Neutral Citation: [2016] IEHC 389

THE HIGH COURT

[2013 No. 10432 P]

BETWEEN

CENDANT LIMITED (IN LIQUIDATION AND RECEIVERSHIP) AND FABJOLL LIMITED AND EOIN RYAN

PLAINTIFFS

AND

GALTEE PLANT HIRE LIMITED AND NOEL SIMPSON

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered the 1st day of July, 2016.

1. Waterford Castle Hotel and Golf Course ["WCHG"] is a resort situated on an island on the River Suir, not far from Waterford City. The island, known as Little Island, measures a little over 300 acres and access is provided by means of a ferry which plies along a fixed course between a slipway at Ballinakill on the mainland to a slipway on the island. The fixed course is achieved by means of chains linked to the ferry and anchored at points on the mainland and the island. Such an arrangement no doubt renders the operation of the ferry less susceptible to the variable conditions of the tidal river. The ability of the resort to function as such is wholly dependent on the access provided by the ferry.

2. These proceedings arise from the liquidation and receivership of the companies which owned and operated WCHGC. The first plaintiff was the owner of certain of the lands of Little Island including the lands on the mainland and the lands on the island to which the ferry was attached. On 19th July, 2013, a provisional liquidator Aidan Murphy, was appointed by the High Court to the assets of the first plaintiff. On the same day, the third plaintiff was appointed receiver by NAMA over the secured assets of the company. At that time access to the island was being provided by a boat called the Loreley. This boat was the property of the first defendant and was supplied to the first plaintiff pursuant to a bareboat charter agreement made 16th January, 2012. The agreement was for a five year period at a rate of €75,000 per annum giving a total contract value of €375,000.

3. In these proceedings the plaintiffs seek damages for trespass, breach of contract, misrepresentation, deceit and unlawful interference with economic and business interests arising from an alleged breach by the defendants of the terms of the charterparty agreement. The defendants in return seek damages for trespass, breach of contract, detinue, slander of title and a sum of €210,000 allegedly arising from the costs of the arrest of the vessel, the subject matter of these proceedings arising from charterparty liability to a third party. The parties raised two issues for the preliminary determination of the Court, namely:-

> (a) Whether the plaintiffs have locus standi to maintain this action and in particular to seek the injunctive relief which they sought on the 27th September 2013; and
>
> (b) Whether a purported assignment of the bareboat charter by the liquidator of the first plaintiff to the second plaintiff was valid.

The Parties

4. The first plaintiff, Cendant Limited (in Liquidation and Receivership) (hereinafter generally referred to as "Cendant") is a limited liability company involved in the operation of WCHGC together with another company called Newgold Limited. WCHGC comprises a hotel, 48 lodges and an 18 hole golf course on Little Island in County Waterford. Access to Little Island, as already stated, can only be gained by ferry, which operates from the foreshore at Ballinakill, County Waterford. Cendant owns the portion of Little Island on which the golf course and lodges are situated and the part of the foreshore at Ballinakill from which the ferry access is organised and operated. Cendant and Newgold Limited were both involved in the operation of WCHGC and both companies were involved, at various stages, with the operation of the ferry service to and from the island. On 19th July, 2013, petitions to wind up both Cendant and Newgold Limited were presented to the High Court and a Mr. Aiden Murphy was appointed provisional liquidator to both companies. On 2nd August, 2013, both Cendant and Newgold Limited were wound up by order of the High Court and Mr. Aiden Murphy was appointed as official liquidator to both companies.

5. The third plaintiff, Eoin Ryan, is an accountant and partner of McKeogh Gallagher Ryan Accountants. Mr. Ryan was appointed as a statutory receiver of Cendant and Newgold Limited on 19th July, 2013, under the National Asset Management Agency Act 2009. On the same date, Mr. Ryan was also appointed receiver of a company called REFL Construction Limited, which had been responsible for the construction of the lodges at WCHGC. Galtee Plant Hire Limited, the first defendant, had worked as a contractor for REFL Limited in the course of that construction.

6. Mr. Ryan is also the director and secretary of the second plaintiff, Fabjoll Limited, which was incorporated for the purposes of managing the assets of Cendant and Newgold held pursuant to the receivership. On 2nd August, 2013, the official liquidator of Cendant and Newgold Limited sold the unsecured assets of Cendant and Newgold to Mr. Ryan, some of which were assigned directly to Fabjoll Limited.

7. The first defendant, Galtee Plant Hire Limited, is a limited liability company from whom at the time of the liquidation/receivership, Cendant chartered the ferry vessel the Loreley pursuant to a bareboat charterparty agreement. As already stated, this vessel was the only means of access to Cendant's business on Little Island. The second defendant, Noel Simpson, is a director of Galtee Plant Hire Limited. According to the evidence of Mr. Ryan, Mr. Noel Simpson, director of Galtee Plant Hire Limited is a brother of Mr. John Simpson, who was a director of Newgold Limited and Cendant.

