Neutral Citation: [2015] IEHC 12

THE HIGH COURT

Record no. 2012/7479P

Between/

Independent Trustee Company Limited

Plaintiff

-and-

Registrar of Companies

Defendant

Judgment of Mr. Justice Tony Hunt, delivered on 16 January 2015.

Facts

The facts relevant to the claim in this case were agreed by a joint statement signed on behalf of the parties in June 2014.

The plaintiff is a limited liability company incorporated in Ireland. The defendant is an officer established pursuant to statute to conduct and oversee the registration of companies registered under the Companies Acts 1963 to 2012 ("the Acts") and is responsible for maintaining and updating entries in the Register ("the Register") in relation to each company registered in the State under the Acts.

Since the introduction by the defendant of an electronic register in about 1991, the defendant creates an entry in the Register with regard to each registered company which is entitled "status" and which records that a company's status is either "normal", "strike off listed", "liquidation", "receivership", "ceased following cross-border merger" or "dissolved", as the case may be.

The application of these descriptions to a company is a long-standing practice of the defendant but is not and has not ever been a requirement of the Acts. Prior to 1991, the defendant maintained a hard copy file in respect of each company and applied a sticker indicating the relevant status of the company to the front cover of the hard copy file. No sticker was applied if the company status was normal, and this information was available to the public on inspection of the hard company file.

This status description forms part of the company information that is made available free of charge by the defendant, on the company search facility on the website maintained by it (www.cro.ie.). The status description of Irish registered companies is also made available by way of private commercial websites who make use of the proprietary information maintained by the defendant on the Register.

The plaintiff company carries on business as a pension provider and acts as the trustee to approximately 2750 unit trust funds. As the trustee of each fund, the plaintiff holds the legal title to the properties owned by each fund on trust for the beneficiaries of such fund.

The principal fund operated by the plaintiff is the Delta fund which was established by a Declaration of Trust made in writing by the plaintiff on 2 January 2002 ("the declaration of trust") (as modified by the first supplemental deed to the declaration of trust dated 25 May 2005) in favour of the various unit holders in the Delta fund. The Delta fund is subdivided into a series of several sub-funds which include Delta Fund 704530 ("the sub-fund").

Pursuant to clause 2.00 of the declaration of trust, the plaintiff stands possessed of the sub-fund's property upon trust exclusively for the unit holders of the sub-fund. Pursuant to clause 9.00 of the same document, the plaintiff is prohibited from dealing with the assets or property of the sub-fund for its own account unless authorised in writing by the unit holders of the sub-fund.

Pursuant to clause 5.10 of the declaration of trust the plaintiff is entitled to discharge from the sub-fund certain disbursements and administration expenses, and pursuant to clause 24.01 the plaintiff is entitled to be paid remuneration and fees out of the assets of the sub-fund. The plaintiff is in fact paid property management fees from rent received in respect of the sub-fund's property, and also uses the rent received to discharge other disbursements, including insurance costs and VAT.

By facility letter dated 20 November 2007 ("the facility letter") West Bromwich Commercial Ltd ("the lender") advanced £4,088,000 to the sub-fund to finance the purchase of Gloucester House, 399 Silbury Boulevard, Milton Keynes, England ("the property"). The loan was to be repayable over five year periods to be determined by the lender and clause 10.3 of the facility letter provided that the lenders recourse in respect of the loan was limited only to the assets of the sub-fund together with the security outlined therein.

By Deed of Legal Charge dated 16 April 2008 between the plaintiff as trustee of the sub-fund of the one part, and the lender of the other part, a first fixed charge was created over the legal and beneficial interest in the property. Under clause 15.1 of the deed of legal charge, the lender was entitled to appoint a receiver over the whole or any part of an asset which was secured in favour of the lender upon the occurrence of any of the events of default specified in clause 12 of that deed.

Pursuant to section 99(1) of the Companies Act 1963, prescribed particulars of charge (Form C1) were delivered to the defendant on 25 April 2008, by solicitors on behalf of the plaintiff, notifying the defendant for the purposes of s.99(1) that the plaintiff had on 16 April 2008 created a charge over the property. The said Form C1 was duly recorded by the defendant as a received submission and registered in respect of the plaintiff, and thereafter appeared as a registered charge on the Register maintained by the defendant in respect of the plaintiff as charge number 1372, being a security on the plaintiff's property or undertaking created by the plaintiff on 16 April 2008. The submission reference number allocated by the defendant to the said Form C1 was 5845819.

By letter dated 30 June 2011, the lender asserted that one of the aforesaid events of default had occurred, in that the maximum loan-to-value ratio between the property and the loan had been exceeded. On foot of this, by deed of appointment dated 4 July 2011, the lender purported to appoint Jonathan Edward Cookson and Harry Jolyon Peel Dunger as the receivers of the property, and of the rents, profits and income thereof. The receivers' appointment was limited only to the property, and did not encompass or attach to any other aspect of the sub-fund, nor did it extend or purport to extend to the plaintiff, or to any part of the assets of the undertaking of the plaintiff.

On about 7 July 2011, the lender lodged a Form E8 with the defendant, being the form prescribed for use in order to comply with the

obligations set out in section 107(1) of the Companies Act 1963, in which it notified the defendant of the appointment of the receivers over the property. The said Form E8 was allocated submission reference number 7636633 by the defendant. It stated that the receivers had been appointed on behalf of the holders of the following instrument under the powers contained in the instrument: "*Deed of Mortgage dated 16 April 2008 between Independent Trustee Company Limited and West Bromwich Commercial Limited*", which is the charge registered as charge no. 1372 in the Register of Charges maintained in respect of the plaintiff.

On the following day, 8 July 2011, the lender placed an advertisement in "The Irish Times" which gave notice of the appointment of the receivers over the property and which also referred to the plaintiff as being "in receivership". The placing of this advertisement by the lender caused great concern to the plaintiff's customers, business counterparties and creditors generally and following a number of enquiries, the plaintiff considered it necessary to issue corrective statements, both to its creditors and in the press.

