THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 149

[2013/337]

The President
Peart J.
Irvine J.

BETWEEN

DÓMHNAL SLATTERY

APPELLANT

AND

FRIENDS FIRST LIFE ASSURANCE COMPANY LIMITED

RESPONDENT

JUDGMENT of the Court delivered by the President on 10th July 2015

Introduction

1. This matter comes before the Court, firstly, by way of an appeal by Mr. Slattery, the appellant, against the judgment and orders of the High Court dismissing his primary claim for declarations upholding the effect of a clause in a Deed executed by him and Friends First, the respondent, on 20th July 2009. Secondly, the respondent appeals against the award of €100,000 that the High Court made in favour of Mr. Slattery in respect of breach of confidentiality.

2. At all material times, Mr. Slattery was a director and shareholder of an investment company named Claret Capital. The parties' dispute had its origins in a loan of $14.05m made by Friends First to a Claret Capital company that was part of a consortium acquiring the St. Regis Hotel in Washington D.C. A sister company was involved also and Claret Capital became the General Partner or asset manager. The hotel was operated by a management company under the St. Regis brand.

3. Mr. Slattery and fellow directors of Claret Capital signed joint and several Guarantees in respect of the loan of $14.05m. The Deed of Guarantee is dated 18th March 2008. There was an ongoing issue that surfaced subsequently from time to time whereby Mr. Slattery and his fellow guarantors protested that they had not known they were making such a commitment and had only signed the back page of the Guarantee document. However, Friends First rejected those allegations and insisted on the validity of the Guarantee. The issue ultimately evaporated and Mr. Slattery accepted in the High Court that he was bound by the Guarantee until the execution of another Deed on 20th July 2009.

4. As the trial judge found and is not disputed, there were difficulties with the investment. It had been intended that the money advanced was bridging finance which was to be replaced by the introduction of new investors but matters did not proceed as has been anticipated. The defendant was concerned about the performance of the loan. Friends First sought additional collateral for the loan in the form of the interest in the hotel that was acquired by the money that had been lent and it also sought security of shares in an aircraft leasing company named JetBird in which Mr. Slattery had a significant shareholding.

5. By a Deed of Pledge that was executed on 20th July 2009, the plaintiff charged shares in JetBird in favour of the defendant. One provision in the Deed of Pledge - Clause 2.2 - expressly limited the plaintiff's liability under that agreement and also under the Guarantee of the 18th March 2008 to the value of the shares in JetBird that were charged in favour of the defendant, thereby - if effective - liberating Mr. Slattery from any further burden from the Claret Capital loan. The circumstances in which that clause came to be inserted in the Deed of Pledge are the essence of the dispute in this case.

6. In these proceedings, the plaintiff, Mr. Slattery, sought declarations affirming the validity of the clause and its effect of restricting his obligations to the JetBird shares, in addition to claiming damages for breach of confidentiality because of things that were said about him by a senior manager of the defendant's parent company. The defendant, Friends First, in its counterclaim, sought rectification of the Deed of Pledge to remove the disputed clause, claiming that it was inserted into the draft Deed without its knowledge and that it had executed the Instrument by mistake in circumstances that warranted and even demanded equitable intervention in the interests of justice. Friends First denied the plaintiff's entitlement to damages for breach of confidentiality.

7. The defendant claimed that the plaintiff misrepresented the contents of the Deed of Pledge, that it had executed it under a mistake, that the mistake made by the defendant was at all material times known to the plaintiff and that the conduct of the plaintiff and his servants or agents was such that it would be unconscionable for the plaintiff to rely upon the defendant's unilateral mistake and/or where the plaintiff was estopped from denying the agreement in the form mistakenly believed to exist by the defendant.

8. In a judgment delivered on 15th March 2013 in the High Court, McGovern J. upheld the defendant's counterclaim and ordered rectification of the Pledge Agreement by removal of the offending clause. The plaintiff did, however, succeed on his claim for damages; the judge awarded €100,000 for breach of confidentiality. Each of the parties appealed to the Supreme Court against the decision that was unfavourable. The appeals were referred to this Court by direction of the Supreme Court under Article 64 of the Constitution.

9. In his judgment the trial judge set out the following issues:

> (i) Are the terms of clause 2.2 of the Deed of Pledge clear on their terms? If so, what is the effect of the document on its face?
>
> (ii) Was the Deed of Pledge executed in circumstances of mutual mistake or unilateral mistake? If so, is the defendant entitled to rectification or rescission?

(iii) If there was no mutual or unilateral mistake, is the defendant bound by the terms of the Deed of Pledge and is the plaintiff entitled to the declarations which he seeks?

(iv) Did the defendant owe to the plaintiff a duty of confidentiality? Was the defendant in breach of that duty or in breach of contract?

(v) If the defendant was in breach of a duty of confidence or in breach of contract, did any loss flow from this such that would entitle the plaintiff to damages?

The plaintiff's appeal concerns the judge's findings on the first three issues.

10. Clause 2.2 of the Deed of Pledge reads as follows:

"2.2 The liability of the Pledgor to the Pledgee under this Deed and the Guarantee shall be:

2.2.1 limited in aggregate to an amount equal to that recovered by the Pledgee as a result of the enforcement of this Deed with respect to the Charged Assets; and

2.2.2 satisfied only from the proceeds of sale or other disposal or realisation of the Charged Assets pursuant to this Deed; and

2.2.3 the Pledgee shall not have any recourse under this Deed or the Guarantee to any assets of the Pledgor other than the Security Assets."

11. The judge held that the terms of clause 2.2 of the Deed of Pledge were clear but their effect was less obvious when considered beside Clause 4 of the Guarantee whose provisions it purported to affect radically. The former provision was obviously in sharp conflict with the latter, which said that it was ". . . in addition to and independent of every other Guarantee or security which Friends First may any time hold in respect of all or any of the Guaranteed Obligations". The judge also found further conflict between the Pledge and the guarantee and noted another difficulty. If Mr. Slattery were to be liberated from any liability under the guarantee by this deed affecting him personally in his relations with Friends First, that would have implications for his fellow guarantors under the 18 March 2008 guarantee, who were now destined to become his former fellow guarantors. In the event, these complications did not arise but they remain relevant to the interpretation of the disputed clause. It is also of interest to look at the clause in relation to the deed as a whole, a matter which is addressed later.

12. The judge analysed the sequence of events that culminated in the executed Deed containing Clause 2.2. The *dramatis personae* on the Claret side were the plaintiff, Mr. Slattery; Mr. Leon Atkins, General Counsel employed by Claret Capital; Mr. Doyle, a fellow director and guarantor of the Claret loan and Mr. McGuinness. For Friends First, those who were principally concerned were Mr. Gibney and Mr. Browne. Mr. Atkins acted on behalf of the plaintiff. A&L Goodbody were the solicitors for Friends First and Mr. Wheeler of the firm was handling this transaction.

13. On 5th May 2009, Mr. Leon Atkins, General Counsel of Claret Capital, sent an email to the directors, including the plaintiff, in which he referred to the proposal to take control of the hotel investment away from the company and said that it might be a good negotiating point to removing the personal guarantees on the $6.5 million. Mr. Slattery commented the following day that it might be the right time to exit their involvement with the asset "provided we can do so in a manner that mitigates some or all of our PG exposure." McGovern J. commented that "while the wish to mitigate the Personal Guarantees remained very much a live issue in the minds of the plaintiff and Claret Capital, this goal was to be pursued in consideration of the replacement of Claret Capital as general partner in the St Regis investment".

14. The following chronology is taken from the judgment at para. 24 and following:

"13th May 2009 – Mr. Atkins sent a model Deed of Pledge which had been used on some previous occasion.

28th May 2009 – Mr. Gibney reverted to Mr. Atkins attaching two copies of the draft Deed of Pledge: one was a clean copy and the other was a red line copy showing changes and comments from A&L Goodbody.

29th May 2009 – Mr. Atkins sent a revised draft; in this version the security in the Deed was to support the loan to Claret Capital not Mr. Slattery's Guarantee.