Background

8. On 2nd May, 2007, Cendant created a charge in favour of Allied Irish Bank in respect of its interest in Little Island and its interest in the area from which ferry access is gained to Little Island (i.e. the foreshore of the River Suir between Little Island and Ballinakill). Its interest consisted of the portion of Little Island upon which the golf course and lodges are situated and the part of the foreshore at Ballinakill (on the mainland) at which the ferry to the island docks.

9. On 16th January, 2012, Cendant entered into a bareboat charterparty agreement ("the charterparty agreement") with Galtee Plant Hire Limited pursuant to which Cendant chartered the vessel known as the Loreley from Galtee Plant Hire Limited. The terms of that agreement were as follows:

> *"Galtee Plant Hire Ltd. is the registered owner of the ferry ship Loreley and has agreed to enter into an agreement to charter the vessel to Cendant Ltd. on a bare boat basis.*
>
> *The agreement is subject to the following conditions;*
>
> *1. TERM: This agreement is for a period of five years.*
>
> *2. PAYMENT TERMS: €75,000 per year, payable monthly in advance.*
>
> *3. RUNNING COSTS: All day to day running costs are for the account of the charterer.*
>
> *4. MAINTENANCE: Charterer to keep vessel maintained to the highest standard as per initial condition survey.*
>
> *5. ANNUAL SURVEY: Charterer to maintain the annual passenger licence and discharge all costs associated with same. Copy licence to be furnished to the owner each year on demand.*
>
> *6. HARBOUR LICENCE: Charterer to maintain the river licence and discharge all costs associated with same. Copy licence to be furnished on demand.*
>
> *7. INSURANCE POLICY: Charterer to secure insurance policy to cover the vessel for passenger use and damage howsoever caused and to discharge all costs associated with same policy document to be furnished to the owner each year on demand.*
>
> *8. THIRD PARTY CLAIMS: Charterer will indemnify the owner from all and any claims from crew, passengers, vehicles, plant and machinery, other vessels etc., howsoever caused.*
>
> *It is hereby agreed that the parties hereto consent to the foregoing and abide by same".*

10. There was some confusion as to the history of the ferry arrangements and the Court notes that the letter from the defendants of 29th August, 2013, regarding the charterparty agreement (referred to below) states that both Cendant and Newgold Limited are parties to such agreement despite the fact that only Cendant is mentioned in the agreement. It appears to the Court that the operative agreement at the time of the liquidation/receivership was between Cendant and Galtee Plant Hire Limited and that the reference to an agreement with Newgold, as a matter of probability, relates to an earlier arrangement. The Court comes to this view because the agreed statement of facts submitted by the parties states that, prior to the commencement of the charterparty agreement of 16th January, 2012, the Loreley had been owned by REFL Construction Limited and chartered to Newgold Limited. Furthermore, according to the affidavit of Mr. Ryan, the charterparty agreement of 16th January, 2012, replaced a previous arrangement pursuant to which Galtee Plant Hire Limited had also been the provider of the service. It is not clear to the Court who the parties to such an agreement were. In any event, it appears to the Court that there was a degree of interconnectivity between Cendant, Newgold Limited, REFL Construction Limited and Galtee Plant Hire Limited insofar as the operation of the business at WCHGC was concerned. The Court is satisfied for the purposes of this decision, that the operative agreement is that set out at paragraph 9 and is an agreement between Cendant and Galtee Plant Hire Limited.

11. On 19th July, 2013, Mr. Ryan was appointed as receiver to Cendant, pursuant to a deed of appointment of statutory receiver. This appointment was in respect of secured obligations acquired by NAMA and was made pursuant to s. 147 of the National Asset Management Agency Act 2009. Those secured obligations included the aforementioned charge by Cendant in favour of Allied Irish Bank, dated 2nd May, 2007. Mr. Ryan was also appointed receiver in respect of the secured assets of Newgold Limited and in respect of the secured assets of REFL Construction Limited. His appointment therefore encompassed the whole of Little Island.

12. On the same date, National Asset Loan Management Limited presented petitions to the High Court seeking the winding up of Cendant and Newgold Limited, returnable for 31st July, 2013. Mr. Aiden Murphy was thus appointed provisional liquidator of both companies by the High Court on 19th July, 2013. On 2nd August, 2013, Mr. Murphy was appointed official liquidator to those companies by order of the High Court, the winding up petitions having been heard by Moriarty J.