Whenever a Form E8 is received by the defendant, it is recorded on the Register as a "Received" submission against the company to which it relates. When the E8 is processed by a staff member of the defendant, a check is carried out to ensure that the charge under which the receiver has been appointed is registered with the defendant in respect of the company concerned, and that the form is fully completed, signed and dated. The Form E8 is then registered by the defendant. On registration of a Form E8, the defendant's computer system operates to automatically change the company's status to "Receivership". This is for information purposes (that an E8 has been received and registered in respect of the company) and is also intended by the defendant to insulate the company concerned from enforcement measures by the defendant for non-filing of annual returns, such as strike off, which would terminate the legal existence of the company and impede the receivership.

The E8 was received by the defendant on 7 July 2011 and was recorded as "received" in respect of the plaintiff. On 11 July 2011, the plaintiff's solicitor rang the defendant's office and asked whether the defendant intended to change the plaintiff's status from "Normal" to "Receivership". The defendant informed the plaintiff's solicitor that normal procedures would be followed and that registration of the Form E8 would trigger a "*status change*" in respect of the plaintiff. The plaintiff's solicitor then wrote to the defendant on 29 July 2011 objecting to the status change.

Following the correspondence of 29 July 2011 and a further letter dated 31 August 2011 from the plaintiff, enclosing an opinion of junior and senior counsel, the defendant wrote to the presenters of the Form E8, Richard Black Solicitors, on 6 October 2011 to inform them of the objection of the plaintiff to the registration of the form E8, and of counsel's opinion which had been furnished to the defendant. The defendant queried whether that firm of solicitors wished to withdraw the Form E8 which had been filed by them in the light of the foregoing. The firm wrote back to the defendant on 11 October 2011 in the following terms, declining to withdraw the Form E8:

> *"It is our understanding that the company holds the legal ownership of the asset in question but does not hold the beneficial interest. Section 107(1) in our view is clear in its terms and requires a filing to be made where a receiver is appointed over the property of a company and does not distinguish between legal and beneficial interests. On this basis, it was and remains our view that a filing was required in this case and we do not intend to withdraw the Form E8."*

The defendant has agreed to refrain from making any change with respect to the plaintiff's "*status*" as it is recorded on the Register pending the trial of the action. The defendant has stated by letter dated 20 June 2012 that:

> *"Whenever the status designation "Receivership" is applied to a company following registration of Form E8 by CRO, the following explanatory note now appears directly beneath the status field:*
>
> *"Receivership" means that Form E8 (Notice of Appointment of Receiver) per s107 CA 1963 has been filed with the CRO in respect of all or part of the property of the company, which property may or may not beneficially owned by the company. Please refer to the relevant E8 form(s) for further information."*

The action was tried on 11 December 2014, when Mr. Lyndon McCann SC appeared for the plaintiff and Mr. Tony O'Connor SC appeared for the defendant. Both sides filed helpful legal submissions. The statement of facts was augmented by evidence from Mr. Aidan McLoughlin, who is a director of the plaintiff, and was the managing director at the time material to this case. He explained that the plaintiff carried on business as a trustee company, mainly holding property on behalf of self-administered pension schemes.

In general in such schemes, the pension holder picks the assets to be held on his behalf, and in the case of funds administered by the plaintiff, such assets are generally real property financed by borrowing. These schemes must be administered by an independent trustee such as the plaintiff, who is regulated by the Central Bank and audited by Grant Thornton. Trust assets managed by the plaintiff appear in the accounts of the relevant pension fund, and not in the accounts of the plaintiff.

Mr. McLoughlin produced a copy of the plaintiff's accounts, which state that the plaintiff, in its capacity as trustees of client's pension and ancillary funds, has numerous charges registered in the Companies Registration Office. The assets which are the subject of these charges are those of client pension and ancillary funds. They are not owned by the plaintiff and are not included in the financial statements of the plaintiff. Lenders financing the acquisition of such assets have recourse only to the relevant asset, and not to any other property of the plaintiff.

Mr. McLoughlin explained that the registration of charges took place in this case owing to a specific requirement by the lending bank. He also described the consequences of the publication of the advertisement by the lender in The Irish Times, which resulted in a storm of activity, involving a great deal of clarification and explanation to the plaintiff's own bankers, the regulator, other lenders and the plaintiff's staff. He stated that this was the first time that this had occurred, and that there have been similar occurrences since, for which the plaintiff is now better prepared, and which generally involve the plaintiff attempting to persuade lenders not to publish receivership notices, but to proceed directly to the sale of the distressed assets.

Under cross-examination by Mr. O'Connor, Mr. McLoughlin confirmed that the plaintiff had been established since 1994, and was capable of establishing subsidiary companies for the purpose of managing trust funds and assets under the control of the plaintiff. He also confirmed that he was familiar with the benefits and burdens of company incorporation, and that the Companies Office record relating to the plaintiff disclosed the creation by it of over 1000 charges over properties held by it as legal owner and trustee for various pension funds. He agreed that the Form E8 can also indicate beneficial ownership, and that it was possible for the viewer of a company record to delve into the details of the actual filings if the appropriate fee was paid by them.

Claim

Based on the foregoing, the plaintiff claims an injunction preventing the defendant from altering the status of the plaintiff on the

register of companies from "normal", a declaration that sections 107(1) and 317(1) of the 1963 Act do not apply to the appointment of the receivers over the property by the lender in this case, an injunction restraining the defendant from recording any notification from the lender that receivers have been appointed over the property, and an injunction restraining the defendant from publishing or notifying to any third party the fact that such notification has been received by it.

The Defence asserts that the property falls within the provisions of s.107(1) and s.317(1) of the 1963 Act, and denies that any third party would be misled by the terms used by the defendant in compiling and exhibiting the contents of the Register. It suggests that the plaintiff is not correct in the suggested interpretation of the relevant statutory provisions.