2nd June 2009 – Mr. Gibney came back with two further versions, namely, a clean copy and redlined version which reverted to supporting Mr. Slattery's Guarantee and not the Claret loan. Mr. Gibney said that Mr. Atkins appeared to be misinterpreting the rationale of the Pledge."

15. At this point, as the judge found at para. 30 of his judgment, the parties were at cross- purposes on the deed. The dispute related to whether the Pledge should support the loan or the Guarantee. There was no indication of any discussion about inserting a clause mitigating liability under the Personal Guarantee:

"4th June 2009 – an exchange of emails on this date between Mr. McGuinness of Claret and Mr. Gibney of Friends First led the trial judge to infer that the drafting of the Deed of Pledge was proceeding in a manner that was separate from the issue of mitigation but a connection was emerging between that issue and the requirement that Claret Capital step down as general partner in the investment project."

It should be remembered that the question of mitigation of the Personal Guarantees, whether that was to extinguish the liability or to restrict it by excluding recourse to principal private residences, was a matter of concern for all the Claret partners, whereas the Deed of Pledge was exclusively for Mr. Slattery, whose shares in JetBird were being charged in favour of Friends First. In addition to the Deed of Pledge, which affected only Mr. Slattery, it was also proposed that the Claret Capital partners' stake in the transaction would be charged in favour of Friends First by way of a separate formal deed.

"9th July 2009 –

11:41 AM: Mr. Atkins circulated a draft Deed of Charge to the Claret Capital partners. In his covering email he said that the charge was to be entered into 'as part of the arrangements designed to get you all to a point where the Personal

Guarantees over the Friends First loan to CCH are released'. He advised them that by entering into this deed they would be confirming the validity of the Guarantee.

1:18 PM: Mr. Atkins sent another email as follows: – 'As a further thought, I am adding the words appearing below to each Deed to be entered into with FF. If this wording is accepted (which it has every chance of not, but it is worth trying), then the Guarantees will be recourse only to the security provided'. There followed the terms that became Clause 2.2 and Clause 9.7 in the Deed of Pledge and the Deed of Charge respectively.

1:42 PM: Mr. Slattery responded to the 11:41 AM draft, saying that it was 'okay to send over to Tom as a draft'.

2:14 PM: Mr. Slattery responded to the 1:18 PM email, saying 'Good thinking'.

4:43 PM: Mr. Doyle, a fellow director and guarantor, replied to the 1:18 PM email and copied his colleagues with the comment – 'Any way to make it a bit more inconspicuous?'."

At paragraphs 41 to 48 of his judgment McGovern J described the significant events that followed these exchanges.

"41. Mr. Atkins inserted the suggested wording at clause 2.2 of the Deed of Pledge which also incorporated the amendments suggested by the defendant to the previous draft. Both the Deed of Charge, which contained the same wording at clause 9.7, and the Deed of Pledge were sent to Mr. Browne, copying Mr. McGuinness, Mr. Gibney and Ms. Suzie Nolan, another employee of the defendant. The body of the email read:-

'Further to our meeting on Tuesday, please find attached two draft documents:

1. Deed of Pledge - Jetbird Shares.

This is a pledge by Dómhnal of 363 shares in Jetbird in favour of Friends First. This draft incorporates all of A&L Goodbody's comments on the last draft that I circulated to Eugene.

2. Deed of Charge - Holdings in CCH etc.

This charge will be entered into by each of Dómhnal, Max, Bryan and Ronnie Carroll and charges their holding in CCH, and rights accruing to those holdings and any interest in the Hotel that they receive by virtue of their loans to CCH. This is the first draft of this document which has not yet been circulated to Friends First.

Please note that for the sake of expediency, I am forwarding these documents are the same time as they are provided to the Claret principals and so the documents are subject to their review and comment'.

42. It is of some significance that Mr. Atkins did not 'redline' or highlight the changes that he had made. Mr. Seamus Ó Cróinin, a partner in A&L Goodbody's, gave evidence to the effect that the common practice among experienced commercial lawyers is that "redlined" documents will be exchanged up until the end of the circulation of documents during negotiations, and that this is central to the practice of commercial firms in the interest of efficient negotiations. He regarded it as 'inconceivable and unprecedented' that another commercial lawyer would depart from this established practice. Mr. Browne offered the view that a non-redline document would only be furnished at the execution stage. He did, however, accept that the document had been sent for review to the defendant's legal advisers, and that he would have expected this would involve the document being read from top to bottom.

43. On the morning of 10th July 2009, Mr. Gibney, who was on leave, replied directly to Mr. Atkins' email, asking, 'Is this the version that I sent back to you with our handwritten comments or an earlier version?' Mr. Atkins responded, later that same day, 'Yes, this is the version you sent back to me and which incorporates your comments'.

44. Independently of the correspondence between Mr. Gibney and Mr. Atkins, Ms. Nolan, of Friends First, embarked on a 'side by side' comparison of the draft that had been sent on 9th July, 2009, and the previous draft, primarily with a view to ensuring that the defendant's comments had been satisfactorily incorporated. Ms. Nolan gave evidence that she did not notice the insertion of clause 2.2 at this point. She then forwarded the draft to Mr. Fergus Wheeler, the solicitor in A&L Goodbody who was dealing with the matter, pointing out a number of issues with the incorporation of previous comments by Mr. Atkins, and requesting that Mr. Wheeler, 're-review this document and ensure . . . that it represents a final version for execution'.

45. On 17th July 2009, Mr. Wheeler reverted to Ms. Nolan with a copy of the Deed of Pledge, bearing handwritten amendments and insertions, described as 'tidy up' comments. Ms. Nolan sent this document on to Mr. Atkins, copying Mr. Gibney and Ms. Browne, with a request to issue a 'final version of the document'. Remarkably, the document proffered made no amendment to, and raised no query about the insertion of clause 2.2.

46. On 16th July 2009, the plaintiff had emailed Mr. Atkins to ask how he 'got on' with the matter of the Pledge and Charge. On 17th July 2009, following receipt of the marked draft from Ms. Nolan, Mr. Atkins responded, 'Don't hold your breath yet but they have NOT amended the Guarantee wording I added'. The plaintiff's further response, on the same evening, was 'Let's get it signed ASAP!!'

48. It seems clear, therefore, that there was no intention on the defendant's part that the plaintiff's liability under the Personal Guarantee should or would be mitigated at this stage, nor that the effect of the Deed of Pledge would be to significantly alter the status of the Personal Guarantee."

16. The trial judge found that this was a case of unilateral mistake. Friends First and their solicitors did not notice that Clause 2.2 was in the draft Deed. They would not have agreed to it if they had noticed. Mr. Atkins and Mr. Slattery knew that Friends First was thus mistaken; alternatively, they wilfully closed their eyes to that knowledge. Mr Atkins, to the knowledge of the plaintiff, surreptitiously inserted the clause in the hope that it would escape notice and Friends First would execute the Deed and be bound by it. That constituted sharp practice. McGovern J. set out his specific determinations on unilateral mistake as follows:

" (a) At a time when the plaintiff was prepared to sign the Deed of Pledge (albeit reluctantly), Mr. Atkins came up with

the idea of inserting clause 2.2 'as a further thought . . .' He did not believe the wording would be accepted by the defendant, having stated in an email to the Claret Capital partners 'if this wording is accepted (which it has every chance of not but it is worth trying) then the Guarantees will be recourse only to the security provided'.

(b) Mr. Atkins, to the knowledge of the plaintiff, intended to slip clause 2.2 into the Deed of Pledge by sleight of hand. The plaintiff responded to Mr. Atkins' suggestion of inserting the clause by saying 'good thinking' and later, on the same date (9th July 2009), Mr. Doyle, who was one of the Claret directors, sent an email to Mr. Atkins saying 'any way to make it a bit more inconspicuous?'

