

## THE HIGH COURT

## CHANCERY

[2014 No. 10540P]

## BETWEEN:

DANIEL SACCO now BOYLAN

PLAINTIFF

-AND-

KENNETH FENNELL AND LUIGI SACCO

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 3rd November, 2017.

**Summary**

1. The proceedings in this case involve a claim by Mr. Daniel Sacco against his father, Mr. Luigi Sacco and Mr. Kenneth Fennell ("the Receiver"), a receiver appointed by IIB Bank (now KBC Bank Ireland Plc) (the "Bank"). The claim against Mr. Luigi Sacco was undefended. The claim against the Receiver relates to a takeaway chip shop at 116 Ranelagh Road, Dublin known as 'Luigi's Takeaway' and two apartments over the takeaway which property was mortgaged by Mr. Luigi Sacco to the Bank (the "premises").

2. Mr. Daniel Sacco is suing the Receiver of the premises as he alleges that he is the true owner of that premises, rather than his father, and that while he is not taking any issue with the validity of the appointment of the Receiver, he claims that his ownership of the premises takes priority over the rights of the Receiver. While the plaintiff claims to have an ownership interest in the premises, the interest he is claiming in the premises was not registered in the Registry of Deeds at the time of the registration of the Bank's interest in the premises, nor has the alleged ownership interest been subsequently registered in the Registry of Deeds. In light of the inconsistent evidence in this case, the key issue is whether on the balance of probabilities the plaintiff did in fact acquire an ownership interest in the premises, as he alleges, from his father in 1998/1999 which interest he claims would then take priority over the subsequent mortgage by his father of the premises to the Bank.

**Background facts**

3. Mr. Daniel Sacco is 37 years of age. In 1998 he was awarded £417,000 as compensation for the loss of his leg in a car accident which occurred in 1992 when he was 12 years old. In his evidence, the plaintiff stated that he was "*robbed*" by his father of this money and has nothing to show for the very unfortunate accident that befell him when he was very young. This is because the plaintiff claims that most, if not all, of his compensation was consumed by certain dealings with his father; first, the purchase price for an ownership interest in the premises (some £153,000 plus £20,000 for fit-out and equipment) which is the subject matter of these proceedings; secondly, another tranche was given to his father (some £200,000) to be invested in a restaurant business in Dame Street, which investment came to nought; and thirdly, the balance was lent to his father and never repaid.

4. So aggrieved is the plaintiff that on the 23rd February, 2016, he changed his surname by deed poll to adopt his mother's surname, Boylan, so that now he is known as Daniel Boylan. However, since most of the evidence provided in this case refers to him as Daniel Sacco, this name is used by the Court in these proceedings.

5. The essence of the plaintiff's claim before this Court is that he agreed to buy an ownership interest in the premises in September of 1998 from his father. On the 4th September, 1998, he transferred the bulk of the £417,000 award into a bank account in the joint names of himself and his father and then on the 23rd March, 1998, from this account he paid his father £153,000 by bank draft, which he says was the purchase price for the premises. He also paid his father a further £20,000 by bank draft of the same date for the fit out of the premises and for equipment for the purpose of trading the take away business. Crucially no Deed of Transfer was produced in evidence to support this claim nor was the alleged ownership interest of the plaintiff in the premises ever registered. While evidence has been produced to the Court that the plaintiff paid his father the sums alleged, since copies of bank drafts of the relevant sums have been produced, there is little direct evidence that this payment was made in return for an ownership interest in the premises apart from the plaintiff's testimony. In this regard, the plaintiff did provide sworn evidence on the second day of the trial that, on the 23rd March, 1999, in the offices of Mr. Ronnie Ringrose, solicitor (now deceased), the plaintiff and his father executed a Deed of Transfer which transferred the ownership of the premises from his father to him. He accepts that this alleged interest which he has in the premises was never registered in the Registry of Deeds and that Mr. Luigi Sacco remains registered in the Registry of Deeds as the owner of the premises. He relies, inter alia, on the payment of the money, the fact that he registered the business name 'Luigi's Takeaway' in his own name on the 3rd September, 1998, the fact that he paid rates for the takeaway and that in 2001/2002 he invested €60,000 in refurbishing the apartments over the takeaway as evidence of his acquisition of an ownership interest in the premises.

6. On the basis of his alleged acquisition of the ownership of the premises in 1998/1999, the plaintiff alleges that his father should not have mortgaged the premises to the Bank on the 14th August, 2002, and that the Receiver appointed by the Bank is not now entitled to possession of the premises, since the plaintiff's unregistered ownership interest in the premises which he says he acquired in 1998/1999 takes priority over the Bank's mortgage (which was registered on the 8th November, 2002). On this basis, the plaintiff also claims that his ownership interest in the premises takes priority over the rights of the Receiver appointed pursuant to that mortgage.

7. No evidence was adduced to show that the Bank was on actual notice of the alleged ownership interest of the plaintiff when the mortgage between the Bank and Mr. Luigi Sacco was executed in 2002. Evidence was however produced to the effect that the plaintiff ran the takeaway from 1998 to 2004. In 2004 he became a property developer on a full-time basis, and was involved in the development of a housing estate in Carpenterstown, County Dublin. As a result, from 2004 until late 2014 (just before the Receiver took possession of the premises), the takeaway was run by a Mr. Marco Bertuzzi. Two leases were produced in evidence, a lease dated 1st January, 2009, between Mr. Bertuzzi and the plaintiff, and a lease dated 1st January, 2012, between Mr. Bertuzzi and Mr. Giuliano Sala as tenants and the plaintiff as landlord.