Submissions

Mr. McCann submitted as follows:-

a) The plaintiff has no beneficial interest in or right over the assets of the sub-fund, being possessed of the sub-fund's property upon trust exclusively for the unit holders of the sub-fund, and is prohibited from dealing with the assets or property of the sub-fund on its own account.

b) The assets of the sub-fund do not appear on the plaintiff's balance sheet because the plaintiff has no beneficial interest in them, in accordance with proper accounting practice.

c) The plaintiff had no *in personam* liability to repay the loan which the lender advanced under the facility letter, which imposed the obligation to repay the loan on the sub-fund, and provided that the lenders recourse in respect of the loan was limited only to the assets of the sub-fund.

d) The practice of recording the perceived status of a company in the manner described above is not mentioned anywhere in the Acts, but is simply a practice that has evolved over the years, explained by the defendant as being required for information purposes, and for insulating the company concerned from possible enforcement measures by the defendant for non-filing of annual returns.

e) Despite the fact that the practice has no statutory basis, information regarding the perceived status of the company by the defendant is available for free to all public users of the website maintained by the defendant, and to the users of private commercial websites who make use of the proprietary information maintained by the defendant on the Register.

f) Publicly available information regarding a company and its status is of crucial significance in its dealings with customers and creditors. The information that a company has been placed in "Receivership" creates a very harmful impression of its financial standing and conveys the impression that the company is in financial difficulty, is unable to pay its debts as they fall due, has had a receiver appointed over all of its assets and has the consequence that those dealing with the company cannot be sure that its assets will be available to discharge the debts which are due to them.

g) The purpose of the Register of Companies as maintained by the defendant is to provide information about a company to members of the public, so that persons who are contemplating whether or not to do business or to continue doing business with that company may make a better informed decision about the matter. In other words, the purpose of the register is to inform rather than to mislead. He cited Murphy J. in **Business Communications Ltd. v. Baxter** (High Court, 21 July 1995):-

> *"Since the introduction of legislation permitting people to incorporate with limited liability, it has been recognised that the protection which this conferred on those taking advantage of the privilege has to be counterbalanced by statutory provisions to protect and safeguard the interests of those dealing with them. The original and essential protection to those dealing with companies incorporated under the Companies Acts from time to time was the creation of a registration office in which would be filed the* ***essential information*** *in relation to companies incorporated under the legislation so that outsiders would have an opportunity to ascertain the persons constituting the corporation and be in a position to form some estimate as to the assets which would be available to meet its liabilities" (Emphasis added).*

h) A statement in the register of which confused members of the public into believing that it was insolvent, unable to meet its liabilities and had enforcement measures taken against assets owned by it because of such default, when such was not in fact the case, could never be properly regarded as "essential information" to enable those members of the public to form some estimate of its financial position.

i) The only statutory functions which the defendant is permitted to carry out concern the specific registration requirements as provided for in the Acts, and it does not have untrammelled authority to make any form of entry on the register save that which is authorised by statute. While the Acts require that certain information be maintained on a public register, such as the creation of charges, the appointment of a liquidator, the appointment of a receiver or the appointment of an examiner, there is no provision which permits the defendant to record the receipt of this information under the single heading "status" or in doing so, to use the label which is relevant to this case, namely "receivership". Moreover, there was no implied statutory power to use such a generic label where this was an inaccurate description of a situation where a receiver was appointed over part only of the company assets.

j) Various provisions of the Acts provide that both the defendant and third parties who deal with the company must be informed of the appointment of either a liquidator or a receiver. The application of a broad status label in a receivership situation was inappropriate because the function of a receiver was simply to secure the assets of a company which have been mortgaged or charged in favour of the debenture holder that appointed him. As the bulk of a company's assets may be unaffected by such an appointment, the general label "Receivership" was not an accurate description of the status of a company in such circumstances. It was argued that this description conveyed an impression that the company's assets generally had been affected by the appointment of a receiver and that the conduct of its affairs is under the receiver's stewardship, and was all the more inaccurate in circumstances where the asset in question was legally owned by the plaintiff subject to a trust, rather than beneficially owned by the company.

k) Sections 107(1) and 317(1) of the 1963 Act, which require notification where a receiver has been appointed over the property or part of the property of a company, must be construed in a manner whereby the phrase "the property" is taken to include only that property in which a company holds a beneficial interest, and does not encompass property where the company holds the legal title on trust for the benefit of certain beneficiaries, for the straightforward reason

that where a company holds assets on trust for others, those assets are not considered part of its property.

l) Although a literal reading of these sections required notification where a receiver has been appointed to the "property" of a company, in this case the receivers were not appointed to property of the company, but to property which the plaintiff holds on trust for the benefit of the sub-fund. The property is therefore an asset of the sub-fund and the plaintiff holds it on trust for the sub-fund, which has the exclusive beneficial interest therein.

m) It was well established that assets which are held on trust by a company for a third party beneficiary are not considered to be the property of the trustee company, and is not part of its estate so as to be available for creditors (citing Goode, Principles of Corporate Insolvency Law (3rd ed.) para. 6-35, **Sinclair v. Watson (1855) 20 Beav. 324, Barclays Bank Ltd. v. Quistclose Investments Ltd. [1970] A.C. 567, Carreras Rothmans Ltd. v Freeman Mathews Treasure Ltd. [1985] Ch. 207** and **Re Lehman Brothers International Europe [2009] EWCA Civ. 1161**).

n) Even if a literal construction of the phrase "the property" in the legislation includes assets which a company does not own and which are instead owned by trust beneficiaries, this construction would give rise to absurd and unreasonable results which would not reflect the plain intention of the relevant statutory provisions (citing **Nestor v. Murphy** [1979] 1 I.R. 326, and Denham J. in **Director of Public Prosecutions (Ivers) v. Murphy** [2005] 3 I.R. and s.5 of the Interpretation Act 2005.

o) This construction would give rise to absurd results because whereas the plaintiff derives no benefit from the trust's property, which does not form part of its assets, the company would nonetheless be required to inform all of its customers, clients and bankers of the appointment of the receiver to that property, on an application of the provisions of s.317(1) of the 1963 Act, which requires a statement to that effect on all company correspondence in these circumstances, which would result in the commission of a criminal offence if this requirement was not observed. In the case of a trust company, this would cause unnecessary alarm and confusion in circumstances where it was not beneficially entitled to ownership of the property in question.