13. Between 19th July, 2013, and 2nd August, 2013, the provisional liquidator operated the business of the resort with the consent of Mr. Ryan as the receiver. Mr. Ryan gave evidence that at the time of his appointment as receiver, he had very little information about the Loreley and how it had operated pre-receivership, as the provisional liquidator would have dealt with such matters. The provisional liquidator, according to Mr Ryan, had indicated to him that records were limited such that it was difficult to discover or ascertain liabilities. Correspondence exhibited from the liquidator, Mr. Murphy, to Mr. Noel Simpson, indicates that Mr. Simpson received payment in the amount of €1,442 per week in respect of the charterparty agreement from Mr. Murphy in his capacity as liquidator from 19th July, 2013, to 2nd August, 2013. Mr. Murphy also paid €6,000 to Christopher Hannon for services rendered by Mr. Hannon during the same period. It thus appears that whatever uncertainties arose from the records, the provisional liquidator was perfectly clear as to the basis on which the first defendant was supplying services to Cendant and paid current liabilities in respect thereof.

14. Mr. Ryan also gave evidence that he later received legal advice regarding the charterparty agreement, such that he understood that he had an obligation to maintain the vessel, that he required a harbour licence and that he had an obligation to insure the vessel. This suggests that Mr Ryan and his advisors were aware of and familiar with the terms of the charterparty agreement of 12th January, 2012.

15. On 23rd July, 2013, four days after his appointment, Mr. Ryan, according to his evidence, received an unsolicited email from a Mr. Noel O'Regan. Mr. O'Regan informed Mr. Ryan that he was a broker acting on behalf of the owners of the *Foyle Rambler*, a ferry vessel which had previously operated at Waterford Castle, and that he would be interested in entering into negotiations with Mr. Ryan

concerning the purchase of the vessel. In late July, 2013, Mr. O'Regan contacted Mr. Ryan again to inform him that another party was interested in purchasing the *Foyle Rambler* ferry. Mr. Ryan told Mr. O'Regan to get back in touch if the sale was not agreed.

16. On the same date the provisional liquidator received correspondence from Galtee Plant Hire Limited indicating its intention to reduce the service of the ferry. Mr. Ryan states that this correspondence was later passed on to him by the liquidator and was a source of confusion to both of them given that the staffing of the ferry and its operation were a matter for the charterer.

17. On 30th July, 2013, Mr. Ryan inspected the *Loreley* with Captain Bhandarkar of SSL Marine Limited. According to the evidence of Mr. Ryan, he had had no dealings with Galtee Plant Hire Limited at this stage. He states however that Mr. Christopher Hannon, who was engaged to maintain and service the Loreley pursuant to the terms of the charterparty was present. Mr. Hannon had informed Mr. Ryan, on 19th July, 2013, the day of his appointment, that he was owed significant monies in respect of the services he had rendered.

18. On 2nd August, 2013, an Asset Transfer Agreement was entered into by the official liquidator on behalf of Cendant and Newgold Limited as vendor and the receiver as purchaser. This agreement was for the transfer by way of sale to the receiver of certain assets of Cendant and Newgold, utilised in the carrying on of business of WCHGC but not secured in favour of the NALM. The sum of €178,940 was paid for these assets. As part of the Asset Transfer Agreement it was agreed that Cendant would assign to Fabjoll Limited such rights, title and interest as it had in the bareboat charter agreement in respect of the Loreley which had been chartered to Cendant by Galtee Plant Hire Limited on 16th January, 2012. Mr. Ryan gave evidence that the rationale for seeking assignment of the charterparty to operate the ferry was to ensure access to the island was maintained so that the assets of the companies over which Mr. Ryan was receiver could continue to be traded.

19. The portion of the agreement relating to the charterparty was originally redacted when discovery was made. It included a clause indemnifying the vendors, Cendant and the official liquidator "in respect of any liabilities, loss or damage or claim arising out of or in connection with the Bare Boat Licence or the assignment thereof, other than any liability which would rank as an unsecured claim against either of the vendors". The indemnity was subject to the terms of the following clause:-

> *"The Purchaser's liability under this clause shall not exceed €119,000 and shall be in respect of any successful claim brought by Galtee Plant Hire Limited arising out of or in connection with the Bare Boat Charter Licence only, since 16 January 2012".*

Mr. Ryan gave evidence that the figure of €119,000 was a *pro rata* calculation of the annual rent of €75,000 due pursuant to the terms of the charterparty agreement of 16th January, 2012, up to 2nd August, 2013, and was therefore considered the maximum which could potentially have been due on the basis of that agreement. He stated that this clause represented an abundance of caution on both sides and was designed to satisfy any concerns of the liquidator in relation to challenges concerning the validity of the assignment since in his view, any claims for payments arising from the charterparty agreement would have come under the umbrella of unsecured claims. Mr. Ryan states that he was not particularly concerned about the assurance, which was included at the request of the liquidator, as his legal advice was that the potential for a claim was remote. The plaintiffs characterise this provision as a mere *"coach and horses"* provision erring on the side of caution. The Court feels certain that what was meant was *"belt and braces".*

