

THE HIGH COURT

[2013 No. 5608 P.]

PAUL MCCANN AND PATRICK DILLON AND BANK OF SCOTLAND PLC

PLAINTIFFS

AND

THE TRUSTEES OF THE VICTORY CHRISTIAN FELLOWSHIP BEING BRENDAN HADE, SHEILA HADE AND GERRY BYRNE

DEFENDANTS

JUDGMENT of Ms. Justice Donnelly delivered the 17th day of December 2014.**Introduction**

1. In these two motions, the third plaintiff, Bank of Scotland Plc ("the Bank"), seek orders in aid of execution of the judgment of Gilligan J., perfected on 14th January, 2014, awarding the Bank the sum of €18,758,224.88 together with the costs of their action against the defendants. The circumstances in which that Order was made are set out fully in the judgment of Gilligan J. delivered on 29th November, 2013. It is unnecessary to detail the issues which arose in those proceedings. Suffice to say that the defendants are trustees of the Victory Christian Fellowship ("the VCF"). The principle aim of VCF was identified as the promotion of the Christian faith. Mr. Brendan Hade was identified as the senior pastor and a founding member of the fellowship. Sheila Hade is the wife of Mr. Hade and the other defendant is a founding member of VCF.

2. In the first motion dated 27th February, 2014, the Bank seeks disclosure by the defendants *qua* trustees of assets, income, liabilities, etc., together with a statement of the defendants' current and anticipated income, identifying all sources of same, and the defendants' expenditure. The plaintiff seeks that such disclosure be made by way of affidavit and that discovery be made in aid of same.

3. The second motion dated the 1st May 2004, arose out of information obtained since the date of issue of the first motion. In essence, in the second motion dated 1st May, 2014, the Bank seeks disclosure from the defendants as to the basis upon which the proceedings have been maintained and funded. The recovery of the plaintiffs' costs as against those third parties, once identified is also sought in the motion. However, the issue of recovery of costs from third parties was properly held over and is dependent on the outcome of this second motion and, more particularly, the outcome of any information received from the defendants should the order seeking disclosure be granted.

The Evidence

4. Christopher Arkinson, a director of a case management division within the Bank, detailed in an affidavit the post-judgment engagement between the Bank and VCF. In essence, he said that the defendants refused to co-operate with the Bank in the provision of an acceptable statement of affairs regarding the assets of VCF and failed to make any proposals to discharge the judgment. Those requests went unanswered and the first motion issued.

5. Shortly after the motion issued, a further statement of affairs dated 5th March, 2014, was sent to the Bank's solicitors on 7th March, 2014 on behalf of the defendants. The Bank's solicitors replied saying that that statement of affairs was deficient in a number of respects, including that it omitted bank account details and details of church subscriptions and membership. At a later point, a large volume of bank statements, for a variety of different church accounts, was sent by the defendants to the Bank's solicitors. The Bank submits that this statement of affairs does not assist in understanding the current position of VCF.

6. The solicitor for the defendants, in response to the criticism levelled at them by the Bank's solicitors, replied that "*our clients are not in receipt of any subscriptions or membership revenues and Victory Christian Fellowship has ceased all activities since it was forced to leave its church at the Victory Centre referred to in previous correspondence*". The defendants made further replies to the Bank's criticisms.

7. Mr. Brendan Hade swore an affidavit on 10th April, 2014, on his own behalf and with the knowledge and consent of the second and third defendants. That affidavit makes the point that there was limited recourse to be had to the defendants in the context of the deed of mortgage involved. Counsel for the Bank has confirmed that the judgment obtained relates only to the defendants as trustees of VCF. In those circumstances, any orders that are sought would relate to the defendants only as trustees of VCF.

8. Part of Mr. Hade's affidavit dealt with issues relating to a stay that the defendants sought from the Supreme Court. However, such a stay was refused by the Supreme Court and, as of the hearing of the motions, the matter stood to be heard on appeal in either the Court of Appeal or the Supreme Court.

9. The Bank in a further letter dated 31st of March, 2014, had listed six issues with the VCF response. In relation to the subscription and membership revenues, the Bank drew attention to disparities in respect of the various letters sent on behalf of the defendants. For example, the reference to the cessation of activities was said to be in conflict with the letter from the defendants' solicitors to the effect that a remnant of the congregation of VCF met for Sunday service at the Red Cow Hotel and the Alexander Hotel in Dublin each Sunday. They referred to various advertisements for these gatherings which appeared to be on a Facebook page relating to VCF.

10. Mr. Hade replied to these points in his affidavit. He said that many of these events had been previously booked and that while VCF was unable to organise the programme of activities for 2013, this did not prevent some such events from taking place as they were organised by former members of VCF on their own initiative.