p) The obvious intention behind the relevant provisions of the Acts was to warn persons either doing business or intending to do business with the company that the company has defaulted in respect of debts and other obligations for which it has a legal liability; that a receiver has been appointed over a particular asset assets; and that the income arising from the particular asset or assets is no longer available to the company and will therefore not be available to discharge the general debt of the company. In addition, such persons were able to ascertain by reference to the register of charges whether a company had encumbered its property or not.

q) Such notification serves no purpose where the company has no legal liability in respect of the underlying debt and where the receiver has been appointed over property which is held only by the company on trust for the benefit of others, and where the property would never have been available to satisfy creditors in any case. It is argued that an absurd and unreasonable result would ensue if a company is required to notify business counterparties of the appointment of a receiver with the appointing lender has no entitlement to call upon the company to repay the underlying debt, and that this serves to mislead rather than inform actual and prospective creditors.

Mr O'Connor submitted as follows:-

a) The primary issue for decision is whether section 107(1) of the 1963 Act applies to the charge and the appointment of the receivers in question. If so, then secondary issues of status designation and the application of section 317(1) arise.

b) If the question of status designation arises, then it is the broader explanatory note applied by the defendant to the transaction that falls to be considered, rather than the simple label "Receivership", as the defendant indicated prior to the issue of these proceedings that henceforth the expanded explanatory note would appear in the event of a receivership, indicating the possibility that the assets were not beneficially owned by the company, and referring the person inspecting the register to the specifics of the relevant E8 form(s) for further information.

c) The interpretation contended for by the plaintiff amounted to asking the court to legislate and created a new category of receiver, which the Oireachtas has not seen fit to provide in drafting the Acts.

d) The Acts do not distinguish between charges and receivers in the manner suggested by the plaintiff. The defendant was required by statute to register the Form E8 and therefore entitled to change the status of the plaintiff to "in receivership" following publication by the lender of the appointment of the receivers under section 107(1). The defendant at all times acted bone fide in the discharge of its duty to maintain a Register relating to companies incorporated under the Acts, and if the registrar had declined or failed to register such a charge, she would be acting ultra vires.

e) The system of applying status labels to a company entry on the Register simply amounts to providing a summary of information required to be maintained thereon by the Defendant. No issue had ever been taken with such practices from 1963 until the dispute giving rise to these proceedings.

f) s.99(1) of the 1963 Act provides for the registration of a charge creating security on the company's property or undertaking, including "*a charge on land, wherever situated*, **or any interest therein**". (Emphasis added).

g) This provision does not provide for any exemption or distinction in respect of property in the legal ownership of the company and held on trust for another or others, and property the beneficial ownership of which is vested in the company. It applies to all interests in property, whether legal or equitable, and provides unequivocally that all charges in respect of such property must be registered in order to be valid as against the liquidator or creditors.

h) The plaintiff proceeded to register the deed of charge pursuant to this provision, notwithstanding its current assertion that the company had no beneficial interest in the property. The plaintiff has not challenged its legal obligation to register deed as aforesaid, but now asserts that the lender had no obligation to notify of the appointment of receivers under section 107(1), which does not apply. There is a fundamental contradiction in the two positions taken by the plaintiff, in that both provisions applied to the "property" of the company.

i) s.107(1) provides that where a receiver is appointed in respect of the property of a company, the appointer is obliged within seven days to publish statutory notices of the appointment, and deliver the form prescribed (the Form E8) to the

defendant. The section or the prescribed form does not elaborate on or qualify the definition of "receiver", although the form itself allows for a field to be filled which indicates whether the receiver has been appointed to all or substantially the whole of the property of the company, or to part of the property of the company (the box ticked in this case) or the income arising from the property, or part of the property of the company.

j) Consequently, the Form E8 reflects the fact that the term "receiver" does not necessarily refer solely to a situation where the appointment of the receiver relates to all of the assets of the company. The Form E8 filed in respect of the Delta sub-fund fully describes the asset over which the receiver was appointed, and is clear on its face that the appointment was over part only of the property of the company, and under only one instrument of charge.

k) Receivership does not equate to insolvency and, furthermore, a receivership over part only of company property is a different proposition to receivership over all of the property. The defendant was entitled pursuant to section 370(1) to place on the Register a class of documents validly delivered to her, including the Form E8 the subject matter of these proceedings.

l) The assertion by the plaintiff that the appointment of a receiver necessarily implies that solvency is in question ignores completely the meaning of the word "receiver" as defined in section 323 of the 1963 Act as follows:-

> *"It is hereby declared that, unless the contrary intention appears…any reference in this Act to a receiver of the property of a company includes a reference to a receiver and manager of the property of a company and to a manager of the property of a company and includes a reference to a receiver or to a receiver and manager or to a manager, of part only of that property, and to a receiver only of the income arising from that property or part thereof; and…".*

m) The proposition by the plaintiff that the reference to "property of a company" in s.323 refers only to property that is beneficially owned by the company, so that a receiver appointed over an asset in respect of which the company has no beneficial interest would not be covered by the concept of a receiver, is a broad ranging proposition which is unsupported by the Acts themselves, in that not only is the term "property" unlimited in this way in the literal text of the Acts, this approach was also contrary to the common or ordinary meaning of that term.

n) There are many companies which may hold only legal title to assets whether due to the nature of the business undertakings (as in the case of the plaintiff) or as a result of the limitations contained in their memorandum or articles of association (for example a trustee holding property for a religious order, charities or clubs incorporated as companies limited by guarantee).

o) The plaintiff's argument taken to its logical conclusion would mean that all such companies would fall outside the remit of the provisions of the Acts insofar as they relate to receivers. This was a dramatic and wide-ranging redefinition of the term "receiver" with unquantifiable potential ramifications.