20. Part 7 of the Asset Transfer Agreement dealt with "Third Party Assets". The Court considers some of its provisions significant in the context of the issues which it has to decide:

> *"7.2 If requested by the owners of any Third Party Assets and the Purchasers, the Vendors shall at the Purchaser's expense and on a full indemnity basis enter into novations of some or all agreements relating to the Third Party Assets in a form reasonably acceptable to the Vendors and the Official Liquidator and be approved by the Vendors' Solicitors.*
>
> *[…]*
>
> *7.4 If no novation takes place or if a valid demand for delivery up of a Third Party Asset is received by the Vendors, the Official Liquidator or the Purchaser, the Purchaser shall immediately on demand deliver up possession of the Third Party Asset to the Official Liquidator or otherwise as the Official shall direct. The delivery up of any Third Party Asset shall be at the Purchaser's own expense and the Purchaser shall sign all such documentation as may reasonably be required in connection with the delivery up.*
>
> *[…]*
>
> *7.6 The Purchaser shall indemnify the Vendors and Official Liquidator on a full indemnity basis immediately upon written demand against all and any liabilities as they arise on account of the giving up of possession of any of the Third Party Assets to the Purchaser, or of the failure by the Purchaser to deliver them up or to deliver them up in the same condition as that which they are in as at the Completion Date or of any use or misuse of any of the Third Party Assets by the Purchaser or by any person under his direction or control between the giving up of possession and the Third Party Asset being redelivered to the Official Liquidator or otherwise as directed by the Official Liquidator".*

21. Whatever the view of Mr. Ryan and his advisors as to the remoteness of a potential challenge to the assignment of the bareboat charter, it is clear that the advisors to the liquidator of Cendant were not as sanguine and they took specific steps to protect the liquidator in the event of such a challenge. On the same date as the Asset Transfer Agreement was entered into, being 2nd August, 2013, Gilligan J. gave liberty to the official liquidator to transfer certain assets of Cendant *"subject to the agreement by the Official Liquidator of satisfactory escrow terms concerning those assets which are the subject of potential retention of title claims".* A similar order was apparently made in relation to the assets of Newgold but such order is not exhibited.

22. It appears from the order of Gilligan J. and from the terms of the Asset Transfer Agreement that all parties to such agreement were mindful of the potential difficulties which might arise in relation to the assignment of the bareboat charterparty agreement.

23. On 2nd August, 2013, Fabjoll Limited commenced operating the Loreley. Fabjoll tendered the appropriate monthly hire fee for use of the Loreley from 2nd August onwards. Mr. Ryan acknowledges that no prior consent was sought from Galtee Plant Hire Limited in relation to the assignment of the charterparty agreement.

24. According to the evidence of Mr. Ryan, on 6th August, 2013, Mr. Ryan telephoned Mr. Noel Simpson, a director of Galtee Plant Hire Limited, to ensure that he was aware of the assignment of the charterparty agreement to Fabjoll Limited. Having failed to reach

Mr. Simpson, he left him a voicemail message. On 8th August, 2013, Mr. Ryan wrote to Galtee Plant Hire Limited enclosing a cheque in relation to the charterparty agreement and requesting a meeting with Mr. Simpson. On the same date, Mr. Murphy, liquidator of Cendant, wrote to Mr. Simpson of Galtee and to Mr. Christopher Hannon, informing them that he had handed over the operation of the trade at the resort, including responsibility for the operation of the ferry, to Mr. Ryan as receiver. On 9th August, 2013, Mr. Ryan stated that a colleague of his contacted Mr. Simpson to inform him that the cheque sent on 8th August, 2013, was unsigned and to request that he return it, which Mr. Simpson agreed to do. Mr. Ryan stated that his colleague also reminded Mr. Simpson that Mr. Ryan was seeking a meeting with him. He further stated that he attempted to contact Mr. Simpson in this regard on subsequent occasions but to no avail. In late August, Mr. Simpson contacted Mr. Ryan and indicated that he would shortly return to Ireland from the UK whereupon he would get in contact with Mr. Ryan in relation to the meeting requested. Such contact did not occur.

25. In mid-August, Mr. Ryan asked Captain Bhandarkar to carry out a survey on the *Foyle Rambler*. However, in late August, according to his evidence, he contacted Mr. O'Regan, the broker engaged in selling that vessel, to advise him that he was not interested in purchasing the vessel. He did however request that he be informed in the event that the vessel was purchased.

