Neutral Citation Number: [2011] IEHC 430

THE HIGH COURT

2010 519 COS

IN THE MATTER OF ELLEN CONSTRUCTION LIMITED (IN RECEIVERSHIP) AND

IN THE MATTER OF S. 316 OF THE COMPANIES ACT 1963 AND

IN THE MATTER OF THE COMPANIES 1963 TO 2009

BETWEEN

KIERAN WALLACE, RECEIVER OF ELLEN CONSTRUCTION LIMITED (IN RECEIVERSHIP)

APPLICANT

AND

MICHAEL FORTUNE AND CYRIL BARDEN

RESPONDENTS

JUDGMENT of Mr. Justice Roderick Murphy delivered the 23rd day of August 2011

1. Notice of Motion
By notice of motion dated the 24th September, 2010, the applicant, the receiver of Ellen Construction Limited (in receivership) ("the Company") sought directions pursuant to s. 316(1) of the Companies Act 1963,

> (1) that Ulster Bank Limited ("the Bank") had not released it security in respect of any interest in or over the lands and premises referred to being houses Nos. 10, 20 and 41 Clearwater Cove, Rosslare, Co. Wexford ("the Property") whether arising pursuant to a:-
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> > (a) Security assignment dated the 30th May, 2005 between (i) the Company and (ii) the Bank of a building licence agreement granted by the Richmond Partnership to the Company dated the 19th May, 2005; (the respondents were, *inter alia*, partners in Richmond with Michael and Martina Doran who were directors of the Company)
> >
> > and/or
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> > (b) Debenture dated the 8th February, 1999, ("the Debenture") and made between (i) the Company and (ii) the Bank; and/or
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> > (c) Deed of Mortgage and charge dated the 12th September, 2003, between (i) Michael Fortune, Cyril Barden, Michael Doran and Martin Doran and (ii) the Bank in respect of Folio 21830 and 759F Co. Wexford more particularly described.
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> (2) Directions pursuant to s. 316(1) of the Companies Act 1963, as amended, confirming that Mr. Kieran Wallace (the Receiver) was validly appointed receiver in respect of the said property and/or in respect of the Company's interest in or concerning the property pursuant to the said security assignment and/or the debenture.
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> (3) To the extent necessary, a direction pursuant to s. 316(1) of the Companies Act, 1963 as amended that the respondents and each of them, deliver possession of the property to the receiver.

2. Affidavit of Kieran Wallace
The applicant, a partner in the firm of KPMG, was appointed by the Bank as receiver by Deeds of Appointment dated the 6th and 9th of November, 2009, not only over the Company, but over certain assets of the Richmond Partnership, its interest in Clearwater and Island Key, and in another Partnership.

His affidavit was sworn on 17th September, 2010, in support of an application for directions in circumstances where it appeared that the respondents were alleging that the Bank had released certain of its security in respect of the three units comprising the Property.

He referred to the affidavit also of the 17th September, 2010, sworn by PJ. McIntyre of the Bank, the contents of which he believed to be true and accurate. Mr. McIntyre had explained to him the nature and origin of the Bank's security pursuant to the Richmond Clearwater mortgage, the security assignment and the debenture.

He said that it would appear that the respondents did not take any appropriate steps to reduce the sum due by the Company to the Bank to the agreed figure of €2 million as referred to in Mr. McIntyre's affidavit and, accordingly, had not proper or rightful claim that the Bank had released its security in respect of the property.

He understood that that unit No. 20 was fully furnished and appeared to be in occupation. Units 10 and 41 were unoccupied. He understood they had not been fitted out. He did not have keys for unit No. 20, but did have keys for units 10 and 41. In the absence of directions confirming that the Bank had not released its security over the property and that he was validly appointed receiver in respect of the property he said he was not in a position to take any steps to sell the property.

In the circumstances, he sought directions including directions regarding the delivery of possession of the property and the property to him as receiver.

3. Affidavit of PJ McIntyre
Mr. McIntyre was a senior manager of corporate markets of the Bank in September 2006. His affidavit was based on a review of the books and records of the Bank and from the facts within his own knowledge.

He referred to the Notice of Motion, the description of the property and the allegation of the respondents that the Bank had agreed to release its security over the property.

He set out a chronology of events of the purchase of the property by the respondents together with the other Richmond Parties, Michael Doran and Martin Doran the facility letter dated the 9th June, 2003, between the Bank and the Richmond Partnership pursuant to which the Bank advanced a sum of €1.5 million to the Richmond Partnership on a joint and several basis for the purpose of purchasing the site at Rosslare Strand, Co. Wexford.

The Bank acquired a first legal mortgage of Clearwater under the Deed of Mortgage and charge date the 12th September, 2003, made between the Richmond Partnership and the Bank.

The Richmond Partnership entered into a building licence agreement dated the 19th May, 2005, with the company for the purpose of building a residential development consisting of 45 residential units. The licence was secured to the Bank and all of the company's rights title and interest in the Clearwater licence was assigned to the Bank pursuant to the security assignment dated the 30th May, 2005, between the Company and the Bank. The Company had in any event already charged all of its assets and undertakings to the Bank pursuant to a debenture dated the 8th February, 1999, made between the Company and the Bank.

Pursuant to facility letter dated the 11th May, 2005, between the Bank and Richmond Partnership the Bank advanced the sum of €2.05 million to the Richmond Partnership to fund an overdraft and for the purpose of an equity release in respect of a site in Rosslare Strand. A further facility letter was entered into on the 23rd January, 2006, between the Bank and Richmond Partnership pursuant to which the Bank continued to facilitate in the sum of €2.05 million borrowed by the Richmond Partnership pursuant to the previous facility letter and that the Bank entered into a facility letter with the Company on the 11th May, 2005, whereby it advanced the sum of €6,580,100 to the Company for working capital facilities in relation to a separate development at Seabury also in Wexford, credit card facilities and the sum of €5.5 million in respect of the construction of the 45 units at Clearwater.

A further facility letter of the 6th June, 2006, and of the 15th August, 2007, continued the facilities.

The Richmond Partnership entered into unlimited guarantees and indemnities dated the 30th May, 2005, 12th January, 2007 and the 13th February, 2008, pursuant to which they jointly and severally guaranteed and indemnified the Company's present and future liabilities to the Bank.