p) The exclusion of receivers over certain types of asset from all of the provisions of the Acts relating to receivers was never envisaged or intended by the Oireachtas, and the manifest and clear intention behind the use of the word "receiver" was to signify that the provisions applied to all receivers, whether appointed over the legal or beneficial interest in an underlying asset.

q) The various cases cited by the plaintiff depend on the disposition of corporate property in the particular circumstances arising on the facts of those cases, and have no application to the particular point of statutory interpretation at issue in this case.

r) The plaintiff's submissions ignored the fact that while as trustee it has no beneficial interest in the property under management, it is entitled under the Declaration of Trust to discharge certain disbursements and administration expenses from the sub-fund, to be paid remuneration/fees out of the assets of the sub-fund, and most particularly to be paid property management fees from rent received. Therefore, the plaintiff enjoys valuable commercial rights under the Deed of Trust in relation to the property and is entitled to benefit in a broader sense from contractual arrangements pertaining to the management of the property. Contractors providing maintenance, utilities or services to the property in question might be hampered in obtaining payment due to the appointment of a receiver over the property, and are entitled to know of facts sufficient to enable them to take relevant commercial decisions, through publication of the receivership and inspection of the Register and relevant documents of charge.

s) The meaning of "a receiver of the property of the company" in section 107(1) is clear. "Property" means any property, whether real, personal intellectual property rights, and whether a legal or equitable interest is held. The claim by the plaintiff that there is an absurdity to the literal meaning of the word "property" disregards a substantial body of case law which construes the jurisdiction to rely on interpretation other than literal interpretation very narrowly (citing Blayney J. in **Howard v . Commissioner of Public Works [1994] 1 I.R. 101**, Denham J. in **D.B. v. Minister for Health [2003] 3 I.R. 12** and Clarke J. in **Kadri v. Governor of Wheatfield Prison [2012] IESC 27**). The absurdity exception to the literal rule of interpretation is of limited ambit and can be deployed only in cases where there is firstly a clear absurdity, and secondly where the intention of the Oireachtas, had it addressed the issue, could be clearly discerned from the statutory text. It is not sufficient to demonstrate that the legislature has erred, or that it might have included more detailed provisions had it considered particular situations.

t) There was nothing ambiguous about the words used in the Acts, and there was no absurdity created by the literal interpretation of those words. On the contrary, a departure from the literal meaning of the words of the statute would give rise to an equally absurd result that all of the provisions of the Acts concerning receivers would be inapplicable to receivers appointed over trust property.

u) The defendant was entitled to use the system of status descriptions, either as originally constructed, or as modified prior to the issue of these proceedings as an administrative practice incidental to and consequential upon the performance of the express statutory duty to maintain a Register containing prescribed details of companies incorporated under the Acts. The system went no further than was necessary and appropriate to provide relevant information to interested members of the public.

v) The true position concerning the position of the plaintiff company was readily apparent from an inspection of the contents of the Deed of Charge, a copy of which must be maintained at the registered office of the company pursuant to

section 109 of the Act, and from the details contained on the particular Form E8 concerning this transaction. There was no evidence or warrant for anybody to draw a necessary inference from the Form E8 and the subsequent change to the status designation that the plaintiff was insolvent.

Discussion

The arguments advanced by the defendant are substantially correct, for the following reasons:-

The system by which the defendant applies "status labels" to the registered record of a company depending on certain events is not in excess of the powers granted to the defendant by the Acts to maintain a Register containing certain prescribed particulars relating to each company, for the protection and information of interested members of the public. She is obliged to register particulars of a charge and the appointment of a receiver on the application of an interested party when the wording of the Acts requires her so to do. In order to discharge this statutory purpose, she is entitled to organise and arrange the Register in a clear and comprehensible manner, in order to display the details required to be displayed by statute for the information of members of the public consulting the Register.

One of the main reasons why a member of the public might wish to inspect the Register is to ascertain the financial status and well-being of a company. The appointment of a liquidator or of a receiver to the whole or part of a company's property is usually generally indicative of the nature of this status or well-being. Having regard to this purpose of the Register, it is within the competence of the defendant to apply to the record of an individual company a factual description as to whether any of these situations are applicable to individual case, for the information of a person consulting the Register for this purpose. This can be fairly regarded as incidental to, or consequential upon the maintenance of the Register which the legislature has authorised, and cannot be construed as being *ultra vires* the defendant. The various states denoted by the labels devised and applied by the defendant all fall generally within the category of "essential information" regarding incorporated bodies, of clear interest to third parties attempting to ascertain the true financial position thereof.

In organising the Register in this way, the defendant is obliged to ensure that the label applied to a company is reasonably fair and accurate in the individual circumstances of each case. This presents no difficulty in a case where a liquidator is appointed, as this cannot apply to a part of a company's property, unlike the situation that may arise where a receiver is appointed. As the facts of this case demonstrate, receivership can apply to a part of a company's property, or to the entire property and undertaking of a company, and may have nuances and subtleties for ongoing business which are not applicable to a company which has simply gone into liquidation. Accordingly, it is reasonable to require the defendant to ensure that the manner in which the Register displays information pertaining to receiverships differentiates between the various possibilities, in so far as this is reasonably practicable.

In this respect, the criticisms made by the plaintiff of the application of a single "receivership" label are well founded, in circumstances where this does not adequately define the extent of the particular receivership situation. As has been pointed out by the defendant, a receivership does not necessarily connote insolvency on the part of the company, and may be limited in scope. On the other hand, the extent of the receivership may be so wide as to raise the issue of solvency. Whereas it is not accepted that a person consulting the Register is entitled to automatically assume that solvency is necessarily an issue where receivership occurs, the Register should provide some signpost to the correct details in each individual case.

The refinement introduced by the defendant in the form of the explanatory note which alerts the person inspecting the Register to the existence of the various possibilities regarding ownership, coupled with an invitation to inspect the individual Form E8 for applicable details is sufficient to meet this criticism, by drawing to the attention of the person consulting the Register to the location of particular facts delineating the extent of a receivership issue in an individual case.

As the issue raised in this case concerns the discharge by the defendant of functions conferred by statute, the starting point for consideration of the legality of the actions taken by the defendant is the wording of the relevant statutory provisions.