26. On 20th August, 2013, Mr. Ryan submitted the necessary documentation to the Port Authority of Waterford to procure a Harbour Licence in the name of Fabjoll Limited, for the operation of the *Loreley*. On 23rd August, Mr. Ryan received an email from the Port Authority of Waterford informing him that Mr. Carl O'Mahony, the defendants' solicitor had contacted the Port Authority to raise objection to a harbour licence being provided to Fabjoll Limited on the basis that Galtee Plant Hire Limited was still operating the ferry. It strikes the Court that this objection could not be valid in circumstances where the boat at that time was still the subject of a bareboat charter and the charterer had responsibility to procure the necessary licence.

27. On the 29th August, 2013, Galtee Plant Hire Limited's solicitor wrote to Mr. Ryan, purporting to terminate the charter agreement. The letter reads:-

> *"Dear Sirs,*
>
> *We refer to the bare licence agreement entered into by Galtee Plant Hire Limited and Newgold Limited and Cendant Limited and you might note the following:*
>
> *a. As you are aware both Newgold and Cendant Limited have failed to discharge their core obligations on foot of a service agreement and a bare licence agreement. There is now a sum in excess of €733,000 due and owing to our clients Galtee Plant Hire Limited. Notwithstanding demand for payment in this regard, no payment has been remitted.*
>
> *b. Notwithstanding the fact that the grant of the bareboat charter was personal to Cendant Limited and Newgold Limited, those companies it would appear have purported to assign their rights without reference in any respect to Galtee Plant Hire Limited.*
>
> *c. Notwithstanding the fact that the bare boat charter was explicit in making it clear that no proprietary rights were conferred upon Newgold Limited or Cendant Limited in the ferry, these companies have purported without permission from Galtee Plant Hire Limited, to install security guards on the ferry in what can only be interpreted in an attempt to unlawfully secure physical possession of the ferry and this act of trespass has been conducted without consultation in any respect with the owner of the ferry, Galtee Plant Hire Limited.*
>
> *d. It has now come to our attention that Mr. Eoin Ryan, receiver of Cendant Limited and Newgold Limited and director of Fabjoll Limited have made contact with the Harbour Master in Waterford and has [sic] represented to the authority that Fabjoll Limited is now the operator of the ferry and has sought the transfer to that company of the licence to operate the ferry. It would appear that in the course of the exchange, Mr. Ryan has failed to advert to the fact that the rights contained in the bare boat agreement which were personal to Cendant Limited and Newgold Limited have been subject to the purported transfer to Fabjoll Limited without reference to Galtee Plant Hire Limited.*
>
> *In light of the foregoing and in light of the fundamental failure to discharge the payment obligations already arising on foot of the bare boat agreement, our client is left with no option but to notify you of the termination of the licence agreement. For the avoidance of doubt you might note that our clients rights (and obligations) arising on foot of the said agreement are hereby terminated. You might note from this point onward no reliance may be placed on the agreement in any respect in asserting rights flowing thereunder. You might further note that nothing in this correspondence can be construed as constituting a waiver of our clients demands and entitlement to payment on foot of the bare licence agreement. To that end, we hereby re-issue our previous demands for payment and demand that the sums due be remitted within 14 days of todays [sic] date.*
>
> *Our client is happy to extend to your client a facility on foot of which can be maintained a facility to access the Island pending resolution of the outstanding issues between the parties. To that end you might note the following:*
>
> *1. Our clients will maintain a service consummate [sic] to the service that pertained to date subject to the payment on a weekly basis of the sum of €1,442 per week as per the bare licence agreement plus the amount representing the monthly fuel bill and the associated running costs plus weekly payments to substantially reduce the balance of the €733,000 currently outstanding.*
>
> *2. You must pay on a weekly basis the salary amounts due to the crew operating the ferry.*
>
> *3. You must immediately remove your security staff from our ferry immediately [sic] and if you seek to place the security staff on our ferry, please seek consent in writing otherwise we maintain the right to determine in every respect the right of access and egress to our clients property, being the ferry.*
>
> *4. Please note that our client will discharge all its responsibilities with regard to the statutory licence and certificates required to operate the ferry.*
>
> *Please further note that nothing in the agreement, should you accept same, may be construed as being other than an invitation to you to accept a bare interim agreement to maintain the service at no extra cost to you pending resolution of the broader issues between our clients. Please note should your client wish to engage in any negotiations with regard to its procuring our clients assets or procuring a long term agreement, our client is open to such negotiation and any such negotiation should be through this office".*

28. The Court notes that in this letter, the first defendant claims arrears in excess of €733,000 on foot of a contract, the total value of which is €375,000 over a five year period from 16th January, 2012. It is clear that the first defendant is trying to fix the plaintiffs with liability for debts incurred under a previous arrangement which was superseded by the bareboat agreement of 16th January, 2012. In this context the Court notes that according to the agreed set of facts the Loreley *"had formerly been owned by REFL construction and chartered to Newgold Limited under the precursor to the Bareboat Charter".* The Court can see no basis on the evidence before it for the first defendant's claimed entitlement to a sum in excess of €733,000, in circumstances where the undisputed value of the relevant contract is €375,000.