References were made to other transactions and facilities letters in relation to which another Partnership had guaranteed and indemnified the liabilities of the Richmond Partnership and the Company to the Bank.

By letter of demand dated the 5th November, 2009, the Bank made formal demands on the Company for the immediate repayment of all monies due owing or incurred by the Company to the Bank.

On the 6th November, 2009, the Bank made formal demands to the Richmond Partnership, for the immediate repayment of all monies due owing or incurred by the Partnership as principal debtor to the Bank in connection with the facility letters and the guarantees and indemnities.

On the 6th November, 2009, the Bank also made a formal demand on the other Partnership for the immediate payment of all monies due.

Mr. McIntyre referred to the Deeds of Appointment of the receiver on the 6th and 9th November, 2009.

In relation to this dispute he said that in or around the 20th January, 2009, Mr. David Sheeran, Financial Controller of the Company met with Derek Murphy of the Bank with the view to seeking confirmation from the Bank that it would release its security over the property in the event that the Company's indebtness to the Bank were reduced to €2 million which sum would be secured on the nine remaining units at Clearwater. The property was secured in favour of the Bank and the Company was indebted to the Bank in the sum of circa €2.567 million.

He said that on the 27th March, 2009, he received an e-mail from Mr. Sheeran requesting (i) the Bank agree to release a security over the property subject to the debt being reduced to €2.1 million and (ii) the Bank confirming that its recourse against the respondents was "non recourse on Clearwater cove".

By way of reply by e-mail dated the 31st March,, 2009, he indicated that the Bank was agreeable to release its security in the Property being the three units in Clearwater subject to the Company's liabilities to the Bank being reduced to €2 million (not €2.1 million as requested by Mr. Sheeran).

Mr. McIntyre averred that:

> "It was understood as between David Sheeran and me that the said sum of €2 million would be thereafter secured on the nine remaining units at Clearwater. I understood that proposed reduction of the Company's liabilities to €2 million would be funded by either (a) the sale of the Property or (b) from some other source of funding not connected to Clearwater."

In addition he said that he confirmed that the Bank's recourse against Messrs Barden and Fortune in respect to their guarantee and indemnity of the Company's liability to the Bank was limited to their interest in Clearwater (without prejudice to the Bank's recourse against them in respect of their liabilities and interest in the other Partnership).

As well as referring to the e-mails between Mr. Sheeran and him dated the 27th and 31st March, 2009, as outlined above. Mr. McIntyre referred to a letter dated the 31st March, 2009, from him to Mr. Sheeran and a letter dated the 7th April, 2009, from him to Messrs Barden and Fortune. He said that although the precise terms were not clearly outlined it was understood that as between Mr. Sheeran and him that the Bank would only agree to release the property subject to the Company's indebtness being reduced to €2

million from the sale of the property or by means of cash injection and that the debt of €2 million would be secured on nine units at Clearwater. He said that his understanding in that regard and in relation to the recourse against the respondents was apparent from his handwritten notes on his letter to Mr. Sheeran dated the 31st March, 2009, which were contemporaneous and were set out as follows:-

> "(a) Beside the word "house" the comment "residual debt secure in nine remaining houses/break even €222k. David Sheeran advised today that three of the nine recently contracted for €305k, €270k and €225k (smaller unit)".
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> (b) Beside the word "interest" the comment "this has already been the position"."

He said that by letter dated the 23rd December, 2009, the Bank's and the Receiver's solicitor wrote to Mr. Barden in response to a telephone conversation with a John Whittaker and a Michael McNaughton at the Bank. It was outlined to Mr. Barden that the Bank did not intend to release the security over the property, other than in circumstances where the sum due by the Company to the Bank was reduced to €2 million from the receipt of sale proceeds due in respect of the sale of the property. As at the 23rd December, 2009, the Company's indebtness to the Bank was in the sum of €1,401,428 plus accrued interest in the sum of €2,879.65 and this sum was secured on seven units remaining at Clearwater. While the Bank's liabilities were reduced below €2 million (from the sale of five other units in Clearwater), they were not reduced in accordance with the agreed terms as outlined and, accordingly, the Bank was not obliged to release its security over the property.

By letter of the 21st January, 2010, the respondents' solicitors indicated that their instructions were contrary to the Bank's instructions to its solicitor. They also indicated that the property had been long since handed over to the respondents who had spent considerable sums on the same. The letter did not detail who was alleged to have handed the property over the respondents.

By letter of the 12th March, 2010, the Bank and receiver's solicitor wrote the respondent's solicitor requesting that their clients hand over peaceable possession of the property. It is was also requested that the respondents' solicitor set out the precise legal basis on which they were asserting that the Bank allegedly agreed to release its security in the event of refusal. The respondents were advised that immediate steps would be taken to take legal redress for the Bank including but not limited to injunctive relief, damages and costs, without further notice.

Further correspondence ensued.

Mr. McIntyre said that in the circumstances where there was a failure to meet the terms as outlined, the Bank did not consent to the property being handed over to the respondents, and was not obliged to do so. The receiver was entitled to sell the property. The Bank did not commit itself nor represent to the respondents (as they claimed), anything to the contrary.

4. Affidavit of Cyril Barden

The second named respondents by affidavit sworn on the 3rd November, 2010, referred to market softening in 2008, to the exposure of the Company in a number of other ventures and the extent of its indebtness which had become a source of concern to the Bank. The Bank was approached by the Company with a view to ameliorating their position. The Company needed to procure a reduction or suspension of the site fines payable to the Richmond Partnership in relation to the unsold units. Three of those units (the Property) had in fact been informally ceded to himself, Mr. Barden and Mr. Fortune, his co-respondent, by the Company. They had taken possession of those units. They were most assuredly not for sale to the general public. They were in effect intended to represent their profit out of the venture. They would only agree to a suspension of the site fines payable to them if the Property were formally ceded to them and released from the Company's indebtness. They required unencumbered title to the property. The fact that the property was the subject of an arrangement of this nature was, he believed, well known to the Bank.

That was the background to the negotiations the Company conducted with the Bank which are referred to in the affidavit of Mr. McIntyre. At the date of those negotiations, the Richmond Partnership debt had been discharged and their only outstanding liability in relation to the development was the guarantee provided to the Company and, as had been recognised by Mr. McIntyre that was no recourse. They, the Partnership including the respondents, took the view that they could not be compelled to pay any further monies and that they had an arguable case that they were absolutely entitled to the release and that there only existing liability was non recourse.