At this point, it is convenient to dispose of the arguments made by Mr. McCann based on case law that decides that property subject to trust obligations does not form part of the estate of the company for the various purposes set out in those cases. These decisions do not provide a proper interpretation of the word "property" when used as a statutory term, but stand for the uncontroversial proposition that property impressed with obligations in favour of third parties cannot be dealt with by a company in a manner contrary to those obligations, and in those circumstances will not subsequently be regarded as part of the general company assets available to creditors or other third parties.

For example, in **Sinclair v. Wilson**, the Madras Government notes which were pledged without the consent of the beneficiary were held by the court to have been separated and set apart as belonging to the plaintiff. The fact that they were thereby not available in the bankruptcy of the firm that pledged the notes does not in itself suggest that that firm did not have a proprietary interest in the notes. Sir John Romilly M.R. appeared to suggest that if the notes had been disposed of with the intention of benefiting the beneficiary rather than the firm, then the loss might have fallen on the beneficiary. The firm clearly continued to have a sufficient interest in the notes to apply them for a proper purpose, as distinct from an improper purpose, after the original purpose for which the notes were lent to the firm had been completed.

Similarly, **Quistclose Investments** simply decides that there is no difficulty in recognising the co-existence in one transaction of both legal and equitable rights and remedies. A loan made for a particular purpose can give rise to an equitable right in the lender to see that the money so advanced is applied for that purpose. Where a trust arises, a third party having notice of the trust is not entitled to retain property which is subject thereto. The case does not specifically support the proposition that a bare legal interest cannot be regarded as "the property" of the holder thereof.

Similar observations may be made about the other cases opened by the plaintiff in this regard. The principle central to all of these cases establishes only that property held subject to a trust is not available in a liquidation, or in any other scenario where creditors of a trustee company attempt to have access to the assets of the company, or for the purposes of a scheme of arrangement such as that proposed in the **Lehman Brothers International Europe** case.

These decisions are all directed to the availability of assets for various purposes, and not to the definition of "property" or to the allocation or nature of the various proprietary interests that may co-exist in such assets. Applied to the facts of this case, they demonstrate only that the property of the Delta sub-fund would not be available for similar purposes should the plaintiff company have acted in breach of trust by disposing of the assets in a manner inconsistent with the interests of the beneficiaries of the fund. The plaintiff was perfectly entitled to deal with and pledge the trust property in the interests of the beneficiaries, including charging

the legal interest with repayment of the purchase loan. The limitation of the effect of these decisions is set out by Goode, who states that trust property does not form part of the company estate "*so as to be available for creditors*." (Emphasis added). They do not decide that a legal interest in property is not available for other legal purposes.

The core decision taken in this case was that of the plaintiff company to receive and hold the property in trust for the Delta sub-fund in its own name, rather than in a separate and subsidiary vehicle incorporated for that purpose. This course of action had the practical effect of interposing the corporate person of the plaintiff into the trust scheme. In doing so, the plaintiff clearly acquired a proprietary interest in the property, which falls within any ordinary definition or conception of the term "property".

Moreover, the plaintiff thereby clearly acquired an interest in land susceptible to the provisions of s.99(1) of the 1963 Act. It acquired the legal interest with the ultimate purpose of benefiting the sub-fund unit holders, but only with the assistance of the large sum advanced by the lender. Presumably the lender stipulated that the security required for this advance was a charge upon the legal interest in the property held by the plaintiff, and not any other interest therein. This fact alone demonstrates the substance and vitality of the interest of the taken by plaintiff in the property. In compliance with the stipulation, the plaintiff agreed with the lender for the execution of the Deed of Charge.

Mr. McCann characterised this step as a requirement of the lender, rather than a strict requirement of the Acts, in circumstances where the legal ownership of the property was held in trust for others. This submission ignores the provisions of s.99 of the 1963 Act. The subsequent registration of the charge in favour of the lender is recognition of the fact that the plaintiff held a proprietary interest sufficient to be charged with the repayment of the loan taken out to finance the asset. No alternative method of securing the loan has been suggested by the plaintiff. The lender would hardly have advanced the sum in question without a form of security that enjoyed the protection and priority conferred by registration of their charge under s.99.

The unreality of this submission is plain when one considers an alternative scenario, whereby the lender depends on the beneficial interest for security for the loan advanced, rather than the legal interest held by the plaintiff. Quite apart from any difficulty in ascertaining who might hold that interest for the purposes of obtaining security, the nature and extent of the beneficial interest in the trust property might not be particularly desirable or completely watertight for the purposes of such security.

It is by no means clear that the holders of the beneficial interest possessed a proprietary interest in the trust assets of equivalent substance and strength to the legal interest held and exercised by the plaintiff on their behalf. This scenario is also at odds with the fundamental nature of a pension trust, which requires the interposition of a trustee until benefit can be drawn down, and forbids direct management or ownership of the pension assets by the beneficiaries until that entitlement arises.

The debate as to the true nature of the interest of a beneficiary of a trust is one of long-standing. One view suggests that there cannot be two owners of the same thing, and what the beneficiary really owns is the obligation of the trustee (a right *in personam*), coupled perhaps with the right to follow the trust assets into the hands of others (a right *in rem*).

The wider view suggests that the legal estate is a mere "shadow" following the equitable estate, which is the substance of the property, and the beneficiary may enforce a form of ownership against all but the *bona fide* purchaser for value without notice. On either view, if the beneficial interest was to be charged with repayment of the purchase loan, that interest could be defeated or impaired by the trustee dealing with a *bona fide* purchaser for value without notice, in a way that the legal interest could not.

By electing to hold the legal interest in the property, the plaintiff engaged the operation of all relevant provisions of the Acts. Legal ownership of the trust property is not a mere formality for the plaintiff. It enabled the plaintiff to secure the considerable finance required in order to construct the trust in favour of the beneficiaries and thereafter enabled the plaintiff to derive income from management of the trust asset.