29. Mr. Ryan gave evidence that he did not consider the conditions proffered in the letter of 29th August to be reasonable and at this point he began to consider his options for ensuring the provision of a ferry service to the island which, he stated, included a possible purchase of the *Loreley*.

30. In early September, Mr. Ryan contacted Pahlsson Shipping Company Limited, a shipbrokers based in the United Kingdom. On 6th September, 2013, a Mr. Magnus Pahlsson contacted Mr. O'Regan on behalf of Mr. Ryan seeking information on the *Foyle Rambler*. Mr. Ryan gave evidence that his instructions to Mr. Pahlsson were to ascertain the price at which the *Foyle Rambler* might be available since at this point he was merely exploring his options and had no authority to enter into any agreement. Mr. Ryan states that this course was motivated by the correspondence he had received from the Port Authority on 23rd August and from Galtee's solicitor on 29th August, 2013.

31. On 13th September, 2013, the plaintiffs' solicitors responded to the letter of the defendant's solicitor dated 29th August, 2013. They rejected the assertions made on behalf of Galtee Plant Hire Limited as to the non-assignability of the bareboat charter without the prior consent of the owners and asserted that in the absence of any express prohibition of assignment, the official liquidator was entirely free to assign the charter agreement and noted that Fabjoll Limited's engagement of a security firm to remain on the ferry at all times was entirely in accordance with the charter agreement. The letter also stated that the Port of Waterford Company had been informed of all material facts in the licence application. The plaintiffs' solicitors sought clarification of the basis in law for the defendant's purported termination of the charter agreement. Finally, the writer requested a price at which Galtee Plant Hire Limited would be willing to sell the Loreley.

32. On 16th September, 2013, Galtee Plant Hire Limited's solicitor responded to the plaintiffs' solicitors as follows:-

> *"Firstly, you will note that the bare boat charter agreement to which you refer has now been terminated in light of the breach of fundamental obligations contained therein and we refer to our previous correspondence in that regard to your client dated 29th August 2013.*
>
> *Secondly, your clients did not avail of our clients [sic] offer to extend a temporary facility pending resolution of the outstanding issues between our clients that offer has now been withdrawn.*
>
> *Having spoken to the authorities in Port of Waterford, it is clear that your client did not make them aware of all material facts relating to the operation of the ferry.*
>
> *We have already notified your client that they should now make arrangements to source an alternative ferry within the next 14 days as our clients will be taking the appropriate steps to take control of the ferry which our clients own.*
>
> *Our clients have been contacted by an Asian Consortium who I understand have an interest in buying the island itself who have asked if our clients are willing to sell the ferry. To that end, our clients have made enquiries and established the current weekly charter fee and accordingly have engaged the services of a marine broker who is going to Waterford tomorrow to professionally value the ferry. If your clients wish they can submit an offer through this office which will be considered in conjunction with any other offers received for the purchase of our clients vessel".*

Having received this notice, Mr. Ryan took measures to source an alternative vessel. At this point, Fabjoll Limited had sent a cheque to Galtee Plant Hire Limited for the August fee and later for the September fee pursuant to the charter agreement. The cheques were not cashed and the cheque proffered for the month of September was returned to the plaintiffs by the defendants' solicitor.

33. On 18th September, 2013, the plaintiffs' solicitors responded to the defendant's solicitors above letter, reiterating their request for the legal basis for the termination of the charterparty agreement; requesting a statement of the material facts which had not been provided to the Port Company and seeking a purchase price for the Loreley to be sent by the 19th September, 2013.

34. On 20th September, 2013, Galtee Plant Hire Limited's solicitor wrote to the plaintiffs' solicitors informing them that the Loreley had been valued at €1.45 million. No evidence of such a valuation has been produced to the Court. He requested confirmation whether or not the plaintiffs wished to purchase the vessel.

35. On 22nd September, 2013, Mr. Ryan submitted a recommendation to NAMA that a deal to purchase the *Foyle Rambler* should be finalised.