Accordingly, he said at para. 7 of his affidavit, that they (the Partnership including the respondents) that they authorised the Company through Mr. Sheeran to approach the Bank with the proposal that they would suspend their right to receive any fines from the future sales provided that the property was forthwith released.

He said that Mr. Sheeran met with Mr. McIntyre and concluded an agreement which was entirely in accordance with their requirements which were well known to the Bank. The letter dated the 7th April, 2009, from the Bank to Mr. Sheeran received accurately reflected the terms thereof. They were entirely satisfied with its terms but requested Mr. Sheeran to obtain a letter addressed to them. Mr. McIntyre admitted that the Bank was willing to provide releases and accepted that the letters were evidence of the Bank's agreement in that regard. Mr. Barden says that Mr. McIntyre then asserted that the terms upon which the release would be granted were different from the terms he intended and he introduced his handwritten uncommunicated notes as evidence of his intention. Mr. Barden stated that the evidence of the parties' intention was not merely irrelevant but was inadmissible and that M. McIntyre was not interpreting a document in a particular manner but was introducing terms that were nowhere apparent from the document.

Mr. Barden says that it is unlikely in the extreme that such reservation limitation were in fact communicated to Mr. Sheeran. He said he did not know because he was not there, but Mr. Sheeran was perfectly well aware of what was acceptable to (the Richmond Partnership). He said the object of the exercise was to procure the release of the property and not their sale. If they were sold they would not be the subject of any arrangement but would necessarily be released by the Bank in favour of the individual purchasers. It was untenable that the reduction was to be funded from some unspecified source, presumably provided by the Company and not connected with Clearwater. The Company was under pressure from the Bank and was seeking a facility from the Partnership to reduce that pressure. The Partnership had no obligation to provide any facility and would not accept a proposal which contained no benefit to the Partnership.

He said that the reduction on the facility was confirmed by letter he received from Mr. Sheeran on the 30th October, 2009, addressed to the Richmond Partnership which stated:-

> "I can confirm that the balance in Ulster Bank, Wexford branch account No. -- is below €2 million and as such it is in order to proceed and obtain the release of house Nos. 10, 20 an 41 pursuant to the letter of the 7th April, 2009."

Mr. Barden said that this was "utterly at variance with the suggestion that the reduction was to be achieved by the sale of the self same property or from other resources".

He said that in accordance with the arrangement the Partnership took steps to formally cede the houses to Mr. Fortune and to himself. He referred to the contracts for sale between the Richmond Partnership and himself and his co-respondent.

5. Second Affidavit of PJ McIntyre.
Mr. McIntyre stated that it was noteworthy that the respondents did not seek to place before the court the direct evidence of Mr. Sheeran. This was all the more remarkable in circumstances where they were seeking to allege and prove an agreement that was waived, released and otherwise varied to the Bank's security pursuant to the debenture, the security assignment and the mortgage.

Moreover, Mr. McIntyre averred that at no stage was it indicated that Mr. Sheeran had taken issue with what was thought to contradict anything that was said by Mr. McIntyre in his first affidavit. He said that the Bank fully reserved all of its rights to make an application with regard to the exclusion of certain matters referred to in Mr. Barden's affidavit which were not grounded on direct evidence.

He said that the agreement reached by him with Mr. Sheeran arose from the facts presented at the time of the negotiation, but the commercial objective of the Bank was that it was prepared to release three of the twelve units leaving the Bank with security over nine units provided that its debt be reduced to €2 million, that is security over nine of the twelve remaining units. It was not the case nor ever intended by himself or Mr. Sheeran that the three units would be released to the respondents merely because, by virtue of the sale of various of the units, the amount outstanding fell beneath €2 million in the ordinary course of events.

He referred to the e-mail which he sent to Mr. Sheeran in response to Mr. Sheeran's e-mail of the 27th March, 2009, where he said he was "a great man for keeping his notes and had found his file note of the meeting of the 20th January, but at the time the Clearwater Cove debt was €2.567k and was now at €2.585k . . ." The agreement was to release three units if the debt was reduced to €2 million.

He referred to the surrounding facts, his discussions and understanding with Mr. Sheeran and the commercial logic of the agreement.

He said that he had at all times been consistent in his understanding of the discussions between the parties and had always contended that the proposed reduction in the Company's liabilities to €2 million was to be funded by either the sale of the property or some other source of funding not connected with Clearwater and that the sum of €2 million was to be secured on the remaining nine units. He said that that was not "untenable" as the Company had raised external funding in the amount of €2.5 million from a third party.

He said that the letter referred to by Mr. Barden of the 30th October, 2009, from Mr. Sheeran to the Richmond Partnership was sent by Mr. Sheeran some seven days before a receiver was appointed over the Company. The letter was not in accordance with nor did it reflect the agreement reached between the Bank and Mr. Sheeran. The respondents believed that they were entitled to call on the Bank for releases to be executed in respect of the property. He wondered why this was not done as soon as the €2 million liability threshold had been reached. No request was made of the Bank by Mr. Sheeran in that regard. The fact that neither the respondents nor the Company requested the release of the property once the liability of the Company fell below €2 million was indicative of the Bank's understanding of the events.

6. Affidavit of Dereck Murphy
Mr. Murphy, a manager of the Wexford branch of the Bank from October, 2003, onwards, swore an affidavit on the 17th December, 2010, on the basis of a review of the books and records of the Company and from facts within his own knowledge. He referred to the affidavits already sworn and to the meeting of the 20th January, 2009.

He said that the respondents had made a number of assumptions regarding the Bank's knowledge of the contents of discussions which he understood were ongoing in or around that time between the members of the Richmond Partnership comprising Michael Doran, Martin Doran and the respondents and further assumptions with regard to what may have been discussed at the meeting.

He believes that Mr. McIntyre had accurately set out and explained in his two affidavits what the Bank's understanding or level of knowledge was with respect to the discussions taking place between the members of the Partnership and regarding the agreement with Mr. Sheeran in respect of the potential release of the Bank's security over three units of the development. Mr. McIntyre's recitation of events were accurate and comprehensively explained and he confirmed from his own attendance at the meeting that this was so.