It also cannot be said that the fact of receivership of trust assets is irrelevant to third parties. For example, the plaintiff seems to be entitled to incur obligations to third parties in the course of the management of the trust property. These debts are defrayed from the income of the property. The fact of the appointment of receivers to the trust property is surely "essential information" for persons who have either dealt with the plaintiff in this manner, or who might be contemplating such a course of action. It is hardly within the spirit of the Acts that there should be a class of receivership which is invisible to concerned persons who have recourse to the Register in these circumstances.

The true position is that the plaintiff's power to deal with this property as legal owner was considerable and substantial, and subject in the ordinary way only to the constraints imposed by the trust. In an echo of the facts of **Sinclair v. Watson**, the plaintiff here was perfectly entitled to execute a charge on the property for the proper purposes of the sub-fund, but would not have been entitled to exercise that power for another improper purpose. This suggests that the plaintiff enjoyed very real and substantial proprietary rights in the asset in question.

As the case law opened by the plaintiff does not determine the arguments made by it, it is necessary to turn to the construction of the relevant statutory provisions. They may be summarised as follows:-

s.99(1) renders void against a liquidator or creditors charges for security on the company's property or undertaking, unless prescribed particulars of the charge, verified in the prescribed manner, are delivered to or received by the defendant for registration as required by the Acts within 21 days after the date of creation thereof.

s.99(2)(d) applies the section to "*a charge on land, wherever situate, or any interest therein…,* as well as to a long list of charges on other types of property. The phrase "*any interest therein*" makes it perfectly clear that proprietary interests in land are defined widely rather than narrowly for the purposes of charge creation and registration.

s.107(1) provides that any person who obtains an order for the appointment of "*a receiver of the property of a company*" or appoints such a receiver under any powers contained in any instrument shall within seven days after the date of the order of the appointment publish in the *Iris Oifiguil* and in at least one daily newspaper circulating in the district where the registered office of the company is situated, and deliver to the Registrar of Companies a notice in the form prescribed.

If the plaintiff is correct in the argument that the construction of the term "property" in s.107(1) of the 1963 Act excludes bare legal ownership of an asset, it seems to follow that this interpretation of the term must be narrower than that implied by the definition of chargeable interest used in s.99, and that there is a category of charges registered under that section which permit the appointment of receivers who are not then subject to the notification requirements of s.107(1), simply because the property in question has separate legal and equitable interests.

It also follows that the plaintiff was apparently content to secure for the lender the protection conferred by registration of the charge on the legal interest in the property under s.99, but seeks to avoid the consequences of the application of the provisions of s.107(1) to a receiver appointed under the same deed of charge. There is an apparent contradiction in the stance of the plaintiff with respect to the operation of both sections on the facts of this case. The issue is whether the proper construction of those provisions justifies the existence of such a distinction.

The submission made by the defendant as to the broad application of s.99 is correct, in that it applies to all land, wherever situate, or any interest therein, and does not provide for any exemption or distinction in respect of property in the legal ownership of a company and held on trust for another or others, and property where both the legal and beneficial ownership are both vested in the company. The terms of the section expressly apply to all interests in property, whether legal or equitable, and are unequivocal in the providing that all charges in respect of such property must be registered in order to be valid as against the liquidator or creditors.

Similarly, s.107(1) and the form prescribed thereunder (the Form E8) refer to a "receiver" without additional elaboration or qualification. In addition, the Form E8 contains a field which permits a distinction to be drawn between situations where the receiver has been appointed to "the whole or substantially the whole of the property of the company" as opposed to "part of the property of the company". The latter box was filled in on the Form E8 delivered in this case.

Consequently, this form clearly describes to the careful reader of the Register the full extent and limits of the receivership in question. In these circumstances, it is somewhat curious that the plaintiff received such an extreme reaction to the publication of the statutory notice by the receivers of the trust property, because many of the persons who subsequently contacted the plaintiff must have been familiar with the long-standing nature of the trust business carried on by the company, and with the fact that the trust administration business primarily carried on by the plaintiff was unlikely to be seriously affected by the receivership of one asset managed by it.

The defendant is also correct in submitting that where there is a statutory direction that certain documents relating to a company are received by the defendant, it is clearly contemplated by section 370(1) of the 1963 Act that the defendant is obliged to place such documents on the Register for the purpose of display and inspection by interested persons.

The first port of call where a statutory term is to be interpreted is set out by Blayney J. in **Howard** as follows:-

> *"The first condition that has to be satisfied before recourse can be had to construction by implication is that the meaning of the statute should not be plain."*

Secondly, it appears that resort cannot be had to a secondary purposive approach unless there is ambiguity in the wording of the statute. In D.B., Denham J. held as follows:-

> *"In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blayney J. in* ***Howard -v- The Commissioners of Public Works [1994] 1 I.R.101****. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the Acts themselves. If the words of the statute are clear and unambiguous then no more is necessary than to give them their ordinary sense. When the words of the statute are plain and unambiguous they declare best the intention of the legislature. If the meaning of a statute is not plain then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. In that case I held also that statutes should be construed according to the intention expressed in the legislation and that the words used in the statute declare best the intent of the Act."*

It appears that this approach to statutory legislation has not been altered by the provisions of s.5 of the Interpretation Act 2005. In **Kadri** Clarke J. adverted to this matter in the following terms:-