11. In relation to VCF's website and Facebook account, Mr. Hade said that they were not under the control of himself or his fellow trustees. He stated that prior to the appointment of the receivers, the VCF's website and social media sites were widely used by VCF members to communicate about VCF matters and events. He said that other individuals had administrator access to VCF's website and social media sites. He pointed out that the contact details on the social media sites were given as the Victory Centre which has been in the receiver's possession since 17th June, 2013, and that the landline operated by the VCF was also given but that landline was no longer operational.

12. Mr. Hade said that the VCF has not hosted, managed, promoted or run any events and that it was not therefore necessary to give their location, provide details of their attendance numbers, etc.

13. Other matters of contention concern the management and audit of accounts, the contents of the Victory Centre at Firhouse, Dublin, the bank accounts and various references to Victory Ireland Christian Fellowship by the trustees. It appears that Victory Ireland Christian Fellowship and Victory Christian Fellowship are one and the same entity. Mr. Hade says that the Victory Ireland Christian Fellowship is the formal name of the church.

14. A particular concern identified by the Bank in its letter of the 31st of March, 2014, was clarification as to how the VCF was funding its defence of these proceedings. The Bank stated that on the face of the piecemeal bank accounts provided by the defendants, VCF appeared overdrawn. The Bank said that on this basis, VCF would appear to lack the resources to fund the litigation which included a counterclaim against the Bank. The Bank alleged that the costs and expenses of the proceedings, including the Supreme Court appeal, must therefore have been and continue to be funded by a third party or parties. The Bank requested the identity of those persons including any corporate entity.

15. At para. 66 of his affidavit of the 10th April, 2014, Mr. Hade stated that a number of individuals and families who formerly attended the VCF's services at the Victory Centre wish to ensure that VCF continues in being and regains possession of the Victory Centre. He said that such members of VCF's former congregation wish to protect and preserve the interests, good name and reputation of VCF. These members had, it was said, made personal donations to himself, the second defendant and the third defendant, and not to VCF. The purpose of the donations was to enable this deponent and the other trustees to pay in part, and on account only, the legal fees and expenses they are currently incurring by their involvement in these proceedings, both in this court and in relation to the stay before the Supreme Court.

16. It was primarily the contents of that affidavit that prompted the second motion as detailed above. Mr. Hade replied by affidavit to the second motion on his own behalf and with the knowledge and consent of the second and third defendants. In that affidavit dated the 22nd May, 2014, he responded in varying levels of detail to the various requests set out in the motion relating to the identity of the third party funders; the amount of the funding; the details of any arrangements between the trustees and the said third party funders in respect of funding the trustees' legal fees; the details of what interest, if any, the said third parties have in the litigation; the accounts into which the third party funding has been received along with the names of all account holders who have received the funds; and, the taxation treatment of the said funding by the Revenue Commissioners.

17. Mr. Hade also said that former members of the congregation of VCF are greatly upset and distressed at the conduct of the plaintiffs towards the trustees and the effect that it has had on VCF. He cited in particular the loss of the Victory Centre as causing distress, as this was a focal point in their lives primarily for religious, spiritual or prayer purposes, but also in terms of educational and community needs. He said that there are over 200 persons among those concerned former members of the congregation of VCF who have provided financial assistance to the trustees to assist with the trustees' legal fees for the within proceedings. He said that while the trustees could identify some of these former members, they were unable to identify the majority.

18. Mr. Hale stated that the trustees were most reluctant to identify any concerned former members of the congregation of VCF that they do know without their express prior written permission given the private charitable nature of their donations and because this activity reflects strongly held spiritual beliefs. He said that the amount of funding provided was very small and varied from month to month and week to week. He said there are no arrangements between the trustees and the concerned former members of the congregation in respect of the funding of the trustees' legal fees. None of the concerned former members of the congregation of VCF who have provided help with the funding of the trustees' legal fees have any interest in the outcome of the within proceedings other than a sincere and prayerful desire to rejoin the trustees in the Victory Centre and to be part of their ministry there in the future. He said the monies collected from concerned former members of the congregation of VCF, in respect of the funding of the trustees' legal fees, were credited to a bank account held by Victory Conference Centre Ltd., a company in which the trustees have no interest or involvement. He said that the trustees were not aware of the taxation treatment of such funding.