7. Cross-examination of Cyril Barden
Mr. Barden was referred to his affidavit sworn on 3rd November 2010 identifying him as being part of the Richmond Partnership with Mr. Fortune and the two Doran brothers. The Partnership had borrowed from the Bank to buy the site in Clearwater Cove. The Company, Ellen Construction, was licensed to carry out the building works. The Company borrowed from the Bank.

Mr. Barden, in cross examination, said that Richmond Partnership had repaid the monies that it had borrowed from the Bank in respect of the development and on that basis suggested that the Partnership was entitled to redeem the mortgage. He said that the loan was repaid simultaneously with the approach from the Company. The site finds would have been paid into the Partnership account. The Partnership would have been in profit had it received further site finds after clearing the loan. Profit was not the issue. The issue was that of cash flow as the Partnership had been paying down the loan and possibly had positive cash flow at that stage.

It was put to him that, at €162,000 per site fine, 33 units sold would have had earned some €5.346 million in site fines. He agreed that the development itself was profitable. He was not dependent solely on getting a release of three houses in order to earn a profit.

He said he did not accept that the Partnership had guaranteed the liabilities of the Company and that the Company itself continued to have a liability to the Bank. He accepted, however, that the Richmond Partnership had guaranteed the liability in certain circumstances. He accepted that the Company had remained indebted to the Bank but he did not accept that the mortgage to the Richmond Partnership executed in favour of the Bank covered not only the Partnership's liabilities as primary debtor but also the guarantor surety. He did not think that was intended. He said that in effect the guarantee was a second charge on the lands in question. He was referred to the Book of Core Documents. The deed of mortgage and charge executed by the Partnership was signed by him and contained the following paragraph:

> "In consideration of such sum, if any, as may be specified in the fourth schedule hereto … upon any account

whatsoever."

He said he supposed that the construction suggested that the phrase made it abundantly clear that the mortgage was securing not only the Partnership's own primary indebtedness but also its liability as guarantor for the debts of any third party. He said that whether the guarantee that attached was fit for purpose or otherwise was another question entirely.

He was asked to look at the guarantee and accepted that his signature was on it and was that of the witness, Ms. Reynolds, his solicitor.

He agreed that Ms. Reynolds did not suggest to him that the words in the document meant some other than what they actually said.

In his affidavit he said that having referred to the fact that the Company had exposure in a number of other ventures and their indebtness was becoming a source of concern to the Bank that they were approached by Michael and Martin Doran of the Company with a view to ameliorating their position. He further said in his affidavit that three of the units "have in fact been informally ceded to myself and my co-respondent by Ellen".

No. 20 had never been put for sale from the commencement of the development as it was clear that he would take that as part of his profit from the development. The two other properties were informally ceded in December 2008. They had not been marketed because at that date an agreement had been reached that the properties would be their share of the profit. He agreed that the two Doran brothers would be entitled to a similar 50% or a similar three units, but they advised the remaining partners that "they guaranteed the obligations of Ellen in any event by way of personal guarantee and their primary interest was to maintain Ellen and they had no real further interest in their position in Clearwater Cove insofar as we could make out". He suggested that the Doran's element of the profit was being used to repay the Bank's indebtness. The respondents were paying the site fines to the Company in full and on that basis the Doran's were ceding the respondent's three houses. He said he was not in a position to communicate that fact to the Bank as he had no contact in relation to the development. The guarantee was one that kicked in after the site fines had been discharged in full. In that regard the nature of the limited recourse guarantee was minor – "it was not something that we should have been concerned about". He understood that the Bank's position was that they had an entitlement to recourse against his interest in Clearwater Cove as a guarantor to the liabilities of the Company.

He said that a lot of arrangements that were reached upon a certain understanding are not reflected in documents. He said that he had his understanding and the Bank may have had its understanding. They did not have a mutual understanding. He accepted that the Bank might have a priority over any claim that he might try to assert in respect of the Property. He referred to the Bank's assertion regarding the letters of the 7th April, 2009 and the 20th April, 2009. He said that the Company had approached the Partnership to ask them to waive their entitlement to the licence payments and that if it did so the Company would procure a release from the Bank in relation to the three houses. That was the basis that David Sheeran approached the Bank. He rejected that Mr. Sheeran was their agent.

However, he agreed with what was said in his affidavit that they authorised the Company to make an approach to the Bank through Mr. Sheeran with the proposal identified.

He did not accept that the Bank was unaware of any arrangement or agreement between the Partnership and the Company about the releasing of site fines. He did not agree that there had been an arrangement on the 20th January, 2009 that if the Company reduced its debts to €2 million, secured on the remaining nine houses, that all three units which had not yet been identified would be released. The letter of the 31st March, 2009, was addressed to the Company and that of the 7th April, 2009, addressed to the Partnership was far clearer. He agreed that it was the Bank's position that the letter was issued in circumstances where Mr. Sheeran had agreed with the Bank through Mr. McIntyre and Mr. Murphy on terms on the 20th January, 2009, however, he did not agree with the Bank's position.

The third document in the core documents was the note of the meeting of the 20th January, 2009, prepared contemporaneously by Mr. McIntyre. Mr. Barden did not accept its content, though he was not there. If it had been the agreement that the debt would go down to €2 million secured on nine units so that the three units as requested would be released it should have been put in a letter.

The e-mail of the 31st March, 2009, was in the context of Mr. Sheeran request to the Bank on the 27th March, to confirm that "Cyril Barden and Michael Fortune are . . . in Clearwater Cove and also that you are willing to release units 10, 20 and 41, subject to our reducing the current work in progress loan down to €2.1 million". He said that it was rubbish to say that the debt was to be secured on the nine remaining houses, because he could have bought those houses and paid money over and obtained the release. It was put to him that his agent, Mr. Sheeran, already fully knew what the deal was and that it did not have to be spelled out in the letter of the 7th April, 2009. Mr. Barden disputed that Mr. Sheeran was his agent. He queried why the handwritten note at the bottom of the letter of the 31st March, was not included in the letter of the 7th April. If there were conditions attaching they should have been included. When they got the letter of the 31st March, they asked David Sheeran to go back and have the letter corrected to the extent that it was addressed to them and did not refer to any telephone conversations. And that was what Mr. Sheeran did. He said he had no knowledge of what the negotiations were other than the letters he received from the 31st March and of the 7th April. He agreed that at that time there were twelve units remaining unsold. That was known to Mr. Sheeran and known to the Bank. He did not accept that it was the intent of the letters that the remaining €2 million be secured on the remaining nine unsold houses.