8. This Court has some concern about the authenticity of the lease dated 1st January, 2012, and in particular the credibility of the claim by Mr. Daniel Sacco in his evidence to this Court that it was executed in the presence of his former partner, Ms. Pamela Hanley. This is because her name is spelled correctly where it witnesses the plaintiff's signature, but it is spelled incorrectly, as 'Hanely',

where her signature witnesses Mr. Bertuzzi's signature.

9. On the 18th February, 2014, the Receiver was appointed to the premises. Just over a week prior to the Receiver taking possession of the premises, on the 11th December, 2014, the plaintiff resumed his occupation of the takeaway premises.

10. A key issue in this case is whether on the balance of probabilities the account provided by the plaintiff, of his acquisition of an ownership interest in the premises from his father by oral agreement and subsequent execution of a Deed of Transfer, is true. This is because if the plaintiff did not acquire an ownership interest in the premises as alleged by him, then there is no basis for his claim that he owns the premises and that his ownership interests take priority over the rights of the Receiver.

#### **Analysis of the evidence**

11. It is important to note that the only evidence which was provided to this Court of the existence of the Deed of Transfer in favour of Mr. Daniel Sacco was his own oral evidence on the second day of the trial. For this reason, it is relevant to set out that evidence in some detail. On day two of the hearing, at page 87 of the transcript in the course of the plaintiff's examination in chief, it is stated:-

Q. And what did you understand you were going to receive from Luigi Sacco?

A. The complete ownership, the ownership of the whole premises, that's what he was selling to me. He was selling it to me, I owned it, that's what he said.

Q. And once again, because it is important to be specific on this, what did you understand by ownership of the premises?

A. Ownership meaning I owned it, I was going to own the whole property. I owned it, I was buying it. I was giving him £173,000 for the property. I owned the property, that's what I --

Q. Was there any reference at this time to you paying him rent in respect of that premises going forward?

A. No, no, no. I gave him £173,000 and that was for the ownership, that's what I thought I was buying, was led to believe I was buying.

Q. Can I ask you then were there any dealings with Mr. Ringrose in respect of this agreement?

A. There was --

Q. Because Mr. Ringrose was obviously your solicitor acting for you at the time?

A. There was. Mr. Ringrose was instructed to do the paperwork of the -- get the transfer of the ownership on foot of this, that's what he was instructed to do, because he represented both myself me and my dad at the time and that's what he did do.

At pages 92 to 93 of this direct examination, it states:-

Q. Can I ask you whether or not you ever executed such a deed yourself?

A. I did, yes.

Q. Where did that take place?

A. On the same day. It took place in Ronnie Ringrose's office.

Q. Okay, on what date again?

A. On the same date that the drafts were given, I gave him the drafts in Ronnie Ringrose's office, he was paid.

Q. If you could speak up just --

A. I says in RT Ringrose's office, in Ronnie Ringrose's office.

Q. Okay.

A. The day we signed -- the day I signed the transfer of ownership.

Q. The day you signed the transfer of ownership?

A. Yes.

Q. Can I ask you if you were provided with a copy of the deed?

A. I just remember signing the papers at the time. I wasn't --

Q. Was your father there also?

A. He was, yes.

Q. Can I ask you whether or not your father was involved in this process as well?

A. Yes, he had to sign, both of us had to sign the papers.

Q. Have you a copy of that deed in your possession now?

A. No.

Q. And have you seen it at any time since --

A. No.

Q. -- March 1999?

A. No.

On day three of the hearing, in the course of the plaintiff's cross examination, at pages 75 and 76 of the transcript, it states:-

Q. Okay. That's fine. Yesterday in the witness box -- and this is very important now, Mr. Boylan -- you told us that a transfer was executed by you --

A. Yes.

Q. -- and your father --

A. Yes.

Q. -- in the office of Mr. Ringrose in March 1999.

A. Yes.

Q. But that it hasn't shown up, in effect nobody has been able to find it.

A. That is correct.

Q. And Mr. Ringrose is now deceased?

A. Yes.

Q. And I take it you'd agree with me that from your perspective that's a very important fact in the case, that you executed this document in March '99?

A. Yes.

Q. Would it be fair to say that's almost a centrepiece of

your case --

A. Yes.

Q. -- that you executed such a document?

A. Yes.

Q. And from your point of view it is then unfortunate, obviously, that you can't find the document. And Mr. Ringrose's death may have something to do with that. But how and ever, your evidence is that you did execute such a document --

A. Correct.

Q. -- in March '99?

A. Yes.

12. In deciding whether the plaintiff acquired an ownership interest in the premises, this Court has to have regard not only to this evidence regarding the centrepiece of his case, namely the execution of the Deed of Transfer, but also all the other evidence in this case. Based on an assessment of all of the evidence, this Court finds that on the balance of probabilities the plaintiff did not acquire an ownership interest in the premises in return for the money paid by him to his father in March 1999 and that Mr. Luigi Sacco did not execute a Deed of Transfer in favour of the plaintiff at that time or subsequently. This Court bases its conclusion on the following evidence.

### ***Reason 1 - Evidence of the solicitor***

13. The plaintiff's solicitor in 2012 was Mr. Paul Maher of O'Leary Maher. He was engaged by the plaintiff because by that time relations between the plaintiff and his father had broken down as his father was pursuing the plaintiff for unpaid rent for the premises, which the plaintiff now claims that he owned all along. This claim for unpaid rent was being pursued by Mr. Luigi Sacco through his solicitor Mr. Gerard Cosgrove of Branigan Cosgrove Finnegan. In his direct evidence, Mr. Maher stated:-

"I was first instructed by Daniel in or about late 2012. His instructions were to me that he had been effectively in continuous occupation of the premises at 116 Ranelagh since 1998 and it was his understanding, at that time, that there had been a 35-year lease drafted by Mr. Ronald Ringrose, solicitor, but unfortunately Mr. Ringrose, who I had known also, had since died in the meantime."