19. The reference to the taxation treatment by the Revenue Commissioners appears to be a reference to an issue concerning the removal by the Revenue Commissioners of the charitable tax exemption status of VCF. According to the decision of Gilligan J., this event occurred on 14th May, 2013, when the Revenue Commissioners wrote to the defendants indicating that the charitable tax exemption status of VCF was to be withdrawn retrospectively from 1st January, 2009. It was stated in evidence before Gilligan J. by Mr. Hade that the significance of this fact was minimal as regards the financial situation of VCF as it did not affect the other revenue stream from which VCF benefited. That was the position adopted by the defendants before me. It should be noted that the Victory Centre premises at Firhouse apparently operated a coffee shop, a crèche and a community type centre which was hired out on a commercial basis. The proceedings before Gilligan J. had, as a major focus, the question of whether the accountants of the defendants had breached a confidence in telling the Bank about the withdrawal of charitable exemption. The defendants' view was that this was a decisive reason, if not the sole decisive reason, for the appointment of the receivers by the Bank. As stated above, those are issues which had been heard and determined by this Court and are now under appeal. They are simply mentioned in this judgment to place in context the case and, in particular, the submissions of the defendants.

The nature of the jurisdiction

20. Counsel on behalf of the defendants conceded that the Bank are entitled to examine the defendants in the context of their status as trustees but only to the extent that it relates to their position as trustees of the VCF. That concession did not in any way resolve the issue before me. The Bank's understandable approach was that the application for the order for examination should be left over until such time as this motion is dealt with, and if disclosure is granted, until such disclosure has been made and assessed as inadequate. That is the appropriate procedure as such examination may not be necessary if a disclosure order is made and bears sufficient fruit in the eyes of the judgment creditor.

21. However, counsel for the defendant contended that the prior disclosure order should not be made. His first submission was that, to the extent that some of the reliefs were based upon the inherent jurisdiction of the Court, they were not properly grounded. I am satisfied that this court has jurisdiction to make the orders for prior disclosure in advance of any examination on oath or affirmation of a judgment debtor. Indeed, that matter was expressly addressed by Clarke J. in *Moorview Developments Ltd. & Ors. v. First Active Plc & Ors.* [2011] IEHC 117, [2011] 3 I.R. 615, where he stated at p. 637

"I am more than satisfied that the court has a jurisdiction to order a debtor to disclose any matters that properly come within the scope of a cross examination under O.42, r.36 in advance of the hearing so as enable the hearing to be focused on issues of real inquiry."

In so far as it was submitted that as the present case was not within the Commercial List, there was no jurisdiction to make the order, I reject that contention. *Moorview* is not an authority for that restriction, instead it identifies the jurisdiction to make prior orders of disclosure as a general jurisdiction which gives real effect to Order 42 rule 36.

22. In the outline legal submissions on behalf of the defendants, it is submitted that the nature and extent of the order should be limited not only to take into account the position of the defendants *qua* trustees, but also to take into account the extensive information which is being exhibited on behalf of the defendants in the first defendant's affidavit sworn on 11th April, 2014.

23. Counsel for the defendants submitted that the fact that the defendants have filed their affidavits in circumstances where there has been no replying affidavit means that there is no material conflict of fact existing between the parties and that the Bank is not entitled to the orders of disclosure or discovery. The decision of Kelly J. in *Irish Bank Resolution Corporation Ltd. & Ors. v. Quinn & Ors.* [2012] IEHC 510, relied upon by counsel for the defendants, dealt with the issue of the necessity of examination as to assets and not prior disclosure of assets. In that case Kelly J held that the court must look at the totality of the issues that have been raised in the affidavits. This will include consideration of the entirety of the affidavits sworn and the arguments making reference to conflicts (see para. 68 of the judgment). This reasoning logically applies to a situation where the court is considering whether disclosure/discovery of assets and income is required prior to an order for oral examination.

24. I therefore reject the contention that the lack of replying affidavit means automatically that no material conflict arises. Instead, the issue for me is whether, in the circumstances of this case, disclosure is necessary prior to the oral examination of the defendants.

Conclusion

The first motion

25. The defendants did not engage with the Bank in the immediate post-judgment stage. They only engaged after the first motion had issued and the matter had been before the courts on a number of occasions. Even after the motions issued, there have been subtle changes in the response of the defendants. The defendants refer to themselves in the present tense as the trustees of VCF yet they variously state that VCF ceased upon the appointment of the receiver and its eviction from the Victory Centre, or that VCF has ceased all activities since it was forced to leave the church premises. Nonetheless, VCF continued to receive direct debits, albeit in relatively small amounts, from certain third parties which were paid into its bank account (this is separate to the position with regard to Victory Conference Centre Ltd). Similarly, the pastor has met with what is termed "a remnant" of the congregation in various hotel rooms in the city. It appears that at an early stage, certain events that had been pre-planned continued to operate but it has been stated that these were organised by former members of VCF on their own initiative.