(c) When Mr. Gibney asked Mr. Atkins on 10th July 2009 'is this the version that I sent back to you with our handwritten comments or an earlier version?' Mr. Atkins responded 'yes, this is the version you sent back to me and which incorporates your comments'. This was at best ambiguous and at worst misleading.

(d) On 17th July 2009, following receipt of the marked draft from Ms. Nolan, Mr. Atkins responded to the plaintiff 'don't hold your breath yet but they have NOT amended the Guarantee wording I added'. The plaintiff, on the same evening, replied saying "let's get it signed ASAP!!'"

Appeal

17. The first appeal is by the plaintiff, Mr. Slattery, against the refusal of his claim for declaratory relief confirming the force and effect of Clause 2.2 and against the order made by the Court on foot of the counterclaim whereby rectification was ordered of the Deed of Pledge so as to remove Clause 2.2.

18. There are 16 grounds of appeal, referring to some 19 issues that were considered in the judgment of McGovern J. and all of which were directed to factual findings or inferences. They may be summarised as follows. The common theme is that the judge failed to have any or any proper regard or failed to take into consideration or erred in finding or in deciding:

1. Agreement - the judge was in error because:

    a. There was never an established common intention that the deed of Pledge was to be provided as additional security – Mr. Slattery and the other Claret Capital principals were at all material times seeking mitigation of the Personal Guarantees.

    b. Mr. Slattery sent an email on 14th May 2009 seeking a package solution including release from his obligations in return for the share Pledge.

2. Sharp practice and knowledge of Friends First mistake:

    a. The judge erred in concluding
        i. That Mr. Atkins, with Mr. Slattery's knowledge, intended to slip Clause 2.2 into the Deed by sleight of hand.

        ii. That Mr. Atkins's email of 10th July 2009 saying "Yes, this is the version you sent back to me and which incorporate your comments" was at best ambiguous and at worst misleading.

        iii. That Mr. Slattery was aware that Friends First had not noticed clause 2.2.

        iv. The judge erred in accepting evidence of Mr. Seamus Croinin of A&L Goodbody about the practice of lawyers in highlighting changes in documents.

    b. Mr. Atkins had no reason to think that slipping in a clause would work because:
        i. Clause 2.2 was obvious as to its presence in the document and as to its meaning.

        ii. Mr. Atkins offered repeated opportunities to re-examine the draft, which is inconsistent with sharp practice or unconscionable conduct as found by the trial judge.

        iii. The draft was going to be thoroughly checked.

        iv. The A&L Goodbody staff manual which "prohibits its lawyers from treating amendments made by another lawyer to a document as being accurate".

        v. Friends First instructions to Goodbodys to re-review the Deed and to read it from top to bottom.

3. Was There a Mistake?

    a. The was no evidence before the court of any mistake in the execution of the Deed or, if there was, that such was caused by any act or omission by Mr. Slattery in the absence of any evidence from Mr. Fergus Wheeler, the solicitor in a A&L Goodbody who dealt with the transaction.

    b. Similarly, there was no evidence from Mr. Adrian Hegarty, the Friends First CEO, as to satisfaction with the terms of the Deed.

    c. Mr. Wheeler said that he was "happy with the other amendments."

    d. Friends First instructed its lawyers to conduct a top to bottom review of the Deed and the lawyers confirmed it was acceptable.

    e. It was reasonable for Mr. Slattery to have relied on Mr. Wheeler's email.

f. Mr. Slattery had no actual notice that Friends First was operating under a mistake in executing the Deed, including Clause 2.2.

g. The draft Deed of Pledge that was prepared by A&L Goodbody, but not sent to Mr. Slattery, would have excluded principal private residences from the operation of the Guarantee; it follows that it was not out of the question that Friends First would agree to Clause 2.2

h. Friends First pleaded case, and also its correspondence, is that it was misled by the 10th July 2009 email from Mr Atkins "when the evidence clearly established that no reliance was placed by the defendant/respondent on this email and that the email was not furnished to Fergus Wheeler Solicitor in A&L Goodbody solicitors."

Appellant's Submissions

19. The appellant takes issue with the learned trial judge's findings on mistake and knowledge of mistake, which are agreed to be *sine qua non* for the purpose of the operation of the doctrine of unilateral mistake. It is argued that the evidence does not indicate knowledge on the part of Mr. Atkins and Mr. Slattery that a mistake had been made. The appellant says the findings are based on an analysis of documentation, not on an analysis of evidence given and there is no analysis by the trial judge of the countervailing factors.

20. The appellant submitted that Friends First must show that there was an agreement to provide collateral without any mitigation of the Guarantees, together with an outward expression of that agreement. That is a *sine qua non* of achieving rectification. The appellant submitted it is a condition of achieving rectification of the law this in this country that there must be a prior agreement and an outward expression of the same which are lacking in this case. If Mr. Slattery never intended to provide collateral without mitigation of the Guarantees, he cannot be held to it. Whether one looks at the material objectively or subjectively, one actually reaches the same conclusion; that there was no objective manifestation of an agreement here.

21. The parties agree that mistake and knowledge of mistake are required for rectification based on unilateral mistake. There has to be a mistake of which Mr. Slattery was aware. The appellant submitted there was no mistake and there was no knowledge of a mistake on the appellant's behalf. The appellant doubted that the Court could even reach the conclusion that there was a mistake in the absence of the evidence of Mr. Wheeler who was not called to give evidence in the High Court. The appellant submitted the crucial failure of the learned trial judge in respect of this issue was that he didn't consider the whole body of material which tends to demonstrate an absence of knowledge when objectively assessed.

22. The appellant submitted that Friends First must establish unconscionability or sharp practice. In this case, the appellant submitted that the unconscionability of the party's conduct should not be seen as the sole factor determining the availability of equitable relief by way of rectification for unilateral mistake: he must also be shown to have known of the other party's mistake, or at least to have intended and suspected (and possibly even engineered) that mistake.

23. The appellant says if there was a mistake, it was on the part of Friends First and they were aware of that mistake. Friends First must demonstrate sharp practice leading to a mistake which they cannot do. The evidence that Clause 2.2 was not red lined is not sufficient to ground a claim that sharp practices were employed by the appellant. To give such a ruling would have a profound effect on the manner in which Commercial law contracts and documents are communicated. The appellant says there is no automatic entitlement to redlining. More importantly, if anybody wanted it they could have asked for it. Can it realistically be described as sharp practice to send over a document of this kind to a company with such significant resources and really believe that you are going to achieve anything by doing this? It was suggested that that could not be right.

24. The appellant submitted that the onus was on the respondent to demonstrate that the alleged sharp practice in this case, which amounted to a form of misrepresentation, had actually caused the mistake. The absence of redlining could not amount to sharp practice or unconscionability to render rectification an appropriate remedy.

Respondent's Submissions

25. For unilateral mistake, it must be shown that one party erroneously believed that the document, which is sought to be rectified, did or did not contain a particular provision. According to the respondent in this case, the mistake was that it did not contain, it was believed not to contain, a particular provision.

26. The respondent says this case fulfils all of the criteria required to establish unilateral mistake and the findings of the trial judge support all of those threshold requirements. But the respondent submitted they also meet the requirements of common mistake because, as of the 9th July, there was accord that the JetBird shares would be provided by way of additional collateral. And as the trial judge said, it was agreed at that stage that any question of the release of the guarantees would be postponed until a later stage when there was a resolution of the whole funding.

27. It is clear that Friends First entered the Deed of Pledge under a mistake; at all times, it had made known that it required additional security from the appellant in the form of a Pledge over the JetBird shares. At the time of the entry into the Pledge, Friends First thought that the appellant was agreeable to so provide. While the appellant had sought a "package solution" by his letter of 14th May 2009, this was clearly rejected. In exchanges throughout June and July 2009, no opposition or demur was expressed to the requirement of the Pledge as an additional security. Indeed, the opposite was the case: matters proceeded on the basis that the appellant was indeed agreeable to giving the Pledge as additional security, without any limitation of recourse. It is highly significant that in the early afternoon of 9th July 2009, the appellant sanctioned a draft which contained no limitation of recourse. At no stage was a limitation of recourse ever articulated as a demand or condition of the appellant.