These instructions which Mr. Maher received from the plaintiff, that he was a tenant in the premises and that a 35 year lease, rather than a Deed of Transfer had been signed with Mr. Ringrose, are in clear contradiction to the plaintiff's evidence before this Court that he was the owner of that premises since 1998/1999.

14. In addition, in his cross examination, in apparent reference to the £153,000 (which it is to be noted approximates to €193,000) and which the plaintiff claims was the purchase price paid to Mr. Luigi Sacco for his ownership interest in the premises, Mr. Maher

stated that:-

"....evidence was also given to me of funds €193,000 transferred to Luigi's Italian account.

Q. Is that your note?

A. That's the e-mail I received, yes.

Q. That's the e-mail you received. Okay.

A. The funds were for rent and other outlays.

Q. The funds were for rent and other outlays?

A. Sorry, part of these funds. Part of these funds.

Q. Was for rent and other outlays?

A. Part of them.

Q. Okay.

A. "I have also given Luigi Sacco substantial amounts of cash as loans."

Q. As loans. Okay. And those were his instructions to you?

A. As loans, yes, but he said part of the money was for other outlays."

15. Thus, based on this evidence, Mr. Maher's instructions in 2012 from the plaintiff were that the plaintiff had signed a 35 year lease with Mr. Ringrose, and not that he had signed a Deed of Transfer. Also, it seems that his instructions were that part of the lump sum payment of £153,000 paid by Mr. Daniel Sacco to his father was a payment of rent and other outlays.

16. It is difficult for this Court to reconcile the clear and compelling evidence of the plaintiff's then solicitor that he became a tenant in 1998/1999 with the evidence of the plaintiff now that he bought the premises in 1998/1999. However, this is not the only evidence that contradicts the plaintiff's claim in these proceedings that he acquired an ownership interest in the premises in 1998/1999.

### ***Reason 2 - Execution of sham lease by Mr. Daniel Sacco***

17. The second reason is that a lease, which is dated 10th March, 2008, between the plaintiff and his father for the lease of the premises for a 25 year term from that date was produced in evidence (the "2008 Lease") to this Court. This 2008 Lease identified Mr. Luigi Sacco as the landlord of the premises and the plaintiff as the tenant and it specified a monthly rent of €1,651. It is self-evident that if the plaintiff was the owner of the premises since 1998/1999, as alleged by him, it would be illogical for him to sign a lease as a tenant with his father in 2008.

18. In order to explain this clear inconsistency, the plaintiff, in his evidence to this Court indicated that his father asked him to sign the 2008 Lease in order to support his father's endeavours to restructure loans with the Bank and in particular to enable his father show to the Bank that he had a stream of rental income. On this basis, the plaintiff claims that this lease was therefore only for "*bank purposes*" to assist Mr. Luigi Sacco obtain finance and so it was a sham or fake lease and that he was at all times the owner of the premises.

19. However, some years later in March of 2013, Mr. Daniel Sacco brought the 2008 Lease to the attention of his then solicitor, Mr. Maher. Not only did he not advise Mr. Maher that it was sham document, but (as noted below) in solicitors' correspondence he sought to expressly rely on that lease to establish that he was in fact a tenant of his father's in the premises, that he now says he owns.

20. If this Court were to conclude that it did not believe the retrospective explanation for the execution of the 2008 Lease by the plaintiff, namely that it was a sham lease executed for bank purposes, and instead conclude that it was a genuine lease as alleged by him through his solicitor in 2013, it would be further evidence which is inconsistent with his current claim that he became the owner of the premises in 1998/1999. In support of such a conclusion is the fact that rent was actually paid under the alleged 'sham' lease by the plaintiff to Mr. Luigi Sacco, yet if the only purpose of this lease was to hoodwink the Bank into believing that Mr. Luigi Sacco was getting money, it would seem that there would be little or no reason for the rent to be actually paid. It is clear that rent was paid under this allegedly sham lease because Mr. Orazio Grosso of Grosso & Maldonado, the plaintiff's current solicitor stated in his letter of 14th November, 2014, to the Receiver's solicitors in reference to the 2008 Lease that:-

"Monies payable under this said agreement were paid by our Client for a period of one year, after which point it was agreed between our Client and his father that no further payments were required to be made by our Client."

21. In addition, the conclusion that the 2008 Lease was a genuine lease and that rent was duly paid by the plaintiff thereunder for one year is also consistent with the subsequent solicitors' correspondence and Civil Bill for unpaid rent issued by Mr. Luigi Sacco in 2013. Of significance in the present context is the fact that as of the date of Civil Bill in November, 2013, Mr. Luigi Sacco claimed a sum in rent which was equivalent to almost four and half years rent from the plaintiff on the basis of the weekly rent claimed. Since the 2008 Lease commenced in March 2008, this claim for rent in the Civil Bill is consistent with the plaintiff having stopped paying rent under the 2008 Lease in March of 2009. This is because between March 2009 and November 2013 is approximately four and a half years, which is consistent with the amount of rent claimed by Mr. Luigi Sacco in the Civil Bill in 2013.

22. The execution by the plaintiff and his father of a genuine, rather than a sham, lease in 2008 for 25 years (to expire in 2033), is also consistent with the claim of the plaintiff's solicitor (by letter dated 30th November, 2012, noted below) that the plaintiff and his father had executed a 35 year lease some 10 years previously in 1998/1999, which lease had gone missing. This is because that missing 35 year lease would also have expired in or around 2033, which was the expiry date for the 2008 Lease, which could therefore be seen as a replacement for the original 35 year lease and therefore genuine, rather than a sham.