26. The website and the Facebook page of the entity still function but it is said that the trustees do not control those as former congregation members were acting as administrators. There has been no evidence that there was any attempt to ask their former congregants to take down the website or Facebook page or that the defendants asked the domain name holder or Facebook to take them down.

27. There are real issues arising from the evidence before me as to the position with regard to whether there are truly new churches in being or whether VCF is still in operation. There are issues about the accuracy of the statement of affairs as to the current position of VCF.

28. The other major issue that arises is the reference to the donations made by third parties to pay in part and on account only the legal fees and expenses of the defendants in these proceedings. The averment made by Mr. Hade at para. 66 of his first affidavit is difficult to understand in a context where the defendants have made a large amount of protest about the fact that these proceedings are being taken against them in their capacity as trustees. This paragraph refers to personal donations being made to the defendants and not to VCF to enable the deponents and the other trustees to pay in part the legal fees and expenses of the proceedings. Furthermore, it is clear that those who are providing funding wish to ensure that VCF continues in being and regains possession of the Victory Centre.

29. The evidence before me is that the trustees are receiving at least some income in relation to their position as trustees of VCF, and that there are a significant number of persons who have a desire for VCF to continue and who are prepared to pay money in the hope of ensuring that this will happen. The defendants themselves are, as is their right, anxious to pursue all legal remedies open to them.

30. I am quite satisfied that there are conflicts arising from the evidence that has been placed before me. There are legitimate matters that require to be resolved. There has been piecemeal compliance by the defendants and they have changed emphasis over the course of their engagement with the Bank in response to the motion. I have set out in some detail the issues that arise on the evidence above. Those are matters which in my view require clarity. A particular matter which requires clarity is the issue of whether there are in fact new churches or whether these are in fact VCF. For example, it appears that the remnants of the congregation meeting at various locations have, as their pastors, the defendants in these proceedings. In light of all that has been placed before me, it appears that prior disclosure will be necessary to clarify whether the pastors are attending on a voluntary basis as averred to by Mr. Hade or whether those congregations are, in reality, entities of VCF. I find it appropriate that disclosure and discovery of assets and incomes *qua* trustees of VCF be made by the defendants. I will refer to the extent of those Orders below.

The second motion

31. In relation to the motion for third party funders' information, the defendants have referred to *Moorview* and to the tests they say must be passed before a non-party would be liable for costs (see in particular para 47 of the judgment). They also rely upon the observation of Clarke J. in the case of *Thema International Fund Plc v. HSBC Institutional Trust Services Ireland* [2011] I.E.H.C. 357, [2011] 3 I.R. 654, where he stated at p. 662:

"Charitable intent where the funder does not hope to benefit personally, would, of course, take the case outside the third party funder costs order jurisdiction identified in Moorview...."

32. Counsel for the defendants states that one of the tests in *Moorview* is whether the person sought to be made liable as a non-party for costs was on reasonable notice of the fact that such an order might be sought. The comments in *Moorview* with regard to that reasonable notice were made in the context of the recent development of the jurisprudence in the area. In particular, Clarke J. refers at paragraph 53 to the reasonable notice being given that such an order against third party funders might be sought "at least in cases coming to trial before this judgment". In *Thema International Fund Plc* Clarke J. referred to *Moorview* when saying that "it may be that knowledge by the third party funder of its potential exposure could be a factor in deciding whether to make such an order." That statement does not decide the issue that specific knowledge of the possibility of being pursued for costs over and above the articulation by the courts of the general legal position, is required before an order will be made against a third party funder. In any event, it will be a matter for the plaintiff in this case to address at an appropriate point this issue of knowledge on the part of third party funders. That will be a matter for any application that is made against those third party funders. At issue here is a preliminary

application to identify these sources.

33. In so far as the defendants' submission might seem to suggest that third party funder motions must be brought pre-judgment, I am of the view that the decision in *Thema International Fund Plc* points to the opposite position as the norm. *Thema International Fund Plc* concerned an application for third party disclosure at the *pre-judgment* stage. Clarke J. said, at p. 664:

"Ordinarily, such a disclosure application can be made after the proceedings are over and when the potentiality for a third party costs order arises. In those circumstances no litigation disadvantage could occur by virtue of disclosure for the proceedings will be at an end."

34. Clarke J. referenced a case of the High Court of England and Wales in which an order was made after the case had been concluded. Clarke J. went on to say the only entitlement of an adversary is to apply for a third party funder or costs order in the event that it should win. The only orders which should be made are those which are ancillary to, and necessary to enable effect to be given to, the jurisdiction to make third party funder orders.