28. The appellant was aware that Friends First had at all times sought the Pledge as an additional security. At no stage (and, in particular, in no stage in June or July 2009) did he or his agents ever articulate that a Pledge was being offered only in exchange for the mitigation of the appellant's liability under the Guarantee. He could not, in evidence, identify any reason why a limitation of recourse would have made commercial sense for Friends First. He was or must have been aware that nothing was said by Friends First about the insertion of the clause. In such circumstances, and at the very least, the appellant was willfully blind to the mistake of Friends First.

29. Clause 2.2 was entirely an afterthought of Mr. Atkins' and reflected no pre-agreed strategy. The manner of its inclusion into the draft followed an internal e-mail suggesting that it be made "inconspicuous". The email of Mr. Atkins following receipt of Ms. Nolan's comments on 17th July ("Don't hold you breath. . . ") and the appellant's reaction clearly demonstrate that they well knew that Friends First had not adverted to the presence or import of Clause 2.2.

30. The removal of the redlining, the statement in the covering email and the response of Mr. Atkins of 10th July 2009, evidence a deliberate design to mislead Friends First into believing that the document did in fact represent a draft containing and reflecting the comments of A&L Goodbody on 2nd June 2009 and designed to reduce the possibility of the discovery of that mistake.

31. The appellant must have been aware of the mistake of Friends First, not least because of the deafening silence from Friends First. Given the resolute manner in which, for more than five months, Friend's First had been seeking additional security, it is inconceivable that such a position would have been conceded without any resistance or at least some comment as the reason for such concession. The lack of curiosity professed by the appellant in cross examination as to why Friends First might have said nothing lacks credibility.

32. The deliberate actions undertaken by the appellant and Mr. Atkins continued right up to the execution of the Deed. Necessary amendments to Clause 2.2.3 were not made in redlined drafts circulated on 20th July 2009; rather, such amendments were made in the execution copy only without any comment to Friends First.

33. The respondent submitted that the appeal was an attempt to appeal the findings of fact made by the trial judge in respect of the actions of the parties and their beliefs about events. Matters such as the establishment of a common intention, the existence of a mistake, the awareness of that mistake are all matters of fact. The trial judge saw the witnesses for either side; he had the opportunity to consider their demeanour and credibility and he made his findings accordingly. The respondent submitted that the only conclusion open to the trial judge was that, viewed objectively, the parties had come to a common understanding or shared a common intention. Clause 2.2 was wholly inconsistent with the accord and had been surreptitiously introduced without the knowledge of Friends First.

The Law

34. The law is not in dispute and the parties do not suggest that the judge either misconstrued the law or misapplied it to the findings that he made. The appellant's complaint is that the judge was not entitled to come to the conclusions that he reached before he applied the legal principles.

35. The leading Irish authority is *Irish Life Assurance Company v. Dublin Land Securities Limited* [1989] 1 I.R. 253, a judgment of the Supreme Court. The headnote is as follows:

> "Held by the Supreme Court: 1. In order for a Court to grant rectification of a contract, the party seeking rectification must establish a common continuing intention in relation to a particular provision of the contract agreed between the parties up to the point of execution of the formal contract.
>
> 2. It was not necessary there be a legally binding agreement between the parties in relation to a particular provision antecedent to the contract or instrument which it is sought to rectify, provided that prior accord in relation that provision has been outwardly expressed or communicated.
>
> 3.That the party seeking rectification of a contract must establish by convincing proof the instrument does not reflect the common intention of the parties, especially where long negotiations have taken place between the parties, both of whom have taken legal advice during the negotiations.
>
> The parties seeking rectification of a contract must be able to show what the common intention of the parties was."

At page 260, Griffin J. who gave the Court's judgment, said:

> "Rectification is concerned with defects in the recording, not in the making of an agreement. The Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to be made in pursuance of terms of contracts.
>
> As a general rule, the Courts only rectify an agreement in writing where there has been mutual mistake. That is where it fails to record the intention of both parties. Although that was the original conception of reformation of an instrument by rectification, nowadays a party that has entered into a written agreement by mistake will also be entitled to rectification if he establishes by convincing evidence that the other party, with knowledge of such intention or mistake, nonetheless concluded in the agreement."

The judgment referred to the decisions of the English Court of Appeal requiring some element of sharp practice by the non-mistaken party, a feature that was strikingly absent from that case. Griffin J. endorsed the Northern Irish case of *Rooney v. McParland* and said that:

> "Lord Lowry LCJ summarised the principles clarified by Russell J in the following terms.
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> 1. There must be a concluded agreement antecedent to the instrument which is sought to be rectified.
>
> 2. The antecedent agreement need not be binding in law, for example it need not be made under seal if by a public authority or in writing and is signed by the party relating to a sale of land, nor need it be in writing. Such incidents merely help to discharge the heavy burden of proof.
>
> 3. A complete antecedent concluded contract is not required, so long as there is prior accord in a term of the proposed agreement, outwardly expressed and communicated between parties as in Joscelyne v Nissen. Like the learned trial judge, I would adopt what was said by Russell LJ and Lowry LCJ as representing the law on this subject in question in this jurisdiction."

Griffin J. noted "the heavy burden of proof that lies on those seeking rectification".

36. There is a wealth of legal authority on the subject of mistake in contract, but this case is concerned only with one species, namely, unilateral mistake. Although the trial judge referred additionally to common mistake, he concluded that Friends First was entitled to rectification because of unilateral mistake. In the result, common mistake does not arise for consideration on this appeal.

37. The first principle is that it is difficult for a party to a written contract to escape the effects of its provisions by reason of mistake. When he has had the benefit of legal advice and versions of the Deed have gone back and forth in the course of drafting, the undertaking is even more onerous for a party seeking to establish entitlement to rectification. There is, however, an equitable jurisdiction in exceptional cases for a Court to order that the written formal document be rectified by removing, inserting or altering

the provisions so as to reflect what the parties truly intended, understood and agreed.

38. It is impossible to attempt to delineate the boundaries of the doctrine that enables the Court to intervene in this way in the Articles of Agreement that the parties have signed. In the course of argument, Counsel referred to recent cases that have extended the reach of the doctrine to new situations. In some instances, decisions have given rise to debate and criticism because they were thought to have imposed on the contracting parties terms that had not, it was said, been part of the agreed provisions. These debates do not have to be visited in this appeal because the facts fall within the purview of established legal precedents in Irish authority. This is not a case of dispute about the legal rules to be applied but as for their application in the instant events and circumstances.

39. Friends First has to establish, first, that it executed the Deed of Pledge under a mistake; secondly, that Mr. Slattery and/or his agent, Mr. Atkins, was or were aware of the other party's mistake; and thirdly, that there was an element of sharp practice in the conduct of Mr. Slattery and/or Mr. Atkins, or that the circumstances were such that it would be unconscionable for the Court to enforce the terms of the Deed as executed.

Discussion

40. Mr. McCullough S.C. in his argument to the Court cited 12 central facts on which he relied which may be summarised as follows.