23. On the other hand, if this Court were to believe the version of events now suggested by the plaintiff that although he signed the 2008 Lease as a tenant, he did not become a tenant of his father's in 2008, since this was a sham document as he was the owner of

the premises all along, this leads to the inevitable conclusion that Mr. Daniel Sacco was willing to assist his father in perpetuating a fraud on the Bank in order to gain a financial benefit for his father. However, the consequence of such a conclusion would mean this Court having to now treat with caution the plaintiff's claim that he executed a Deed of Transfer in 1999, when there is no direct evidence of such a Deed of Transfer and his interest in the premises arising from the execution of such a Deed of Transfer was never registered by his then solicitor, Mr. Ringrose.

24. In truth therefore, whichever conclusion this Court reaches in relation to the 2008 Lease it does not assist Mr. Daniel Sacco in support of his claim before this Court that he became the owner of the premises in 1998/1999.

### **Reason 3 - Solicitors' correspondence between 2012 and 2013**

25. Another reason which bolsters this Court's finding that on the balance of probabilities a Deed of Transfer was never executed by Mr. Luigi Sacco is the contents of the solicitors' letters which were sent by Mr. Maher on the plaintiff's behalf between 2012 and 2013. These letters were sent in relation to a claim by Mr. Cosgrove, solicitor to Mr. Luigi Sacco, that the plaintiff owed his father rent in relation to the premises.

26. It is clear to this Court from the oral evidence of Mr. Daniel Sacco and the oral evidence of Mr. Maher that these letters were written on the express instructions of the plaintiff and based on information provided to Mr. Maher by the plaintiff. In the letter of 30th November, 2012, Mr. Maher states to Mr. Cosgrove in relation to his client, the plaintiff, that:-

"We are instructed by our client that he took a 35 year commercial Lease in the above mentioned premises in or around September 1998 and it is our understanding that this Lease was drafted by Ronnie Ringrose Solicitor of 3 Chancery Place, Dublin 7.

We understand that you acted for Luigi Sacco of 21 Charlestown Way, St. Margaret's Road, Finglas, Dublin 11, at the time, who we understand was the Landlord of the premises.

Mr. Ronnie Ringrose Solicitor regrettable passed away last year and we have been advised that all of his files have been sent to the Law Society, however the Law Society are unable to locate any lease relating to the above mentioned premises. "

By letter of the 18th December, 2012 to Mr. Cosgrove, Mr. Maher states that:-

"We would request that your client agree to grant our client a new tenancy in respect of the premises at the current rent of €15,600 per annum and we await hearing from you with draft Lease for our attention in this regard."

Thus, it is clear from these letters that the plaintiff expressly instructed Mr. Maher, not that he was the owner of the premises, but rather that he was a tenant in the premises. Once again this is plainly inconsistent with the claim the plaintiff makes in this Court; that he was the owner of the premises since 1998/1999.

27. In addition, based on the replies in his solicitor's letters it is clear that Mr. Luigi Sacco believed that his son was a tenant in the premises. Thus, in a letter dated 6th February, 2013, from Mr. Cosgrove to Mr. Maher, it is stated that:-

"Our client is prepared to grant a lease to your client at a rent of €500 per week (€26,000 per annum) plus insurance.

In addition our client requires payment of the arrears of rent due on the property for the last three years, none of which have been paid".

28. After this exchange of correspondence between the Mr. Luigi Sacco's and the plaintiff's solicitors, which was based on a 35 year lease executed in 1998/1999, the existence of the 2008 Lease was brought to Mr. Maher's attention for the first time (in March of 2013). As previously noted, Mr. Maher was not told by the plaintiff that this was a sham lease, as is now alleged. Accordingly Mr. Maher wrote to Mr. Cosgrove on the 21st March, 2013, in the following terms regarding the 2008 Lease:-

"I enclose a copy of a Lease of 10th March 2008 whereby your client, our client's father, granted a Lease of the premises to Daniel Sacco for the term of 25 years at a monthly rent of €1,651 [...] It is clear that a Landlord and Tenant relationship exists between our respective clients and we should allow them resolve any outstanding matters between themselves directly, if this can be done."

29. The only explanation from the plaintiff as to why in all of this correspondence he claimed that he was a tenant in the property, first under a 35 year lease and subsequently under a 25 year lease, when he was in fact the owner of the property, as he now alleges, is that he was afraid that he was going to be ejected from the premises by his father who was pursuing him for unpaid rent and that he was under considerable stress as a result. In response to these claims and this pressure, the plaintiff claimed he was entitled to stay in the premises, *albeit* as a tenant with occupancy rights rather than as an owner.

30. This Court finds this excuse to be illogical. It is as plain as night follows day that Mr. Daniel Sacco could never have been evicted from the property if he was its owner, as he now claims. It is also relevant to note that at this time in 2013, he was not only an experienced business man who had run a fast-food restaurant for a number of years, but more significantly he was an experienced property developer and owner of several residential and business premises which he leased to tenants. It is for this reason that this Court finds that it is unable to accept that the plaintiff would have instructed his solicitor in 2012 and 2013 that he was a tenant in the takeaway premises if, as he now alleges, he had become the owner of the premises in 1998/1999 pursuant to an oral agreement and subsequent Deed of Transfer that was never registered.