Mr. Barden was asked whether he was suggesting that the Bank would turn itself from a secured or partially secured creditor into an unsecured creditor. He said that the Bank was entitled to the amount of the sale price over and above that which was to be paid in site fines. If a house sold for €262,000 the Bank would be only entitled to €100,000 of that sum. The Bank was entitled to €1.2 million out of the sale of the twelve houses and sought to improve its position to the extent that he and his fellow partners waived approximately €1.8 million on site fines in exchange for approximately €900,000 worth of houses.

He accepted that there was a proposition advanced by counsel acting on behalf of the Bank that as the Company did not pay the Bank, the Partnership were going to have to pay the Bank as guarantors of the Company's liabilities. But he did not accept that that was the case. He did not accept that it made no commercial sense for the Bank to release three properties in such a way that it would diminish its security.

He said that there was nothing in the guarantee document about limited recourse and that that was dealt with in a letter of loan facility of the 11th May, 2005. There was a reference to the guarantee in relation to "all monies joint . . . known as Clearwater Cove" which he understood was a limited recourse in respect of the Company debt.

He was referred to the letter of the 31st March, 2009, which he got from Mr. Michael Doran, one of the directors of the Company. He

was referred to the writing on Mr. Sheeran's copy. The letter was addressed to him and to Mr. Fortune. There were never arrangements made in relation to the other members of the Partnership, whose primary interest was in keeping their Company, Ellen Construction, afloat. They would benefit in the reduction of the debt which would save their Company. The Richmond Partnership would have been entitled to €162,000 per unit in site fines – approximately €1.8 million in total which would be shared by the partners. The sum of €900,000 would be set off against the Company's debt through the share to the Doran brothers.

Mr. Barden said that if he and Mr. Fortune did not receive site fines they would either have pulled the Company down by suing it on foot of arrangements that the Partnership had with the Company or that they could come to a conclusion that they would get three houses which would resolve the situation amicably. There had been 45 houses in the development with 12 left, so there were 33 sold. The Company did not have any entitlement under the building licence at that point. Mr. Barden said there was a spread sheet prepared on a regular basis that was circulated to the partners and the Bank in connection with the status of each house. The spreadsheet was the colour coded Excel sheet. The house he was to get was never indicated as being for sale.

He affirmed that the Bank had entered into an arrangement with the Doran's relating to the Richmond Partnership in or about August 2009 and that he was not aware of the details.

The comparison between the wording of the letter of the 31st March, 2009, and that of the 7th April, 2009, shows that the first letter was addressed to Mr. Sheeran of the Company and referred to a phone conversation, to the guarantee of the Bank's interest in the site and to security on the remaining nine houses.

The file note of Mr. McIntyre and Mr. Sheerans' meeting on the 20th January, was accompanied with a letter from Mr. McIntyre to David Sheeran confirming that the liability of Mr. Barden and Michael Fortune on foot of their existing guarantee in favour of the Company, in respect of the above development, would be limited to their interest in the site.

The second letter of the 7th April, 2009, was to the Richmond Partnership and did not refer to phone conversations. It did refer to a guarantee on the interest in Clearwater Cove but was silent on the remaining security. The letter of the 7th April, 2009 to Cyril Barden and Michael Fortune care of Ellen Construction Limited at the same address as the letter of the 31st March, was in identical terms to that sent to Mr. Sheeran on the 31st March, 2009.

8. Submissions of Counsel for the Applicant
Counsel stated Mr. Barden's affidavit of 3rd November, 2010, referred to the obligation of the Bank to release its securities over certain units and that the net proceeds of sale of each unit exclusive of VAT were to be paid directly to the Bank. The affidavit had stated that by the time the entire amount due to Richmond under the facility had been repaid there was a prima facie right to redeem the mortgage.

This could not be correct because the security was also over a separate development in East Wall. But, even ignoring that it was incontrovertible that the Richmond Partnership had guaranteed the liabilities of the Company in respect of the Clearwater Cove Development, these liabilities remained extant. Accordingly, while the guaranteed liabilities remained extant the partnership had not right to redeem the mortgage.

Counsel said that the fact that Mr. McIntyre admitted that the Bank was willing to provide releases was, in the applicant's submission, a subjective understanding and had to be interpreted by the letter of 7th April 2009. That letter stated:

> "Re: Ellen Construction Ltd. Debt €2.585 million on Clearwater Cove Development.
>
> I confirm the bank will release its charge over house numbers 10, 20 and 41 in the above development provided our debt is reduced to €2 million.
>
> I further confirm that the liability of Cyril Barden and Michael Fortune on foot of their existing guarantees in favour of Ellen Construction Ltd., in respect of the pub development, is limited to their interest in the Clearwater Cove site. I will release the charge over house numbers 10, 20 and 41 in the above development."

However, what was agreed was what happened on 20th January, 2009. The letter was a partial recitation of what was agreed on an earlier date but was not itself the contract. Mr. Sheeran was the agent of the Company. The Richmond Partnership had mortgaged the entire of the development to the bank as security for the Company's liabilities. The concession for the bank was clearly of benefit to the Richmond Partnership in that the sites would then become unencumbered.

Mr. McIntyre had believed that there were no reservations or conditions imposed upon the release other than the reduction of the facility which he said were confirmed by a letter he received from Mr. Sheeran. Mr. Sheeran had not given evidence.

Mr. Sheeran's letter of 30th October, 2009, confirming that the balance on Ulster Bank, Wexford branch, was below €2 million and that as such it was in order to proceed and obtain the release of houses number 10, 20 and 41 pursuant to the letter of 7th April, 2009, was written to the Richmond Partnership and not to the Bank nor was copied to the Bank, therefore the Bank was not party to the letter. It was unclear as to what the circumstances were when that letter was written. The other two members of the Richmond Partnership, the Doran brothers, were not seeking to contend that the bank had released its security over all or any of the three units in question.

Mr. McIntyre's contemporaneous note of the meeting of 20th January, 2009, referred to payments of €297,000 in respect of number 20 and another €270,000 from a further two houses, leaving €2 million.