> 1. The order for rectification reflects an agreement whereby there would be both additional security and no mitigation of the personal guarantees but the evidence shows conclusively that no such agreement was made
>
> 2. Mr. Slattery was unwilling to give additional security unless he obtained mitigation on the personal guarantees. Initially that meant carving out the principal private residences and later it meant securing the release of the personal guarantees. Internal correspondence suggested he might be willing to give the security without mitigation but in his dealings with Friends First, he was clear at all times that he would not give the additional collateral unless his position in relation to the guarantees was mitigated.
>
> 3. Even after the 7th July, there is no specific point in time when an agreement of the sort put forward by Friends First can be identified as having actually been reached, still less reflected in any matter before the Court.
>
> 4. The draft Deed of Pledge sent on the 9th of July contains Clause 2.2, which is expressed in the clearest of terms in a part that is central to the agreement and that is prominent.
>
> 5. The draft Deed of Pledge sent on the 9th did not contain any redlining and was therefore a document that required to be reviewed.
>
> 6. Clause 2.2 of the Deed of Pledge has a counterpart; Clause 9.7 in the Deed of Charge which was sent on the 9th of July for the first time. There was no previous draft of the Deed of Charge and it is a document therefore that was obviously going to be reviewed, as far as Mr. Slattery was concerned, from top to bottom by the other side.
>
> 7. Mr. Slattery and his advisor, Mr. Atkins, were entitled to assume that the drafts, both drafts, but in particular the Deed of Pledge, would be read and carefully considered not just by Friends First, but by A&L Goodbody, who to the knowledge of Mr. Slattery and Mr. Atkins, were involved in this matter as advisors to Friends First and who had reviewed previous drafts.
>
> 8. The Friends First witnesses said that they just did not read the document.
>
> 9. As a matter of fact, the documents, but in particular the Deed of Pledge, actually went to A&L Goodbody with instructions from Friends First that a top-to-bottom review of the document should be carried out.
>
> 10. It was sent by Mr. Atkins on the 9th of July; it came back from Friends First on the 17th of July and Mr. Wheeler of A&L Goodbody said he was happy with the amendments that had been made by Claret Capital.
>
> 11. The document was not then eagerly grabbed by Mr. Atkins and Mr. Slattery and signed up, as one might expect, if they genuinely thought that there was a mistake, but rather it was sent back by Mr. Atkins on two if not three further occasions with further amendments to the same page as contained Clause 2.2 and actually in due course an amendment to Clause 2.2 itself.
>
> 12. Mr. Wheeler, the solicitor in A&L Goodbody who reviewed the document, was not called to give evidence so the High Court so this Court can have no idea whether Mr. Wheeler was in fact misled by the redlining or by the contents of the single email that A&L Goodbody saw, relating to the draft that was sent over, namely, the email of the 9th of July.

41. In all these circumstances, Mr. McCullough submits that:

> (i) Mr. Atkins inserted Clause 2.2 into the draft Deed in the normal course of such transactions.
>
> (ii) The terms of the provision had been the subject of discussion between the parties and did not represent a wholly extraneous provision.
>
> (iii) Friends First had the benefit of legal advice throughout the process up to completion when the Deed was executed.
>
> (iv) The solicitors' function was to review the draft as presented by Mr. Atkins from top to bottom. There is no reason to believe they did not do so and no evidence to that effect, since Mr. Wheeler was not a witness.
>
> (v) Friends First expressed their acceptance of the draft, and specifically their happiness with the amendments through their solicitor Mr Wheeler.
>
> (vi) There is, accordingly, no evidence that Friends First executed the Deed of Pledge by mistake; secondly, that Mr. Atkins knew of any such mistake; thirdly, that there is no basis for suggesting that Mr. Atkins was guilty of sharp practice.

(vii) In regard to the allegation of sharp practice, Mr. McCullough S.C. submits that this charge cannot survive examination. Mr. Atkins did nothing underhand. The draft he submitted contained the now disputed clause in plain sight and obvious to anybody who read the document. The various particular features that are cited to demonstrate mala fides are insufficient to prove this serious charge and are susceptible of innocent explanation just as cogently as the opposite.

42. The appellant's submissions address these questions:

(i) Did Friends First prove that there was an agreement together with an outward expression of accord?

(ii) Was there a mistake?

(iii) Were Mr. Atkins and Mr. Slattery aware of the mistake?

(iv) Was there sharp practice or were there circumstances in which it would be unconscionable to enforce Clause 2.2?

43. The questions that arise, accordingly, on the appeal on the claim for a declaration and the counterclaim for rectification of the Deed of Pledge dated 20th July 2009, are essentially factual questions. Did the trial judge find the wrong facts as to the Pledge Deed? Did he draw incorrect inferences or conclusions? Did he fail to take account of relevant facts that were in favour of the plaintiff's contentions? Did he misunderstand any factual evidence? Were there flaws in logic or reasoning that led the judge into error?

44. The approach to be taken by an appellate Court in regard to findings of fact made by a trial judge are well established. The trial judge's findings of fact on the evidence are not reviewable as to correctness by way of re-examination of the evidence. Inferences and deductions in a process of reasoning may be revisited. Conclusions based on examination of documentary material where this Court is in as good a position as the trial judge are of course open to reconsideration. In *Hay v O'Grady* [1992] I.L.R.M. 689, the Supreme Court declared that an appeal court is bound by findings of fact made by the trial judge which are supported by credible evidence, even if there appears to be a preponderance of testimony against them. This is because the trial judge has the advantage of hearing the evidence and observing the manner in which it is given and the demeanour of the witnesses. Where inferences of fact are derived from oral evidence the appeal court should be slow to differ. However, the appellate tribunal is in as good a position as the trial judge in drawing inferences from circumstantial evidence.

45. The appellant invites the Court to approach the case on a different basis because, as Counsel argues, the learned trial judge did not actually say in his written judgment that he based his conclusions on his appraisal of the witness testimony. Counsel for Friends First points out that the judge did refer to the evidence in the summary of his judgment that he provided but irrespective of that submits that it is obvious that the judge's analysis and conclusions are based on his view of the evidence as a whole, including the email correspondence which he interpreted in light of the evidence given by the witnesses.

46. This Court is satisfied that the trial judge proceeded as Counsel for the respondent suggests, and that his views as to the meaning and effect of the emails must be given the weight accorded to the conclusions of the primary fact-finder. However, the primary facts as to what correspondence was sent or as to who said what to whom are not in dispute. The issues in the case and on this appeal are matters of inference and deduction. The Court is in a position to apply its own analysis to the documents and to the facts as found by the trial judge.

47. Addressing the substantive matters on the appeal, it is instructive to recall the position in July 2009 prior to the execution of the Deed of Pledge on 22nd July. Friends First had the benefit of the guarantee of 18th of March 2009 and were insisting on additional security from Mr. Slattery to support his obligations under the Guarantee and not to support Claret Capital's liability under the Promissory Note. Mr. Atkins had made changes to a previous draft to take account of Friends First's insistence on the nature of the security. Mr. Slattery approved the draft first produced to him on 9th July 2009, which was confirmation of the agreement by Mr. Slattery to provide security in the form of additional support for his Guarantee. When Mr. Atkins had his idea, the clear implication from his emails to Mr. Slattery and his colleagues is that the clause he was proposing was an extraneous provision that did not belong in the Deed and the responses of the guarantors confirmed that understanding.

48. Clause 2.2 was inconsistent with what had gone before, as is evident from the earlier drafts, the memoranda of meetings, the comments of Mr. Doyle in his emails and the response by Friends First to the proposal of 14th of May 2009, namely, the postponement of the consideration of the request for release or reduction of the burden of the Guarantee until changes in the financial structure of the hotel and its management had been effected.

49. It is irresistible that Clause 2.2 was not agreed. Mr. Atkins said as much, and not only that, but that it was unlikely that it would be agreed. Mr. Doyle wondered, ironically, whether it could be made more inconspicuous. It was obvious to Mr. Atkins and Mr. Slattery and the other guarantors that if anybody on the Friends First side noticed this provision, it would not survive.

50. The trial judge drew attention to difficulties that would arise if the Deed were to be implemented. Clause 2.2 did not sit consistently with the terms of the Guarantee of 18th of March 2009. He also noticed that this Deed of Pledge had serious implications for the liabilities of the other signatories of the Guarantee because it liberated Mr. Slattery who may well have been the person with the greatest asset resources. It is true that they would have enjoyed release of all their obligations under the Guarantee if the Deed of Charge had also gone through.

51. It is also worth examining it as a whole to see how Clause 2.2 fits with the overall purpose of the Instrument and with the other provisions. The Recitals cite the circumstances giving rise to the Deed: (a) Friends First provided a loan to Claret Capital Holdings of some $14.05 million or about 18th March 2008, which is evidenced by a Promissory Note of the same date; (b) Outstanding sums under the Promissory Note are the subject of a joint and several Guarantee by Mr. Slattery and others entered into in or about March 2008; (c) In consideration of Friends First not seeking repayment of sums due under the Promissory Note until such time as the conditions in CCH's letter dated 15th May 2009 arise, Mr. Slattery has agreed to provide security for the Secured Obligations in the terms of this Deed.