### **Reason 4 - Delays in assertion of ownership interest and in claim of a Deed of Transfer**

31. The next reason for the rejection of the plaintiff's claim of an ownership interest in the premises is because there was a significant delay in the plaintiff's assertion of this ownership interest, which he says he acquired in 1998/1999. It is relevant to note that by 2004, the plaintiff had left the takeaway business to become a property developer and he began thereafter purchasing and leasing out residential and commercial properties to third party tenants. As such, if the plaintiff had acquired an ownership interest in the premises and signed a Deed of Transfer in 1998/1999, in consideration for the payment by him of £173,000 to his father, as he now alleges, it seems almost inconceivable that the first time the execution of the Deed of Transfer would be alleged by him was on the second day of this trial some 18 years after it is alleged to have occurred. Yet, this is exactly the sequence of events in this case because there is no reference in the solicitors' correspondence, in the Statement of Claim or in his affidavits, to a Deed of Transfer executed by him.

32. Equally curious is the fact that although the alleged acquisition of the ownership interest took place in 1998/1999, the first time a claim of an ownership interest, as distinct from a tenancy right, was made, was some 15 years later by his then solicitor, Mr. Grosso, who stated in his letter of 22nd May, 2014, to the Receiver's solicitors, that:-

"Our Client strongly denies the existence of all and any leases which appear to have been allegedly entered with Mr. Luigi Sacco and in particular with Mr. Luigi Sacco in respect of 116 Ranelagh Road. Without prejudice to the foregoing, our Client entered into an agreement dated the 10th of March 2008 for the sole purpose of assisting Mr. Luigi Sacco in obtaining finance with KBC Bank. Monies payable under this said agreement were paid by our Client for a period of one year, after which point it was agreed between our Client and his father that no further payments were required to be made by our Client.

In 1998 our Client paid to Mr. Luigi Sacco the total amount of IRL £150,000.00 as full consideration for the freehold interest in the property in question and since then our Client has been in full possession without payment of rent to Mr. Luigi Sacco, as was agreed between the two."

33. The most that had been claimed by the plaintiff prior to this date was a right of occupancy in a defence to Circuit Court ejectment proceedings taken against him on the 26th November, 2013 by his father in relation to the premises. In those proceedings Mr. Luigi Sacco sought possession of the premises as well as arrears in rent of €138,600, which rent was described in the civil bill as payable on foot of an oral agreement entered into between Mr. Luigi Sacco and the plaintiff in or around 1998. In his Defence filed on the 4th February, 2014, the plaintiff insisted that he had been permitted by Mr. Luigi Sacco to "*occupy the said property for the consideration of the sum of £153,000*". It is telling that between September 1998 and February 2014, there was no assertion by the plaintiff of an interest in the premises greater than that of a tenant. Then, when the ownership interest claim first emerged, the plaintiff did not allege in this defence that he had purchased the premises from his father, but rather than he was entitled to occupy the premises. The strongest he puts his ownership claim at this stage is that it was his "*belief and understanding that it was the intention of the parties that the freehold interest in the property would be conveyed to the Defendant by the Plaintiff in exchange for the said consideration*". It is to be noted that even in relation to this belated first claim of an ownership interest in the premises, there is no reference to the Deed of Transfer allegedly executed in March of 1999.

#### **Reason 5 - Mr. Daniel Sacco's own emails**

34. The next reason is the fact that the plaintiff's own emails do not support the claims which he now makes. This is because the plaintiff engaged in an email exchange headed '116 Ranelagh' with Mr. Cosgrove, his father's solicitor, regarding the payment of rent for the premises. Mr. Cosgrove had previously acted for the plaintiff and so the fact that there was email correspondence between them is not that surprising, even though at this stage Mr. Cosgrove was acting for his father in seeking rent from the plaintiff. Mr. Cosgrove sent an email to the plaintiff dated 11th January, 2013, in which he stated:-

"I don't have a record of the lease either or a copy of it. Who drafted it?

Last time we spoke you were going to start paying rent directly to KBC.

Did you do that?"

Mr. Daniel Sacco replied by email dated 15th January, 2013:-

"Good Morning Gerard,

No I have not started paying rent directly to KBC yet but I will straight away".

This undertaking by the plaintiff in January of 2013, to pay rent in respect of the premises is completely inconsistent with his claim before this Court that he is the owner of the premises.

35. In an even more recent email of 19th February, 2015, which it is to be noted is one year after the plaintiff first made a claim of having an ownership interest in the premises (in his Defence to the ejectment proceedings on the 4th February, 2014), the plaintiff stated to his solicitor at that time, Mr. Grosso:-

"Prior to the 1st of December 2014 I had **sublet** [*emphasis added*] the Luigis takeway to Marco Bertusi of 38 Rathmines Road, Dublin 6, who occupied the premises on a verbal agreement for the past number of years."

36. The use of the term 'sublet' is significant. A lay person is unlikely to use the term 'sublet' instead of 'let' accidentally, as by the very nature of the construction of the word 'sublet', its meaning is plainly different from 'let'. Since an *owner* lets a property while a *tenant* sub-lets a property, this is further evidence, as late as 2015, that the plaintiff believed that he was the tenant of the premises, and not its owner as he alleges in the proceedings before this Court. While the plaintiff in his cross examination claimed not to understand the difference between 'let' and 'sub let', the Court does not find this lack of understanding to be credible in view of the plaintiff's experience as a landlord and property developer in 2015.

#### **Reason 6 - No Deed of Transfer and no registration of a Deed of Transfer**

37. The final reason for this Court's conclusion is that there is an absence of any direct evidence to support the plaintiff's bald claim in the witness box that he executed a Deed of Transfer in Mr. Ringrose's office. Despite a search having been conducted by the Law Society, which took over Mr. Ringrose's files upon his death, no such Deed of Transfer was discovered. In addition, if such a Deed of Transfer had been executed it would be most unusual for it not to be registered in the Registry of Deeds by Mr. Ringrose who was alive for many years after its alleged execution. However, no such registration was ever effected leading this Court to conclude that on the balance of probabilities no such Deed of Transfer was executed. It is this Court's view that if a document was signed by the plaintiff and Mr. Luigi Sacco in Mr. Ringrose's office, as alleged by the plaintiff, then on the balance of probabilities and based on the foregoing evidence it was a 35 year lease rather than a Deed of Transfer and as such the plaintiff did not acquire an ownership interest in the premises.