Counsel for the applicant noted that the evidence of Mr. McIntyre and Mr Murphy were uncontradicted and unchallenged in that there was an agreement on the 20th January, 2009 with Mr. Sheeran as agent for the Company and as agent for the Partnership. That agreement provided that there would be a release of the three houses if the indebtness was reduced to €2 million as is clear from the e-mail of the 31st March, 2009 which referred to that meeting.

Counsel submitted that what was absent in the respondents' case was that there was no direct non hearsay evidence denying that Mr. Sheeran was the financial controller and agent of the Partnership. Moreover, no attempt to cross examine Mr. McIntyre or Mr. Murphy was applied for. There was no contest that Mr. Barden's averments in paras. 7 and 8 of his affidavit were hearsay. No correspondence or contemporaneous notes were put in evidence.

It was critical that there was corroboration from the contemporaneous notes of Mr. McIntyre in the e-mail exchange of the 27th

March, from Mr. Sheeran to Mr. McIntyre and from Mr. McIntyre to Mr. Sheeran on the 31st March. The reference in the former to reducing current work in progress loan down to €2.1 million was replied to and Mr. McIntyre, having referred to his notes ("I'm a great man for keeping my notes") agreed to release three units if the debt was reduced to €2 million".

Counsel referred to the inference of failure to produce a witness referred to in *Fyffes Plc v. D.C.C plc and Others* [2005] I.E.H.C. 477 at p. 58 of LexisNexis where Laffoy J. under the heading of Absent Witnesses stated:-

> "The other issue which it is convenient to consider in the context of the burden of proof is much more difficult. It was the plaintiff's contention that the court should draw certain inferences from the failure of the defendants to call certain witnesses.
>
> . . .
>
> While the plaintiff did not cite any authority of a court of this jurisdiction in support of its argument, it did rely on a number of English authorities."

Laffoy J. then cited Brooks L.J. in the Court of Appeal in *Wisniewiski v Central Manchester Health Authority* [1998] Lloyds Reports Med. 223 who reviewed the earlier authorities and summarised their effect as follows:-

> "1. In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> 2. If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call witnesses.
>
> 3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> 4. If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

The *Wisniewiski* case involved a claim on behalf of an infant who had suffered irreversible brain damage before birth in the defendant's hospital. Neither the attending senior house officer nor the registrar were called as witnesses.

Laffoy J. summarised the position as follows:-

> "The court of appeal held that the trial judge was entitled to adopt the course he chose to adopt, which was to infer from the failure of the senior house officer to attend the trial that he had no answer to the criticism made and to find that he would have done what the plaintiff's expert witnesses testified should have been done and that he would have proceeded to a caesarean section."

In *Fyffes* however, Laffoy J. did not think it appropriate to draw such an inference as was suggested by the plaintiff.

The second issue arising from *Fyffes* is the question of the agency of Mr. Sheeran. Mr. Barden, in his evidence, denied such agency.

McGrath on evidence (Thompson Round Hall, 2005) at para. 5-94 states:-

> "An admission made by an agent is admissible against his or her principal if it was made:
>
> (1) at a time when the agency existed;
>
> (2) in the course of a communication which the agent was expressly or impliedly authorised by the principal to make; and
>
> (3) the communication was with a third party and not with the principal himself or herself."

It is not contested that Mr. Sheeran was aware that the Bank was willing to release three of the twelve units with the remaining nine units to secure €2 million. The respondents' case is that what had been agreed by him on the 20th January, 2009, as confirmed in the e-mail from Mr. McIntyre to Mr. Sheeran on the 31st March, was not contained in the letter of the 7th April.

Counsel for the receiver referred to the security given by the Partnership in relation to all sums due under the debenture and the joint and several guarantees which were all sums due guarantees and not limited to the amount but to the recourse.

There was a commercial logic to the approach taken by Mr. McIntyre as communicated to Mr. Sheeran.

Reference was made to Chitty on Contract at 12-095 regarding admissibility of extrinsic evidence. Where the parties appear to have embodied their agreement in a written document, the question arises whether extrinsic evidence, that is to say, evidence of matters outside the document, is admissible so as to affect its content. Two issues were involved: first, whether it is permissible to adduce extrinsic evidence in terms other than those included, expressly or by reference, in the document; secondly, whether extensive evidence may be admitted to explain or interpret the words used in the document.

Chitty refers to the parol evidence rule that verbal evidence was not allowed to be given where there has been a contract which has been reduced to writing. Chitty notes that the parol rule is and has long been subject to a number of exceptions. If parties intend their contract to be partly oral and partly in writing then extrinsic evidence is admissible to prove the oral part of the agreement.

The receiver also referred to the Supreme Court decision in *Analog Devices BV and Others v. Zurich Insurance Company and Others* [2005] 1 I.R. 274 in relation to the principle of interpretation of an "all risks" policy of insurance. In constraining the policies the court had to give effect to the intentions of the parties to be ascertained objectively from the words used in the policies and taking into consideration the surrounding circumstances or factual matrix.

Geoghegan J. referred to the principles having received further expansion from the House of Lords where Lord Hoffman in *I.C.S. v. West Bromich B.S.* [1998] 1 W.L.R. 896 considered that the radical change had come about and to set out and accept the modern principles:

> 1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> 2. The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> 3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> 4. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see *Mannai Investments Co. Ltd. V. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.
>
> 5. The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.V.* [1985] A.C. 191, 201:
>
> > 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."

9. Respondent's Submissions

The respondents submit that the letter from the Bank to the Richmond Partnership of the 7th April, 2009, was the evidence of the agreement reached by Mr. Sheeran in January which provided the conditions for the release by the Bank. That final document, it was submitted, formed the agreement.

Counsel for the respondent referred to the matrix of fact principle in the judgment of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 W.L.R. 1381 at 1384 as follows:-

> "By the nature of things, where negotiations are difficult, the parties positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back; indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object of the transaction, objectively ascertained, may be a surrounding fact."

Lord Wilberforce in referring to the construction of the agreement envisages a final formal agreement the between parties such as the security documents and guarantees. He stated:

> "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti literal, tendencies, for Lord Blackburn's well known judgment in *River Ware Commissioners v. Adamson* (1877) 2 App. Cas. 743, 763 provides ample warrant for a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view."