52. "Secured Obligations" is defined at paragraph 1.1 of the Deed to mean "all obligations at any time due, owing or incurred by the Pledgor to the Pledgee whether present or future, actual or contingent (and whether incurred, solely or jointly and whether as principal or surety or in some other capacity), in each case pursuant to the terms of the Guarantee". A simplified version of this definition is that the expression means all obligations by Mr. Slattery to Friends First under the Guarantee referred to at paragraph 2b. Accordingly, by this document, Mr. Slattery is providing security for his obligations under the Guarantee that he executed with others in March 2008. The Pledge is introduced at paragraph 2.1 as being: "By way of security for the due and punctual payment, discharge and satisfaction by the Pledgor of the Secured Obligations".

53. It would seem to follow from this that there is a serious inconsistency between clause 2.2 and the underlying purpose of the entire Deed. Clause 2.2 limits any liability that Mr. Slattery has to Friends First to the value of the assets now being pledged, but the express purpose of the Deed was to put into place this security over the shares as security for Mr. Slattery's obligations pursuant to the Guarantee. It will be recalled that the background was the insistence of Friends First that this extra security, in the form of a charge over Mr Slattery's JetBird shares, was to support his obligations under the Guarantee. Yet, at a stroke, Mr. Atkins was able to eviscerate the liability under the Guarantee that the Deed was intended to buttress. In the result, Friends First would have been far better off if the Deed had not been executed.

54. The appellant, Mr. Slattery, argues that there was no agreement between the parties "whereby there would be both additional security and no mitigation of the Personal Guarantees". This is correct in a sense and as far as it goes. But it is an invalid proposition. There was no explicit agreement containing those two elements, but it was unnecessary for Friends First to prove such an agreement in those terms. The fundamental fact, as Mr. Slattery and Mr. Atkins well knew, was the need for Mr Slattery to complete a transaction concerning only the pledge by him of his JetBird shares. There was no need and no occasion for Friends First to seek confirmation of the Guarantee. Indeed, as noted above, the express purpose of the Pledge, as agreed and by its own terms, was to support Mr. Slattery's obligations under the Guarantee.

55. It is not the case that Mr. Slattery was unwilling to give additional security without mitigation of his Personal Guarantee or those of his colleagues, as the judge found, and as is evident from the correspondence and meetings. Precisely the opposite was the case. And, of course, the submission is something of a misnomer: Clause 2.2 was purporting to provide replacement of the Guarantee, not support or additional security, and by way of much diminished value Instrument, even on the optimistic assumptions then current about JetBird's prospects.

56. Counsel submits that the effect of Clause 2.2 was not something outlandishly inappropriate to have incorporated into the Deed. The judge's reasons for concluding that Mr. Atkins had slipped in Clause 2.2 in a surreptitious manner were, that there was not an agreement between the parties to liberate Mr. Slattery from his obligations under the Guarantee that he signed in March 2009. There had been conversations and correspondence concerning the Guarantee, including a proposal that would have protected the principal private residences of Mr. Slattery and his colleagues, the other signatories of the Guarantee, in the event of a call. In fact, as appears from the emails, such protection would have been of little enough advantage to Mr. Slattery because his home was secured in favour of other lenders. Although these questions had been raised and considered, and the attitude of Friends First was not hostile to possible mitigation of the Guarantee burden, no agreement to that effect had been reached at the time when the Deed was being prepared.

57. The judge held that Mr. Atkins slipped in Clause 2.2 during the drafting exchanges in the hope that Friends First or its solicitors would not notice it and would execute the Deed without realising that this provision was included. If that is correct, it follows that Mr. Atkins engaged in a form of concealment; that he knew that Friends First had not realised what he had done to change the draft and that Friends First was going to execute the document under a mistake if it did proceed to completion. It also meant that the original draft without Clause 2.2 was the agreed text. On that specific finding, the learned trial judge was entitled to conclude that all the necessary elements that the law requires before rectification will be ordered were present.

58. Mr. Slattery had expressly agreed to the draft sent to him by Mr. Atkins before the latter decided to introduce Clause 2.2. Such affirmation could also be inferred from what had gone before, and from the other terms, in circumstances where it was illegitimate to make this alteration in the course of a drafting process.

59. The new clause that Mr. Atkins inserted was there in the agreement to be seen, it is true, but in the circumstances, can it be said that it was obvious? It was in the same format as to font and size as every other clause in the draft Deed. There was no reason why the recipients of the draft would focus their attention on that clause. Of course, if they had checked through the document clause by clause, they would or should have seen, noticed and realised the changed nature of the Deed. But the reality is that this radical change was in position so as not to be noticed. It was hiding in plain sight, concealed by its seeming ordinariness. There was no reason for Friends First or Mr. Wheeler to suspect that the document was then wholly different from what it had been in the recent past. Therefore, obviousness may be a misnomer. Clause 2.2 could not be highlighted because it would have been summarily rejected if it had been noticed.

60. In that connection, it is relevant that the Deed of Charge that was prepared, but that ultimately did not achieve completion, also contained at Clause 9.7 a similar exclusion of the Guarantee obligations. That fact, however, is not a refutation of the conclusions as to the Pledge Deed. If the provision was not noticed in the Pledge, it is not any more or less remarkable that the similar clause in the Deed of Charge went undetected. Besides, the Charge did not go through the exchange process that the Pledge did.

61. The trial judge held the removal of redlining to be significant. This Court agrees. The draft was moving from party to party with redlining marking the changes so that the recipient could direct attention to the changes. It is understandable, but not best practice, nor is it in compliance with the A&L Goodbody practice manual to assume that no other alterations have been made. But whatever criticism may be directed to the solicitor who made the assumption, it is another quite different matter to query why a person would remove the redlining before the final draft was agreed all round.

62. Clause 2.2 was something of an afterthought. The judge cited the explanation given by Mr. Atkins, and the responses of Mr. Slattery and Mr. Doyle, as evidence that none of them actually expected that Friends First would agree to this term. Subsequent comments confirmed that view. The way that Mr. Atkins transmitted this significantly amended version is also important. Previous drafts had contained alterations that were underlined in red and also some handwritten changes. Mr. Atkins removed the underlining in red and sent only a clear version. The implication is that he did so in order to conceal the fact that he had made a very substantial and significant change to the document.

63. Mr. Atkins did not have to believe his ploy would succeed; if it was discovered, the draft would be changed and it would be executed minus Clause 2.2. There was little enough downside to the scheme. It follows from the fact that he notified his colleagues that it was not likely to be agreed that the document without 2.2 would then be signed. That is evidence of the true, original agreement. The insertion of this new clause was no more than a try-on, but it fooled the recipients, to the surprise, but clearly to the full knowledge of his side. It was not only that they knew of the mistake, but that they deliberately created the conditions in which the mistake might be made.

64. Many of the appellant's submissions invoke the proposition that a party to a contract is entitled to rely on the confirmation by the solicitor for the other contractor as to the terms of the Deed. The draft with the amendments, that included Clause 2.2, was expressly approved by the solicitor dealing with the matter for Friends First, Mr. Wheeler. He had plenty of opportunities to examine the draft; the clause was obvious, his firm's staff manual required the draft supplied to be thoroughly examined and the instructions of

his client were to the same effect. In those circumstances, his confirmation of acceptance of the draft cannot be ignored and must be considered as fully effective. Moreover, Mr. Slattery was entitled to consider this to be final and binding on Friends First. All that, however, is subject to the express finding by the trial judge that neither Friends First nor their solicitors did actually notice the provision that Mr. Atkins had introduced, which, after all, is just what he and Mr. Slattery hoped but were not confident would happen. It might be said that it ill becomes either of them to protest that their scheme succeeded against the odds.