#### **Conclusion**

38. The combined effect of all of this evidence is that this Court concludes that the plaintiff, Mr. Daniel Sacco, has not established on the balance of probabilities that Mr. Luigi Sacco signed a Deed of Transfer in his favour in respect of the premises or that he otherwise acquired an ownership interest in the premises.

39. In reliance *inter alia* on the evidence of Mr. Maher, who was a convincing witness (both in his evidence to the Court and in his

analysis of his written correspondence), this Court finds that on the balance of probabilities the plaintiff orally agreed, or signed, a 35 year lease with his father in 1998 and paid him £153,000 on account of future rent for several years in advance, but he did not agree to acquire an ownership interest in the premises, nor did he sign a Deed of Transfer in relation to the premises. This would also explain why some 10 years later in 2008 the plaintiff signed a lease for 25 years. Also consistent with this conclusion is the fact that as the owner of a long lease, the plaintiff would register the business name 'Luigi's Takeaway' in his name in September of 1998, pay rates in respect of the premises (since it is to be noted that like a lot of commercial tenants, under the terms of the 2008 Lease signed by Mr. Daniel Sacco he undertook as a tenant to pay the rates on the property), invest approximately €60,000 in re-furbishing the apartments in 2001/2002 and indeed why he paid £20,000 for the fit-out of the premises. This conclusion is consistent also with the numerous instructions he gave to his solicitor at that time, Mr Maher, that he was the tenant in the property and indeed his email to his current solicitor Mr. Grosso that he 'sub-let' the premises.

40. While not determinative of the issue, it is also worth noting that the conclusion that the payment of £173,000 (when one adds the £20,000 paid for fit-out to the payment of £153,000) by the plaintiff to his father was rent in advance, is also consistent with the Circuit Court proceedings instituted by Mr. Luigi Sacco in 2013 wherein he claimed that he had rented the premises to his son since 1998/1999 but that Mr. Daniel Sacco owed him unpaid rent of €138,600, which equates to a period of approximately four and half years. Since the Civil Bill was issued in November, 2013, this would suggest that rent had been paid up to at least June of 2009. In addition it has been noted that the plaintiff's solicitor claimed that money had been paid to Mr. Luigi Sacco by the plaintiff for a year pursuant to the 2008 Lease which has a commencement date of March 2008. On this basis, it is implicit in Mr. Luigi Sacco's Civil Bill that he did receive rent from the plaintiff for a period of approximately 10 years from 1998/1999 to 2008. This is consistent with the conclusion that the payment of £173,000 in March of 1999 by the plaintiff to Mr. Luigi Sacco was up to 10 years' rent in advance rather than the purchase price for the premises.

### **Consequences**

41. This Court finds the plaintiff does not have an ownership interest in the premises and therefore does not have an ownership interest in the premises which takes priority to the interest of the Receiver.

42. Arising from the decision of this Court, it is clear that the plaintiff has wrongfully collected rents from the upstairs apartments in the premises which are otherwise due to the Receiver from the date of his appointment on the 18th February, 2014. In his own evidence, the plaintiff estimated that he had collected at least €60,000 in rent, while a valuer who was called on behalf of the plaintiff estimated that the loss of rent to the Receiver was in the region of €100,000, if market rents had been charged for the two apartments during the relevant time.

43. For his part, the plaintiff has claimed that due to the Receiver cutting off the electricity in the takeaway premises he had to dispose of approximately €4,000 worth of perishable stock and he has claimed that he is entitled to be reimbursed by the Receiver for this loss.

44. Taking account of all of these claims and counter claims, this Court will make one order that Mr. Daniel Sacco pay the Receiver €60,000 in respect of rents collected by him.

45. To the extent the terms of this judgment does not decide all issues between the parties (and/or in relation to any consequential orders to be made), this Court will hear submissions from the parties.

### **Addendum to judgment delivered on 24th October, 2017**

46. As was anticipated by paragraph 45 of the foregoing judgment which was delivered on the 28th July, 2017, it became necessary for this Court to hear submissions from the parties regarding the precise orders to be made by the Court arising from its judgment.

#### *Mr. Daniel Sacco seeks order for possession and damages*

47. Although the Court found against Mr. Daniel Sacco in his claim that he had acquired a freehold interest from Mr. Luigi Sacco, counsel for Mr. Daniel Sacco argued in her submissions that since the Court found that on the balance of probabilities Mr. Daniel Sacco had agreed to take a 35 year lease from Mr. Luigi Sacco in 1998, this Court should make an order granting Mr. Daniel Sacco possession of the premises and grant him damages from the Receiver for the Receiver's alleged wrongful taking of possession of the premises on the 11th December, 2014, as well as an order for costs.

48. In this regard, it is to be noted that the Statement of Claim delivered by Mr. Daniel Sacco seeks a declaration that he is the beneficial owner of the legal interest in the premises. The Statement of Claim pleaded nonetheless that:

"In the alternative, a Declaration that the Plaintiff is entitled to a commercial lease of the Property."

However, as noted hereunder, of crucial significance is the fact Mr. Daniel Sacco's evidence denied the very existence of a lease, which he had pleaded in the alternative.