> *"It seems to me that there is at least a broad similarity between that area of jurisprudence (the jurisdiction of the courts to imply terms into contracts) and the intent behind at least aspects of s.5(1) of the Interpretation Act 2005. It is important to note that the construction which that section requires is one that "reflects the plain intention of (the legislature) where that intention can be ascertained from the Act as a whole". It is clear, therefore, that it not only is necessary that it be obvious that there was a mistake in the sense that a literal reading of the legislation would give rise to an absurdity, would be contrary to the obvious intention of the legislation in question, but also that the true legislative intention can be ascertained. There may well be cases where it may be obvious enough that the legislature has made a mistake but it may not be at all so easy to ascertain what the legislature might have done in the event that the mistake had not occurred.*
>
> *Third, it is worth noting that the first part of s.5(1) concerns ambiguity or obscurity. For the reasons advanced by Fennelly J. it seems to me that the wording in this case is clear and does not admit of any ambiguity or obscurity. The second part of the section concerns mistakes in the sense addressed in the previous paragraph. It may well be that there is a difficulty with the fact that the legislation does not address what is to happen in circumstances such as arose in this case were a detained person, in the latter part of an eight week period, so strenuously resists deportation that it proves impossible to give effect to deportation within the eight week period. That the legislature might have wished to make some provision for such a situation could well be considered likely. However, it seems to me that the construction argued for on behalf of the Governor in this case falls foul of s.5(1) in two respects.*
>
> *First it does not seem to me that the literal construction is absurd. There were sound policy reasons for imposing a time limit on a form of detention that might, if it could be open-ended, be considered unjust and, possibly, unconstitutional. The reason for imposing a time limit on the aggregate amount of detention was, as Fennelly J. has pointed out and as I agree, for the reasons set out by Herbert J. in the High Court, (unreported, 30 September 2003) in Okarafor being to prevent the use of multiple periods to get round the eight week limit. Neither does the imposition of such an eight week limit appear to be contrary to obvious legislative intent.*
>
> *This is not, therefore, a case where a literal construction of the legislative measure is absurd or fails to reflect the clear legislative intent. Rather this is a case where it may well be that, had the Oireachtas properly addressed its mind to the question, it might have considered including some additional provisions in the Act to allow the eight-week period to be extended in appropriate circumstances. However, it is by no means clear as to what precise provisions would have been included by the Oireachtas had it so addressed the question."*

Clarke J. then enumerated the possible matters that might have been considered by the legislature in addressing the insertion of

provisions other than those actually appearing in the statute in question. He continued as follows:-

> *"I raise all of these questions not for the purpose of indicating that this Court has any necessary role in deciding the answers. Rather I raise them to demonstrate that the precise type of measure which could or should have been put in place to deal with the sort of problems which arose in this case are not a given. The introduction of those measures requires, as Fennelly J. has said, legislation, and cannot be introduced in the detailed manner required by a strained (beyond the point of breaking) interpretation. To use s.5 of the Interpretation Act 2005 to justify the regime argued for on behalf of the Governor would, in my view, to be use (or perhaps abuse) a section which mandates a sensible or purposive construction to, in effect, rewrite the legislation by inserting a series of detailed measures to which the Oireachtas did not address its mind. In my view such a course of action would not be warranted."*

The first task is to determine whether there is any ambiguity in the language used in the Acts. There is no such ambiguity in respect of either the term "property" as used in s.107(1) or the term "receiver" as defined by s.323 of the 1963 Act. Each word is used in a simple, straightforward and unqualified manner, and there is nothing otherwise apparent from the Acts to suggest that the refinements or distinctions advocated by the plaintiff ought to be applied to the words in question.

On the contrary, the broad definition of chargeable interests set out in s.99 tends to suggest the conclusion that the word "property" used in the associated s.107 ought to be construed in a similarly wide manner. Any ordinary definition of this word suggests that it includes the full range of interests in property, and is clearly taken to include the real and substantial interest represented by the legal ownership of property. Equally, the statutory definition of "receiver" in the 1963 Act (quoted above) is plain and simple, and there is once again nothing in the Acts that tends to suggest that the provisions of the Acts should not to apply to receivers appointed in a certain limited category of circumstances.

The possible division of title to property into legal and equitable interests was presumably well known to the drafters of the Acts. Had they intended the application of the Acts to be conditional upon the category of interest held by a company incorporated under the Acts, they had a clear opportunity to say so. The application of the literal meaning of these words results in a comprehensive and harmonious administration of both the companies Register generally, and the procedures for the registration of charges and appointment of receivers in particular. To adopt the interpretations suggested by the plaintiff would, in fact, constitute an unwarranted interference with the plain and unambiguously expressed intention of the Oireachtas, and would amount to a form of judicial legislation which is beyond the competence of the court.

There is no absurdity in the result produced by the application of the plain and ordinary meaning of these terms. Absurdity in this context requires a result that might fairly be regarded as wildly unreasonable, illogical or inappropriate. None of these epithets can be applied to the outcome in this case, which was the predictable result of various choices was made by the plaintiff. In fact, the practical consequences of the statutory interpretations suggested by the plaintiff are more likely to produce an absurd outcome. In addition, it was open to the plaintiff to structure its operations so as to segregate the day-to-day business of administration of trust funds from the consequences of holding of legal title to property in order to facilitate the activities of the pension funds.

There is no doubt that the outcome is inconvenient for the plaintiff, but this cannot be regarded as synonymous with "absurdity". The consequences described by the plaintiff, together with a requirement to advert to the fact of receivership on business notes or correspondence may all be avoided by measures to segregate the day-to-day business of trust administration from individual asset holding. The difficulty in this case, if such it is, falls entirely within the situation described by Clarke J. in **Kadri**. Firstly, there is no ambiguity in the statutory provisions under consideration. Secondly, there is no absurdity in the result produced by an application of the literal meaning of the relevant statutory words. Thirdly, even if there is an ambiguity producing an absurdity, the solution suggested by the plaintiff is of the variety that has potential consequences better addressed by legislators rather than by judicial interpretation, in that the suggested solution does not derive from other language used in the Acts.

If the Oireachtas wished to legislate specially for the position of trust companies such as the plaintiff, it has had many opportunities so to do. The problem undoubtedly encountered by the plaintiff in this case could well be addressed by legislation, but if this was thought to be desirable, it would require precise evaluation in order to design a solution in harmony with the overall operation and administration of the company law system as currently understood.

Decision

The solution to this case was neatly identified and expressed in the correspondence from the lender's solicitor. The literal interpretation of the relevant statutory terms is clear, and does not produce an absurd result. Therefore, there is no room for the adoption of the statutory interpretations advanced by the plaintiff, either on the basis outlined in argument and submissions, or at all. In the circumstances, the plaintiff's claim must stand dismissed.