65. The High Court referred to the Memorandum of August 2009 that Mr. Atkins prepared for the file, which is relevant according to Counsel for Friends First as retrospectively seeking to explain and justify his conduct in and about the execution of the final version of the contract containing Clause 2.2. It is submitted that the facts are misstated in a manner that is indicative of a motivation to mislead, from which a malign intention existing at the time may further be deduced.

66. The situation is that there was a draft Deed being exchanged to reflect the provision by Mr. Slattery of security in the form of a Pledge of shares owned by him in favour of Friends First. The trial judge found that this was additional security, as agreed, and there was evidence before the High Court that justified that conclusion. The terms of the Pledge Instrument themselves confirm that. But the point is that there was an agreement which was being incorporated into a formal Deed and that is the process in which Mr. Atkins and Mr. Wheeler were engaged. They were not negotiating a new arrangement; they were putting an agreement into legal form in a Deed.

67. Mr. Atkins introduced into this drafting process a provision that nullified the effect of the Guarantee that was still subsisting between the parties. It is unnecessary to look for an agreement that incorporates the purpose of the Share Pledge Deed and also reiterates the previously executed Guarantee. There was no such express agreement because the same was unnecessary. This was additional security that was to leave the Guarantee unaffected. The whole complaint made by Friends First is that what Mr. Atkins did had nothing to do with the Deed that was in the process of being drafted and approved for execution. It is very likely that Mr. Atkins was able to conceal the radical nature of the change that he had made, because the process in which he and Mr. Wheeler were engaged was a drafting and approval process and not the negotiation of the abrogation of the previous contractual commitments.

68. It is difficult to establish a case for rectification of an agreement. There is a written document that was executed by the parties. In this case, it went through a process of drafting and exchange between the intended parties. Friends First believed that their solicitors would go through the document from top to bottom before presenting it to them for execution. Their solicitors' own code of internal practice required that a draft should be fully scrutinised on receipt back in the drafting process. There was, as against that, ample evidence on which the judge could rely in coming to his conclusion that Mr. Atkins's intention was to slip the clause into the Deed.

69. The fact that Mr. Atkins put forward Clause 2.2 to see if it might get by without being noticed, but thinking that it was unlikely to do so, does not relieve his conduct of the charge of being sharp. The same point applies in regard to the suggestion that the disputed clause was obvious. Mr. Atkins made the Deed of Pledge into something quite different from what it had been at every stage up to around 1.00pm on 9th July 2009. There is no doubt that he knew what he was doing: see the messages of 17th July 2009 saying "Don't hold your breath yet…" and "… reply… ASAP".

Conclusions

70. The Court is satisfied that the conditions for rectification on the ground of unilateral mistake were fulfilled. Friends First were mistaken in thinking that the Deed was the same as a previous draft; that it only dealt with Mr. Slattery's pledge of his shares in JetBird; in not realising that the Deed substantially altered the security arrangements and in not realising that the Deed extinguished the Personal Guarantee given by Mr. Slattery in a previous Deed dated 18th March 2008. Mr. Atkins, and through him, Mr. Slattery, knew that Friends First were operating under this mistake as to the terms of the Deed. Mr. Slattery knew what the effect of the amended draft was and hoped that Friends First or their solicitors, A&L Goodbody, would not notice the change. Was there sharp practice? Mr. Atkins introduced the change for the purpose of radically altering the document and its effect and in the hope that it would not be picked up by Friends First or the solicitor dealing with the matter in A&L Goodbody. He brought about the misunderstanding and increased its chance of successfully passing unnoticed by removing the redlining from the draft, thereby implying that he had not made further changes requiring consideration by the other party. The effect of what he was endeavouring to achieve was to introduce into the document an amendment that was inconsistent with the recitals of the deed itself and which nullified the previous Deed of Guarantee that Mr. Slattery had executed in favour of Friends First. That amounted to sharp practice.

71. In circumstances where the non-mistaken party to the agreement is not only aware that the other contractor is operating under a mistake in executing the Deed, but also has actually contrived to bring about the condition in which the mistake is made, sharp practice may be a charitable description of Mr Atkins' conduct. It is clear from the judge's findings, and amply grounded in the evidence, that he intended to mislead Friends First as to the contents of the Deed.

72. It is clear that the same conclusion as that reached by the trial judge follows from an examination of the documentary material and memoranda of meetings. The trial judge also had the benefit of seeing and hearing the witnesses being cross-examined, which placed him in a superior position compared with this Court. This Court holds that no other conclusion reasonably follows. There is, therefore, no basis for challenging the findings and determination of the trial judge on this element of the case. The Court accordingly dismisses the plaintiff's appeal.

Damages Issue

73. The plaintiff sought damages for breach of confidence, breach of privacy and breach of duty arising from the claim that the defendant had disseminated and/or published information concerning the plaintiff's alleged liability to it under the guarantee to parties who had no direct interest therein. It was pleaded that such conduct represented a clear breach of the plaintiff's rights of confidence and privacy in his dealings with the defendant and was gravely damaging to his legitimate commercial interests and concerns.

74. The plaintiff pleaded that in or around August 2010, Harry Van den Heuvel, a senior executive of the defendant's parent company, Achmea, sought a meeting with a similar level officer of CVC Capital partners, a significant shareholder in the plaintiff's employer, Avolon Aerospace (Ireland) Limited. The meeting took place without the plaintiff's knowledge or consent. Mr Van den Heuvel discussed the plaintiff's alleged indebtedness to the defendant, in addition to the circumstances leading up to the execution of the Guarantee and the Deed of Pledge. The claim was that in a vexatious attempt to undermine the plaintiff, Mr. Van den Heuvel advised the senior executive of CVC Capital Partners that the plaintiff had acted improperly in his dealings with the defendant and was not trustworthy. In addition, Mr. Van den Heuvel advised that the plaintiff had misrepresented certain documents and was underhand in his dealings with the defendant. The clear purpose of this meeting was to damage the plaintiff's credibility and reputation with his employer's shareholder and to pressurise him into consenting to the rectification of the Deed of Pledge.

75. The plaintiff alleged that the defendant's actions in this regard whether intended or not had adversely affected the plaintiff's

business interests and his relationship with his employer. Moreover, since the allegation of his alleged personal indebtedness to the defendant had been raised by the defendant, the plaintiff was obliged to put other financial institutions on notice of such claims. That caused a great deal of nervousness in some financial institutions and as the plaintiff is completely reliant on the continued support of these institutions, any matter which causes uncertainty or leads to a collapse of confidence can have devastating financial consequences for the plaintiff.

76. The trial judge held that Achmea, acted as the agent and on behalf of Friends First with the motive of pressurising or harming the plaintiff to get him to alter the *status quo*. A duty of confidentiality existed as between the plaintiff and Friends First because of his position as a guarantor of the borrowings of Claret Capital. The excuse given by Mr Van den Heuvel about due diligence was a threadbare fiction and the judge rejected it. In passing on the information as he did, Harry van den Heuvel was not pursuing a legitimate interest of his own company or of Friends First; neither was there any reasonable justification in the public interest or in pursuance of any legal obligation. The trial judge was therefore satisfied on the evidence that Friends First permitted the improper disclosure of confidential information to a third party for an improper purpose, which entitled the plaintiff to damages.

77. The plaintiff did not establish any special damage arising out of the breach of confidence. The judge held nevertheless that "the Court is vested with the discretion to award compensatory damages, including aggravated damages, notwithstanding any failure to explicitly plead the latter category." In the circumstances, the judge awarded damages including aggravated damages in the amount of EUR100, 000.

78. The arguments focussed on the following issues.

1. Was there a duty owed?

2. If there was a duty to whom was it owed – Mr. Slattery or Claret Capital?

3. If there was a duty owed to Mr. Slattery, was that duty breached?

4. Were there any damages flowing from that breach?

5. If damages are appropriate can aggravated damages be made without compensatory damages?

79. Friends First, the appellant on this issue, submitted:

1. Friends First is not a bank. The nature of the relationship was entirely different from that between a banker and a customer. The plaintiff and Friends First were engaged in a business venture that did not carry a duty of confidence on either side. Accordingly, no duty arises. Legal authority does not say that general commercial dealings carry an automatic implied duty of confidentiality.