Counsel for the respondent said that Mr. Barden and Mr. Fortune had concerns regarding the guarantee and requested the release of houses No. 10, 20 and 41. Mr. Sheeran was authorised to make a request regarding the limited recourse under the guarantee and for the release of those houses. Mr. Barden did not agree with the letter of the 31st March, 2009, to Mr. Sheeran. Therefore there was no concluded agreement. The letter written on the 7th April, 2009, from Mr. McIntyre for the Bank to Mr. Barden was a simple letter and the concluded agreement and did not refer to the matters in the e-mail of the 31st March, which, accordingly, did not apply.

He referred to para. 11 of Mr. McIntyre's affidavit of the 17th September, 2010, which stated:

> "11. I say that I indicated, by way of e-mail dated the 31st March, 2009 that the Bank were agreeable to releasing its security over three units in Clearwater (which units were later agreed as the units which comprise the property) subject to the Company's liabilities to the Bank being reduced to €2 million (and not €2.1 million as requested by Mr. Sheeran). It was understood as between David Sheeran and me that the said sum of €2 million would thereafter be secured on the nine remaining units of Clearwater. I understood the proposed reduction of the Company's liabilities to €2 million would funded by either (a) the sale of the property or (b) from some other source of funding not connected with Clearwater.
>
> In addition I say I confirmed that the Bank's recourse against Messrs Barden and Fortune in respect of their guarantee and indemnity of the Company's liabilities to the Bank was limited to their interest in Clearwater (without prejudice to the

Bank's recourses against them in respect of their liabilities and interests in the Island Quay). (A separate development)."

He referred to para. 12 of the affidavit of Mr. McIntyre of the 17th September, 2010, which stated:-

> "12. Although it may more properly be a matter for submission, the attitude of the respondents is, with respect, to place reliance upon a brief letter to Mr. Sheeran, having no regard to (i) the surrounding facts; (ii) my discussion with and understanding with Mr. Sheeran; and (iii) all proper commercial logic."

Counsel for the respondent says that the letter of the 31st March was not agreeable to Mr. Barden who wanted no reference to the telephone conversation and wanted the letter directly to them.

In counsel's submissions there was an onus on the receiver to have called Mr. Sheeran to say that there was an oral agreement on the 20th January, 2009, in order to substantiate that the letter of the 7th April, 2009, did not fully reflect the entire agreement.

He referred to the letter of the 23rd December, 2009 from Matheson Ormsby Prentice to Mr. Barden. That letter followed within two months from the letter of Mr. Sheeran to the Richmond Partnership addressed to 4 Richmond Terrace, Spawell Road, Wexford which confirmed that the balance of the Ulster Bank, Wexford branch account was below €2 million and as such it was in order to proceed and obtain the release of houses No. 10, 20 and 41 pursuant to the letter of the 7th April 2009.

The reply from the solicitors on behalf of the Bank to Mr. Barden stated, *inter alia*, that:-

> "It was never intended or agreed that the Bank would release its security of units 10, 20 and 41 of the development other than in circumstances where the sum due by the Company to the Bank was reduced to €2 million from receipt of sales proceeds due in respect of the sales of units 10, 20 and 41. In the circumstances where the Banks debt was not reduced to €2 million from sales of the relevant units our client is not obliged and does not intend to release its security over the units."

It was submitted that if a third party wanted to buy and pay for any of those properties that the Bank would have granted the release. The reply of M.J. O'Connor for Mr. Barden and Mr. Fortune to the Bank's solicitors letter makes it clear that the units had long been handed over to their clients and considerable sums of money had been expended by them on the properties on the representation that a release would be given. The letter went on to say:-

> "Our clients will not cooperate with any return of these properties to your client and will insist on the Bank's fulfilling its commitment to release its charge over these three units.
>
> Our clients will most certainly not cooperate in any way with the receiver attempting to dispose of their property and in the event that the Bank refuses to adhere to the commitment and representation already made on which our clients relied, our clients will have not alternative but to compel your clients to do so."

A letter of the 9th March, 2010, repeated the understanding of their client's. By reply, solicitors for the Bank on the 12th March, 2010, asked for confirmation that the respondents would hand over peaceful possession of the units and if they were refusing that they should set out precisely the legal basis on which they are asserting that the Bank allegedly agreed to the release of the security of the said units. By reply dated the 9th April, 2010, solicitors for the respondents referred to the correspondence of the 7th April, 2009 and repeated that they would not cooperate with the receiver attempting to dispose of the property.

Solicitors for the Bank responded on the 29th April, 2010, denying that the Bank consented to the units being handed over or that it was obliged to release its security over the units or that the Bank committed to represent it that it would do so.

The respondent stressed that the letter of the 7th April, 2009, made no mention of the meeting of the 20th January, 2009. It was the final agreement which recorded a consensus.

10 Decision of the Court

Counsel for the receiver had referred to paras. 7 and 8 of Mr. Barden's affidavit of the 3rd November, 2010, as being an acknowledgment of authority given by the Partnership to Mr. Sheeran to deal on their behalf. The background to those paragraphs is contained in para. 6 of that affidavit of the 3rd November, 2010, which, for the sake of completeness, is as follows:-

> "6. This is the background to the negotiations Ellen conducted with the Bank and are referred to in the affidavit of Mr. McIntyre. At the date of these negotiations, the Richmond debt had been discharged and our only outstanding "liability" in relation to the development with the guarantee provided to Ellen and that was non recourse and has been recognised by Mr. McIntyre. We took the view therefore that we could not be compelled to pay any further monies and we had an arguable case that we were absolutely entitled to the release given that our only existing liability was non recourse.
>
> 7. Accordingly, we authorised Ellen through Mr. Sheeran to approach the Bank with a proposal that would suspend our right to receive any fines from future sales provided that that the property was forthwith released.
>
> 8. As is apparent from Mr. McIntyre's affidavit, Mr. Sheeran met with him and concluded an agreement. The agreement is entirely in accordance with our requirements. These requirements were well known to the Bank and the letter from the Bank that Mr. Sheeran received accurately reflects the terms thereon. We were entirely satisfied with its terms but requested Mr. Sheeran to obtain the letter addressed to us. These letters together with earlier e-mails between Mr. Sheeran and Mr. McIntyre have been exhibited in the latter's affidavit. . . ."