36. On 24th September, 2013, Mr. Pahlsson's office wrote to Mr. O'Regan confirming that a firm offer had been made by Mr. Ryan for the purchase of the *Foyle Rambler*. Mr. Ryan gave evidence that at this stage negotiations were ongoing. He stated that Mr. Pahlsson's classification of the offer as "*firm*" was Mr. Pahlsson's own classification and that such statement had no authority to bind Mr. Ryan. However Mr. Ryan confirmed that he had authority at this stage to negotiate a purchase subject to certain conditions. On the 25th September, 2013, in an email to Mr. Ryan's representative, Mr. O'Regan outlined that his clients, the directors of Foyle Ferries, were willing to sell the *Foyle Rambler* for €640,000, with conditions attaching including a requirement to insure the ferry from the date of acquisition. Mr. Ryan gave evidence that solicitors had become involved in the transaction at this point.

37. On 26th September, 2013, the plaintiffs' solicitor responded to the first defendant's solicitor, indicating that their valuation of the *Loreley* appeared grossly excessive, but expressed a desire to enter into negotiations for the purchase of the vessel. No offer was made by the plaintiffs for the purchase of the *Loreley*, even though by then they had a similar vessel available for €640,000. The letter sought confirmation of certain matters and expressly reserved all rights of the plaintiffs in relation to the charter agreement in the meantime. On the same date, Mr. Ryan and Captain Bhandarkar travelled to Donegal to inspect the *Foyle Rambler*. Draft documents relating to the purchase of the *Foyle Rambler* were also exchanged by solicitors for both parties.

38. On 27th September, 2013, Galtee Plant Hire Limited's solicitor wrote to the plaintiffs' solicitors indicating, *inter alia*, that given that the interim agreement terms had not been accepted, Mr. Ryan would be afforded one further opportunity to enter into an interim

arrangement by 5 p.m. that day. In the absence of a response, a further reminder was issued. A response was ultimately received from the plaintiffs' solicitors, outlining that regretably even if Mr. Ryan were minded to do so, he could not procure the necessary approvals to commit himself to such a course in such a short time frame.

39. Meanwhile, at around 1:45 p.m. on 27th September, 2013, a copy of an agreement for the purchase of the alternative ferry, the Foyle Rambler, signed by Fabjoll Limited was sent by its solicitors to the solicitors acting for the vendors of the *Foyle Rambler* with conditions attached. On the same date, Mr. Ryan telephoned Rory O'Sullivan of JLT Insurance in order to acquire a certificate of insurance for the *Foyle Rambler,* which he received by email at 12:10 p.m. Mr. Ryan forwarded this email to the Foyle Ferry Company, vendors of the Foyle Rambler, at 1:14 p.m.

40. Mr. Noel Simpson avers on behalf of the defendants that at 5:10 p.m., on 27th September, 2013, the first defendant's solicitors received correspondence from the plaintiff informing the defendant that the plaintiffs had received advice suggesting that a purchase price of €400,000 in respect of the *Loreley* would be appropriate and inquiring as to whether the defendant would be amenable to negotiations regarding the purchase price. Mr. Ryan stated that the €400,000 proffered by the plaintiffs' solicitor was based on a valuation indicated by Captain Bhandarkar based on his earlier inspection of the *Loreley* and that no counter offer was received in this regard. The purported valuation of Captain Bhandarker has not been put in evidence, but the Court observes that it appears low in the context of a price of €640,000 being offered for a similar vessel.

41. Mr. Simpson, in his affidavit of 30th September, 2013, expressed his concerns that this offer was made in bad faith in order to procure an extension of time by subterfuge without committing to any legal arrangement for service. Mr. Ryan, in his evidence, responded to the concern expressed by Mr. Simpson, stating that although the purchase price for the *Foyle Rambler* was agreed on the 27th September, 2013, it was still necessary to carry out further checks and sign contracts. He further stated that his experience as a receiver led him to consider a deal as not being done until it was officially complete and that if another vessel had become available at this point he would have been under an obligation to NAMA and the funding parties to bring it to their attention. Mr. Ryan further stated that had a reasonable price been reached in relation to the *Loreley*, that vessel would probably have been purchased given the significant factor of convenience and the fact that the plaintiffs' suggested purchase price was significantly cheaper than that of the *Foyle Rambler*. Mr. Ryan also averred in his affidavit of 4th October, 2013, that the price paid for the *Foyle Rambler* highlights that the price stipulated by Galtee Plant Hire in respect of the *Loreley* of €1.4 million, was massively inflated, and made co-terminously with assertions that the ferry service would otherwise be disrupted or ceased. Again the Court observes that it can also be suggested that the price offered by the plaintiffs for the *Loreley* of €400,000 was significantly deflated when measured against the €640,000 price of the *Foyle Rambler.*

42. In any event, at around 7:30 p.m. on 27th September, 2013, the second defendant, Mr. Simpson and a group of men drove onto the ferry in two vehicles. It is not clear from the evidence, but the Court considers it reasonable to infer that the defendants had by then, learned of Mr Ryan's success in locating a replacement ferry. Mr. Ryan averred that he was informed at around 8:15 p.m. that the men had seized the *Loreley* and located it off-shore so as to prevent Fabjoll Limited from accessing or operating it. At this time, the ferry pilot (an employee of Fabjoll Limited) and a security guard (an agent of Fabjoll Limited) were present on the ferry. There were approximately 250 patrons on the island at the time and a wedding was due to be held in the hotel the following day.