2. The matters discussed were not confidential. There was not a discussion of personal financial details of Mr. Slattery as to what he borrowed or what his statement of net worth was or otherwise. The discussion was one of the legitimate exceptions under *Tournier*.

3. The relationship was with Claret Capital no matter how much Mr. Slattery might identify himself with Claret Capital or *vice versa*.

4. Mr. Browne of Friends First conceded in cross-examination that there would be a duty of confidentiality in appropriate circumstances but the question is a matter of law. Mr. Vineburg was cross examined and conceded that the approach arose exclusively in the context of due diligence.

5. In relation to the question of damages, in *Conway*, the Supreme Court, and particularly Chief Justice Finlay said about aggravated damages, that they are compensatory damages which are increased by reason of the oppressive or wrongful conduct of the party. *FW v. BBC* was a case where there were aggravated damages but the court first awarded general damages of £75,500 and then there was a top up by way of aggravated damages of £15,000. In *McIntyre v. Lewis*, again the court expressly split up as between the compensatory damages and then the exemplary or the punitive damages. There is not any situation where there are aggravated damages awarded without some compensatory damages being identified as well. And there could be no compensatory damages awarded here.

6. The learned trial judge's conclusion was that there had been unconscionable conduct, sleight of hand, sharp practice on the part of Mr. Slattery which had led the parties to being where they were. So that at worst what can be said about the disclosure that was made by Mr. Van den Heuvel is that there was a disclosure to CVC of the truth about Mr. Slattery. There was no damage to his reputation in the circumstances because what was said about him was the truth.

80. Mr. Slattery, the respondent on the issue, submitted.

1. Mr. Slattery claimed that there was a duty and it was breached. He relied on *Tournier*, the leading English case in which the courts in England determined that there is a duty of confidence imposed on a banker. Mr. Slattery was the principal of a company that had borrowed a very large amount of money and was a customer in that sense. The point in *Tournier* is that liability was imposed not just because of the fact that they were dealing with a customer, but also because of their character as bankers. So it falls upon a party in the position of Friends First to maintain the duty of confidence.

2. Mr. Browne said that he regarded Friends First as bound by duties of confidentiality towards Mr. Slattery.

3. Notwithstanding the question of a recognised duty imposed by law, this would be a suitable case for the implication of an implied term of confidentiality by reference to *Sweeney v. Duggan* and the other cases involving the officious bystander.

4. For breach of confidence compensatory damages can be awarded for the breach of confidence itself and aggravated damages are also available. A party is entitled to general damages either because it affects his business interests generally or because compensatory damages are available in a non business sense for breach of confidence, for exposing to others things that ought to be private to you. One does not generally, according to the Supreme Court, need to

separate compensatory damages from aggravated damages. Exemplary damages should be separated.

Consideration/Discussion

81. Mr. Van den Heuvel did not reveal details of the plaintiff's accounts or confidential information that the plaintiff had supplied or that other people had supplied about the plaintiff. The information concerned the plaintiff's conduct not his financial circumstances. Mr. Van den Heuvel's complaint was that the plaintiff had behaved dishonourably in his dealings with Friends First.

82. It seems clear that the intention was to damage the plaintiff in some fashion, but it could be suggested that it might also have been intended to be a lesson to the plaintiff or even, as the judge found, to be or to include a means of putting pressure on him. On any view, therefore, this was deliberate conduct that was intended to have a detrimental impact on the plaintiff's reputation.

83. The judge's conclusion that Mr. Van den Heuvel was acting as the agent of Friends First was as he said based on the evidence and is accordingly not open to being disturbed by this Court unless it is manifestly incorrect, which is something that does not arise. The judge was also entitled to conclude that Mr Van den Heuvel's justification was not credible.

84. That leaves the question whether there was a duty owed by Friends First that prevented it from revealing to third parties its grievance about the way Mr Slattery exploited its mistake as to Clause 2.2 of the Deed of Pledge and indeed, on the judge's findings, not only exploited the Friends First mistake but actually created the conditions for the mistaken execution of the deed in a manner that involved sharp practice.

85. On the face of it, given that the trial judge held that the plaintiff Mr. Slattery did engage in some chicanery in getting this clause into the deed, it seems to me that there would have to be a very clear obligation and/or prohibition on the revelation of such information to justify damages, not to mention a substantial award including aggravated damages.

86. For Mr. Slattery to be entitled to retain his award, it has to be the case that Friends First was prohibited from revealing to third parties that he had misled them into executing a deed containing a vital provision to which they had not agreed. The Court cannot see how such information can amount to protected confidential material so as to give rise to a claim for damages even if it is true.

87. Irrespective of motive, if what was said was untrue, it was clearly defamatory and Mr. Slattery was entitled to claim for damages.

88. Mr. Brown made concessions in his evidence in cross-examination about the obligation of confidentiality and Friends First's submissions acknowledge that, but they argue that it is a question of law, which is of course correct. Nevertheless, the fact that a senior executive of the company made this concession is not easy to ignore or to overlook court to declare as wholly irrelevant.

89. It seems to me that this question must be approached on the factual basis as follows, namely, first that the judge made the findings that he did as set out above. To summarise: First, there was a relationship of confidentiality created by the lending contract between Friends First and Claret Capital and Mr. Slattery as guarantor. Even if Friends First is not a bank, the relationship between the parties was analogous to one of banker and customer but not strictly or correctly the same. Second, there was a disclosure of information by an agent of Friends First that was intended to damage the business reputation of the plaintiff. Third, the judge found that the reason put forward for disclosing the information was not true. This point does not seem to add greatly to the case in view of the second point. Fourth, Friends First was not entitled to reveal this particular information because of the duty of confidentiality. It follows that the only real question that arises is in respect of this fourth point.

90. If there is clear authority to restrict the disclosure of information relating to the conduct of a person in his dealings with the entity that owes him the duty of confidence, such that the latter is prohibited from disclosing alleged wrongdoing with the intention of applying pressure on the person to desist from his behaviour or even to punish him for it, then it would be appropriate to uphold the award of damages. Otherwise, it seems to the Court that Friends First is entitled to succeed in its appeal against the award.

91. An analysis of *Tounier's* case does not support the award of damages, still less the award of aggravated damages in this case. In *Tournier v National Provincial and Union Bank of England* [1924] 1KB 461, the Court of Appeal in England held that a banker owes his customer a legal duty of confidentiality not to disclose information to third parties, and any breach of this duty could give rise to liability in damages if loss results. The duty arises on the opening of an account and continues after the account is closed. It covers all transactions concerning the account and information obtained by virtue of the relationship between the banker and its customer. There are of course exceptions which the Court recognised as where the bank is compelled by law to disclose the information, where the bank has a public duty to disclose the information, where the bank's own interests require disclosure and where the customer has agreed to the information being disclosed.

92. The confidentiality protects information gained during the currency of the account and it goes beyond the state of the account to information derived from the account itself.

93. In this case, Mr. Slattery did not have an account with Friends First and neither did the company, Claret Capital. The information that Mr. Van den Heuval revealed was not derived from any account, and as observed above, it did not concern the state of the company's relationship with its bank. It concerned Mr Slattery's conduct. The information that Mr Van den Heuval revealed did not emanate from a protected source in the records held by Friends First about the company or Mr. Slattery.

94. In all the circumstances, while this Court understands how the trial judge came to be critical of Mr. Van den Heuval's behaviour and disbelieved his account, it cannot agree that it gave rise to a claim in damages for breach of confidentiality. The Court finds is unnecessary to reach a conclusion as to whether it is possible to have an award for aggravated damages where the plaintiff has failed to prove a loss that would justify compensatory damages.

95. The Court accordingly allows Friends First's appeal against the award of damages on the counterclaim.