Counsel for the receiver refers specifically to the phrase "concluded an agreement" and submitted that Mr. Barden was responding to para. 7 and 12 of Mr. McIntyre's affidavit which had referred to three matters: (1) the meeting of the 20th January, regarding the release of the Bank's security over the property, (2) the copy e-mails between Mr. Sheeran and himself of the 27th and 31st March, 2009 and (3) the letters of the 31st March and the 7th April. He had said that it was understood as between Mr. Sheeran and himself that the Bank would only agree to release the property on the basis that the Company's indebtness was reduced to €2 million from the sale of the property or by means of a cash injection and that the debt of €2 million would be secured on nine units at Clearwater. It is unclear whether Mr. McIntyre's handwritten notes were on a copy for on the original of his letter to Mr. Sheeran of the 31st March, 2009. The court is satisfied that they were contemporaneous and included the comment, beside the word "house", that "residual debt secured on nine remaining houses/break even €222K. David Sheeran advised today that three of the nine recently contracted for €305K, €270K and €225K (smaller unit)". Beside the word "interest" the comment "this has already been the position"

had been inserted. These notes would appear to be corroborative of Mr. McIntyre's position.

Moreover it is significant that the respondents did not claim the release of security on the three houses when the indebtedness was reduced below €2 million due to the sale of other units and only made a claim when the applicant demanded possession of the Property.

It was not put to Mr. McIntyre by counsel on behalf of the respondents that there was no agreement in January 2009, indeed the phrase used by Mr. Barden was "concluded an agreement". That was the concluded contract and not the letters which followed. Even if there were only the letter of the 7th April, 2009, the Bank's position was that that was not the full or exhaustive agreement and the court is satisfied that the Bank's security was independent of the call on the guarantee as the security was "all sums due mortgage". The facility letter of the 11th May, 2005, which provided, under the heading of "Security" that unless specifically stated otherwise, any security held by the Bank now or in the future is already held as a continuing security for the discharge of all indebtness and other liabilities of the borrower to the Bank now or in the future.

There was no agreement to vary the terms if the Bank's security nor was there any commercial logic nor legal consideration by the Richmond Partnership to do so.

It is significant that Mr. Barden was not at the meeting. He deposes that Mr. Sheeran was perfectly well aware of what was acceptable to the Partnership. The court does not hold with the proposition of the respondent that the applicant was obliged to call Mr. Sheeran as a witness.

Indeed the court adopts the reasoning of Brooks L.J. in *Wisniewiski v. Central Manchester Health Facility*. No reason was given for Mr. Sheeran's absence. The court can, accordingly, draw an inference in relation to the respondent's evidence.

Moreover, the evidence of Mr. McIntyre was uncontradicted. The corroboration of his notes was not challenged.

The court is satisfied that Mr. Sheeran was acting as an agent for the Partnership as is clear from paras. 7 and 8 of Mr. Barden's affidavit and of his evidence on cross examination already referred to. It was clear that he was authorised to get an agreement from the Bank with regard to the release of the three properties which, as it happened, were to be released from the Company to the respondents as part of the profits for the venture in consideration of them foregoing the site fines on the remaining property.

Accordingly the court is not satisfied that the letter of the 7th April, 2009, was the only concluded agreement.

In addition to relying on the letter of the 7th April, 2009, the respondents say that if they were a cash buyer then the Bank would release its security over properties and subject to the contract with the buyer. There is clearly a difference between members of the Partnership taking a conveyance or assignment of the property in the circumstances of this case without paying for same other than foregoing future site fines. If the Company had been guaranteed by the Partnership and the Company were insolvent, then it would follow that the site fines would not, after the discharge of the indebtness to the Bank, be payable to the Partnership.

In any event the court is satisfied that the agreement with Mr. Sheeran was made on the 20th January, 2009. Mr. Sheeran, as agent of the Partnership, was aware of the terms of that agreement in the e-mail of Mr. McIntyre to him of the 31st March. He did not express any disagreement. His knowledge of the conditions is imputed to the members of the Partnership including the respondents.

It would have been clearer if the letter of the 7th April, 2009 had referred to the meeting of the 20th January, 2009. Notwithstanding, the court is satisfied that the circumstances, the factual matrix of the agreement entered into on behalf of the Partnership and the Bank was negotiated and is recorded in Mr. McIntyre's contemporaneous note together with the correspondence and annotation on Mr. McIntyre copies.

What would appear to have confounded the issue is not the short wording of the letter of the 7th April, 2009, but the letter from Mr. Sheeran to the Richmond Partnership of the 30th October, 2009, confirming to Richmond that the balance was now less than €2 million and that it was in order for the Bank to release Nos. 10, 20 and 41.

The absence of evidence from Mr. Sheeran in this regard is, in my view, critical. This is a circumstance which securities were in place and those securities were under seal. The Bank is entitled to rely on them. The onus of proof is on the respondents to show that there was a concluded agreement other than that evidenced in the memo and correspondence from Mr. McIntyre to Mr. Sheeran. The court is satisfied that the respondents failed to discharge this onus.

The Bank was not privy to whatever arrangements were made between the Richmond Partnership and the Company. Indeed Mr. Barden's evidence was that neither he nor Mr. Fortune had informed the Bank of those arrangements.

There was no evidence of the Richmond Partnership being in a position to "pull down" the Company by suing the Company on foot of arrangements.

There is a certain contradiction in the respondents' submissions that not all arrangements are reflected in documents. That must also apply to the letter of the 7th April, 2009, relied on

In any event the court is satisfied that there was an agreement concluded on the 20th January, 2009, within the parameters of the security given where, as accepted, the Richmond Partnership had guaranteed the liabilities of the Company. To question the "fitness for purpose" of this security is not to deny or limit it.

In the circumstances the court will make a direction, pursuant to s. 316(1) of Companies Act 1963, as amended, that Ulster Bank (Ireland) Limited had not released its security in respect of any interest over the lands and premises referred to in the schedule in the notice of motion dated the 24th September, 2011. The court will also make direction pursuant to s. 216(1) of the Companies Act, as amended, confirming that Mr. Kieran Wallace is validly appointed receiver in respect of the said property and/or in respect of the Company's interest in and concerning the property pursuant to the said security assignment and/or debenture.

The court notes that the respondents do not contest the appointment of the receiver and no arguments were made that the test of the validity of his appointment. The issue related to only to the three properties, which the respondents say that they were entitled to and that the Bank had agreed to release pursuant to the letter of the 7th April, 2009.

The court will also make a direction that the respondents and each of them deliver possession of the property to the Receiver.