35. The disclosure sought in this case is directed at the defendants. It seeks to identify those third party funders. This is an application post-judgment for disclosure as to third party funders. I am of the view that such orders are ancillary to, although necessarily arising prior to, orders for costs as against third party funders.

36. In my view, it is not necessary for potential third party funders to have been given prior notification of an intention to pursue them before a judgment creditor can take any steps against the judgment debtor for the purpose of identifying those funders. To hold otherwise would be illogical. How could a judgment creditor be forced to put on notice those persons whose very identity he seeks?

37. In this case, I am not making an order which renders a third party liable to costs. I am dealing with the issue of whether the defendants should be required to make disclosure relating to third party funding. The defendants argue that the tests in *Moorview* have not been met. They argue, *inter alia*, that the former members of the congregation are not the plaintiffs' adversary, that they had a clear charitable intent associated with the contributions, that the contributions were not made in furthering the funders' own interests other than the charitable one associated with religious worship and spiritual life, and that there was no intention to benefit indirectly from the outcome of the within proceedings in capacity such as shareholders and creditors of the defendants. They argue that it is only in these circumstances that third party costs orders would be made.

38. Counsel for the defendants raises in particular the charitable intent of these funders as well as the question of whether they should be identified given the nature of their apparent donations. In my opinion, those considerations are premature. In my view, this issue, as well as those referred to in the preceding paragraph, more properly arise for consideration in the application for an order against the third party funders. At this point, the issue is the extent of the third party funding and the identification of those funders. I address the issue of a claim to privilege below.

39. There is no doubt in this case but that the defendants have been in receipt of third party funding. There is considerable doubt as to the true source and purpose of that. There is a clear conflict in the first defendant's affidavits as to whether the defendants are in receipt of direct funding from congregants or whether they are in receipt of funding from a company. Paragraph 66 of the affidavit of Mr. Hade of April 2014 refers to personal donations being made to the defendants by those members of VCF's former congregation, whereas the affidavit of May 2014 says that the monies collected from concerned former members of the congregation, in respect of the funding of the trustees' legal fees, are credited to a bank account held by Victory Conference Centre Ltd., a company in which it is stated that the trustees have no interest or involvement. No further information about that company has been put forward by the defendants. On the face of it, there is also a conflict between whether it is direct funding by these third party funders or whether in fact all the funding is being channelled through this company.

40. The basis under which they have received such donations is also at issue. The extent of the donations are also at issue. All of these are matters which necessitate disclosure and discovery.

41. The case of *Foley v. Bowden* [2003] 2 I.R. 607, referred to by counsel for the Bank in explaining the wide jurisdiction under O.42, r.36, is of relevance to some of the concerns raised by counsel for the defendants. In that case, the Supreme Court, in granting an order that the relevant member of An Garda Síochána could be orally examined, stated that it would be open to such individual being examined to object to the production of any document whose disclosure would not be in the public interest and for the judge, before whom the examination was taking place, to rule on same.

42. In my view, the disclosure of documents made pursuant to an order of disclosure in advance of any possible oral examination of a party would, by analogy with *Foley*, be subject to a claim of privilege that may properly arise therefrom. Specific issues arising from any claim to privilege may be addressed at that stage. The court will then be in a better position to identify what, if any, entitlement there is to rely upon a claim to privilege over identification of the third party funders.

43. I do note, however, that there must be some engagement on the part of the trustees prior to any filing of the affidavit that will be required as a result of the orders that I will make. In so far as the defendants have referred to written consents being required, it will be their duty to seek, as far as possible, any consents that they say need to be obtained. Furthermore they will have to identify each and every document relating to third party funding or funders over which they claim privilege.

44. Therefore, in respect of the first motion, I am prepared to make the following orders in the following terms:

a. An order in terms of paragraph (a) of the notice of motion with the addition of the following phrase "as trustees of the Victory Christian Fellowship" after the word "defendants" and before the word "have" in the third line of para. (a) of the motion.

b. An order directing the defendants to swear and serve on the Bank's solicitors within a period that I will discuss with counsel, an affidavit setting out and confirming the information disclosed in respect of paragraph (a) above and exhibiting copies of the documentation relied upon in support of the information disclosed.

45. I will also make orders in terms of the second notice of motion at para. 1 (a), (b), (c), (d), (e) and (f) thereof, and I will also add (g) and (h) to that as follows:

(g) All details as to the legal and beneficial ownership of Victory Conference Centre Ltd.

(h) all correspondence between Victory Conference Centre Ltd, its servants or agents and the defendants, their servants or agents including but not limited to details of all payments made from the company to the defendants, their servants or agents.