49. In the Receiver's defence which was filed in this case, it is pleaded that Mr. Daniel Sacco is:

"estopped and /or precluded from advancing a claim to a commercial lease in the property in circumstances where he has maintained from the outset of the proceedings that in fact he holds a beneficial interest in the property."

In his submissions, counsel for the Receiver, argued, *inter alia*, that Mr. Daniel Sacco should be estopped by his own actions from being granted any relief based on his having a lease to the premises, since not only did he deny having a lease in sworn evidence to this Court but he was also offered by the Receiver's solicitors by letter dated 22nd May, 2014, a new lease, which he failed to accept. In this letter it was stated to Mr. Daniel Sacco's solicitor that:

"Our client understands that your client currently occupies the Property by virtue of an oral agreement purportedly made in or around 1998 between Mr. Luigi Sacco and your client. Our client also understands that proceedings were issued against your client by Mr. Luigi Sacco seeking possession of the Property as well as payment of rental arrears in the amount of €138,600.

Our client is prepared to allow your client to remain in occupation of the Property subject strictly to the following conditions:

1. Your client produces evidence of having been in occupation of the Property since 1998 within seven days of the date of this letter;

2. Your client discharges the rental arrears of €138,600; and

3. Your client agrees to enter into a written lease agreement on terms acceptable to our client"

50. Despite reminders from the Receiver's solicitor regarding this offer, Mr. Daniel Sacco failed to accept it and by letter dated 2nd December, 2014, Mr. Daniel Sacco's solicitor stated:

"As stated in our letter of the 14th November, 2014, our Client strongly denies the existence of any lease existing between himself and his father and maintains that he has a freehold interest in the property in question."

51. In addition to this denial of a lease, in the proceedings for the forfeiture of the lease in the Circuit Court by Mr. Luigi Sacco (which proceedings were not taken over by the Receiver), Mr. Daniel Sacco's defence which was delivered on the 3rd February, 2014, is that he was entitled to the freehold of the premises.

*The reality of what Mr. Daniel Sacco is seeking*

52. In summary therefore, what on the face of it might seem to be a relatively benign post-judgment application by counsel for Mr. Daniel Sacco for a court order granting him possession, because of the finding by this Court that he entered a lease with his father, belies the significance of what Mr. Daniel Sacco is actually asking this Court to do.

53. To consider the reality of what Mr. Daniel Sacco is asking this Court to do, one needs to consider the basis of the proceedings and in particular Mr. Daniel Sacco's own evidence which led to this Court's judgment in the first place.

*Documentary evidence of lease which was denied by Mr. Daniel Sacco*

54. First, in order to seek to deny the Receiver possession of the premises, Mr. Daniel Sacco claimed in his proceedings that he was not the lessee of the premises but the owner of the premises. This was in the teeth of the most compelling evidence that he was a tenant, including in particular the written lease agreement which he had personally signed (referred to in the judgment as the '2008 Lease'), and which lease he himself had expressly relied upon in solicitors' correspondence (i.e. the letter dated 30th November, 2012, from Mr. Maher to Mr. Cosgrove referred to in the judgment). As is evident from the judgment, he sought to disown and deny these documents by claiming that the 2008 Lease was a sham lease.

*Mr. Daniel Sacco's sworn evidence to this Court that he was an owner not lessee*

55. Secondly, in addition to denying this documentary evidence, in his sworn evidence to this Court, as set out at paragraph 11 of this judgment, Mr. Daniel Sacco stated that he agreed to acquire ownership of the premises from Mr. Luigi Sacco, he also denied that there was any question of rent being paid by him for the premises and he accepted that the 'centrepiece' of his case was that he had executed a Deed of Transfer of the ownership of the premises, as distinct from a lease. Thus, his direct oral evidence was that he was the owner of the premises and never a tenant.

*Willing to be a participant in a fraud to justify sham lease*

56. Thirdly, since Mr. Daniel Sacco is requesting this Court's assistance in the orders he is now seeking, it is also relevant to note that his admitted motive for his entering the allegedly 'sham' 2008 Lease, was not an honourable one. This is because he said he entered the allegedly 'sham' 2008 Lease so as to obtain money for his father from the Bank on false pretences. It follows that not only did this Court find that Mr. Daniel Sacco was not telling the truth regarding the 2008 Lease, but also that Mr. Daniel Sacco admitted in his own evidence to the Court, in order to justify his claim that the 2008 lease was a sham, that he was happy to be a participant in a fraud.

57. For the numerous reasons set out in the judgment, this Court did not accept the evidence of Mr. Daniel Sacco on his claim to a freehold and his denial of the existence of a lease.

58. While the Court's language in the foregoing judgment is somewhat restrained, the application by Mr. Daniel Sacco after the delivery of that judgment to effectively profit (in the sense of denying the Receiver possession of the premises) from his proceedings, obliges this Court to spell out what should be clear from any reading of this judgment. This is the fact that Mr. Daniel Sacco's proceedings to deny the Receiver possession of the premises, and his evidence to this Court and his actions prior to these proceedings, are based on brazen and blatant lies.

59. It is inconceivable to this Court that Mr. Daniel Sacco can seek possession of the premises and damages on the basis that he is the lessee of the premises, when in these proceedings and by his evidence he did everything in his power to deny and conceal the fact that he had a lease of the premises. This Court cannot simply ignore the blatant lies and the waste of court resources and taxpayers' money caused by Mr. Daniel Sacco.

60. To do so would be to allow Mr. Daniel Sacco to abuse the process of this Court. In essence it would allow him to run one case which he has lost based on the lie that he was not a tenant, but yet having lost that case to permit him to seek, and be granted orders, as if he had run another case, i.e. that he was a tenant and thereby ignore all the lies that had gone before.

