mrs. Jane Fahy solely is, the beneficial owner of 10% of the shares in White Lace is a contrivance. By virtue of the provisions of the Act of 1990, there was a statutory obligation at all material times on Mr. Fahy to make disclosure of directors' interests in the Abridged Financial Statements of White Lace. As I have recorded at para. 3.10 above, the Abridged Financial Statements for the years 2004 to 2009 do not disclose any such interest in him. Similarly, the Abridged Financial Statements for the years between the year ended 31st March, 2000 to the year ended 31st March, 2003 contain a note that Mr. Fahy and Sinead Fahy, who are named as directors in the relevant years (notwithstanding that Jane Fahy witnessed the execution of the 1999 Mortgage Debenture as a director and was obviously a director over some of that time span) had "nil" shares in White Lace.

5.17 In summary, therefore, I have come to the conclusion that –

> (a) the legal ownership of 100% of the shares in White Lace vested in the Company in September 1999 and remains vested in the Company, and
>
> (b) neither Mr. Fahy nor Mrs. Jane Fahy has any beneficial interest in the shares of White Lace and that, as has been represented by Mr. Fahy in filings in the CRO in accordance with his statutory obligations for over a decade, White Lace is a wholly owned subsidiary of the Company.

Accordingly, the Company as its sole shareholder can determine what action White Lace should take in relation to "Barry's Hotel" free of interference from or restraint by either Mr. Fahy or Mrs. Jane Fahy. The Company was, and is, under no obligation to consider the interest of Mrs. Jane Fahy, as contended by Mr. Fahy, because she has no interest whatsoever in the shares of White Lace.

5.18 The powers of the Receiver, who was validly appointed Receiver and Manager of the Company on foot of the 2001 Debenture, which was a valid debenture, in relation to action to be taken by White Lace in connection with "Barry's Hotel" is governed by the provisions of the 2001 Debenture. Section 6 of the 2001 Debenture sets out the powers of a receiver appointed thereunder. I am satisfied that on foot of the extensive powers conferred on him by the provisions of that section, the Receiver did have power to procure that White Lace grant the Tenancy Agreement to the Company and that, on foot of the Tenancy Agreement, the Receiver, as agent of the Company, is entitled to enter into possession of "Barry's Hotel", without resistance from or obstruction by Mr. Fahy as a director of the Company or in any capacity.

6. Order

6.1 There will be an order in the terms sought by the Receiver directing Lynnette Williams and Mr. Fahy to permit the Receiver to enter into possession of the premises known as "Barry's Hotel" located at 1, Great Denmark Street, Dublin, 1. It is important to emphasise that that order is made on the basis that the Receiver, as agent of the Company, by virtue of section 6.5 of the 2001 Debenture, is entitled to possession on foot of the Tenancy Agreement for the term thereby created. I have emphasised that point because, as I have stated at para. 2.9 above, Mr. Fahy averred that "Barry's Hotel" had been let to Mark Ralphe & Partners who were running the business of the hotel, although, as I have stated, that line was not pursued on the second round of this application.