61. Since, for whatever reason, perjury is not an offence that is commonly prosecuted in this country, it is this Court's view that to allow this to happen would be for this Court to signal that there are no consequences for litigants who deliberately and consciously mislead the Court. Instead the message that would go out would be that litigation is a game where one does not have to tell the truth and that sometimes one can profit even where there has been a clear abuse of the system. This Court is of the view that if this were to happen in this instance it would be a parody of justice.

**Conclusion**

62. On this basis, this Court makes a Declaration that it is an abuse of process before this Court for Mr. Daniel Sacco to apply for possession of premises based on the existence of a lease, after judgment has been given to that effect in a case, when during that case, he deliberately denied and sought to conceal the existence of that lease. For this reason, this Court rejects the application by Mr. Daniel Sacco for possession of the premises and his application for damages for the Receiver's taking of possession of the premises. It rejects all the applications in his Statement of Claim and makes an award of costs against him in favour of the Receiver.

63. In particular in relation to Mr. Daniel Sacco's claim in his Statement of Claim that he is entitled to a commercial lease of the



premises, this Court makes a Declaration that he is estopped from making this claim that he has a leasehold interest in the premises in view of his own evidence and his actions to date. This is because not only of his blatant and brazen lies to this Court that he did not have a lease, but also his lies to the Receiver that he did not have a lease. In this regard and as required by the estoppel doctrine, it is clear that Mr. Daniel Sacco's conduct has caused the Receiver to act to his detriment. This is because Mr. Daniel Sacco's claim of a freehold interest has cost the Receiver a significant amount of money in its defence of the claim for possession in the High Court. Yet, if Mr. Daniel Sacco had accepted that he had a lease and he had not pursued High Court proceedings claiming that he owned the premises, the Receiver could have pursued forfeiture proceedings at a significantly lesser cost in the Circuit Court.

64. On the basis that rent is still being collected by Mr. Daniel Sacco, the actual order for damages, set out in the judgment of 28th July, 2017, will be increased by €8,100 to €68,100, to take account of the additional rent for approximately three months which would have been paid on the two apartments since the Court's judgment to today's date.

65. This Court will also make an order against Mr. Daniel Sacco that any rent collected by him or on his behalf from today, which is currently being collected at a rate of €2,700 per month in respect of the two apartments is to be forthwith paid to the Receiver.

#### **Addendum to judgment delivered on 3rd November, 2017**

66. Judgment in default of defence was granted by Gilligan J. on the 30th July, 2015, in favour of the plaintiff against his father, Mr. Luigi Sacco. In the proceedings before this Court, where judgment was delivered on 28th July, 2017, and 24th October, 2017, the plaintiff was unsuccessful in his claim that he acquired a freehold interest in the takeaway premises in Ranelagh, the subject of the proceedings.

67. On the 31st October, 2017, this Court heard submissions on behalf of the plaintiff regarding the amount of damages that should be awarded against Mr. Luigi Sacco, who did not participate in the hearing before this Court.

68. Based on the evidence during the hearing, this Court held that on the balance of probabilities, the plaintiff paid to his father some £173,000 (being £153,000 in respect of rent in advance and £20,000 in respect of fit-out) in return for the plaintiff's rental of the premises during the period 1998/1999 to in or around 2009. Evidence was also provided to the Court that during this period the plaintiff had the use of the premises for which he had paid rent. Accordingly, this Court sees no basis for finding that there should be any award of damages against his father in respect of this payment, since the plaintiff got value for his rental payments.

69. Evidence was also provided during the hearing that £200,000 was paid by bank draft dated 6th April, 1999 by the plaintiff to his father to be invested in a premises in Dame Street in Dublin under the name of the company 'Shop to Shop Limited'. However, evidence was provided that the plaintiff received no value for this investment as the shares in the company were held by a solicitor on trust for Mr. Luigi Sacco. As no controverting evidence was provided on behalf of Mr. Luigi Sacco, this Court will make an award of damages of the equivalent of £200,000, namely €254,000, in favour of Mr. Daniel Sacco, under his current name, Daniel Boylan.

70. An affidavit sworn by Mr. Luigi Sacco was produced in evidence during the hearing. However, a copy of a letter signed by Mr. Luigi Sacco, although not sworn evidence, was also produced to the Court, which letter retracted the contents of the affidavit. Evidence was also given by Mr. Grosso, solicitor for Mr. Daniel Sacco, of a phone conversation he had with Mr. Luigi Sacco. However, as Mr. Luigi Sacco did not give any evidence to the trial, this Court treats with considerable caution any documents allegedly signed by him and statements made by him. For this reason, this Court did not for the purposes of its main judgment attach any reliance to the purported evidence or admissions of Mr. Luigi Sacco. Accordingly, in making its orders against Mr. Luigi Sacco, it places no reliance on the alleged evidence or admissions of Mr. Luigi Sacco.

71. For this reason, this Court can see no basis for making any further orders against Mr. Luigi Sacco. In particular, it cannot see the basis for making an order (sought by the plaintiff) making Mr. Luigi Sacco liable to effectively indemnify Mr. Daniel Sacco for the costs awarded against him for Mr. Daniel Sacco's decision to pursue the Receiver for a claim that he owned the premises. This is because this Court found that Mr. Daniel Sacco had no basis for bringing these proceedings.

72. For the same reason, this Court cannot see any basis for an order (sought by the plaintiff) that Mr. Luigi Sacco should effectively indemnify Mr. Daniel Sacco for Mr. Daniel Sacco's decision to retain rent on the premises which belongs to the Receiver. This Court has found that Mr. Daniel Sacco was wrong to retain that rent and so can see no basis for Mr. Luigi Sacco being affixed with this cost.