43. Mr. Simpson averred that upon taking control of the ship, he immediately notified the Gardaí and advised them that the owners had taken possession of the passenger ship and would provide a service to and from the island where necessary. He stated that the Gardaí were invited on board to prevent a breach of the peace and/or an act of trespass and that the Gardaí arrived and requested that the security staff leave the ship which they eventually did. According to the affidavit of Mr. Simpson, all passengers were accommodated and transported in both directions. Mr. Simpson further averred that it was indicated to Mr. Ryan, through the Gardaí, that this would continue for as long as the Gardaí could maintain a presence on board the ship.

44. At 9:42 p.m. the plaintiffs' solicitors emailed the first defendant's solicitor objecting to what they considered to be the "*irresponsible and unlawful*" actions of his client and informing him that the plaintiffs would hold the defendants personally responsible for any loss or damage occurring. In this email, it was pointed out, *inter alia,* that the plaintiffs had been given 14 days notice of the termination of the charterparty agreement in a letter sent on behalf of the first defendant on 16th September and received by the plaintiffs on 17th September, 2013. On that basis, it was asserted that the termination period would not expire until 1st October, 2013. The defendant's solicitor responded at 10:20 p.m. seeking to re-open negotiations regarding the purchase of the ferry. According to the evidence of Mr. Ryan, a ferry service commenced operating at approximately 10:30 p.m. with a member of An Garda Síochána on board but ceased operating at around 11:30 p.m., when the Garda came off the ferry and the Loreley did not move again until approximately 3 a.m.

45. Mr. Simpson averred that he disembarked the Loreley at 10:50 p.m. and instructed his remaining two staff to remain on board the ferry overnight and to provide a continuing service while the Garda presence was in place. Mr. Ryan confirmed that he had given his consent to the operation of the ferry with a Garda on board but that this was subject to his intention to make an application to the High Court.

The Proceedings

46. At approximately 11 p.m., the first and third plaintiffs applied to the High Court for an order restraining the conduct of the defendants. It is unclear whether the second plaintiff was a party to the proceedings at this time and it is not referred to in the order of Ryan J. However, Mr. Ryan gave evidence in the within proceedings that he applied to the Court on 27th September on behalf of Cendant, in his own capacity as statutory receiver and on behalf of Fabjoll Limited as a director. Mr. Ryan gave sworn evidence by telephone to Ryan J. who ordered that the defendants be restrained from terminating the charterparty agreement in respect of the *Loreley* until after 30th September, 2013; that they be restrained from trespassing upon, or attempting to take possession of the *Loreley* until that date or until a further order of the Court; that they be restrained from interfering with the use of the vessel by the plaintiffs and that they be restrained from interfering with access by patrons, employees or others to Little Island, Ballinakill, Co. Waterford until further order of the Court. In his sworn evidence, Mr. Ryan informed Ryan J. that he had received assurances from those on board the ferry that they would continue to operate the ferry on condition that the security staff engaged by Fabjoll Limited be replaced by a member of An Garda Síochána; he further told him that he was in the process of sourcing another ferry which he hoped would be available within a number of days. Mr. Ryan further swore that he informed Ryan J. that the charterparty was the subject matter of an assignment to Fabjoll Limited but did not mention to the Court whether the charterparty was or was not part of the secured assets which came under the receivership. In addition, Mr. Ryan swore that he informed Ryan J. that correspondence had been exchanged between the parties. While he referred specifically to the letters of 13th and 16th September he confirmed that he did not make specific reference to the letter received from the first defendant's solicitors on 29th August terminating the charterparty. In this regard, the Court observes that the letter of 13th September, 2013 itself makes reference to the letter of 29th August, 2013.

47. On the 28th September, 2013, the order of Ryan J. was served on the defendant's solicitor by email sent at 12:43 a.m. The Gardaí were also informed by email, in accordance with the Court's directions, because the matter was considered by the Court to be one of public safety, given the potential risk to patrons and those on the island. At 12:59 a.m., the plaintiffs' solicitors sent a text message to the defendant's solicitor informing him of the order. Upon receipt of the order on the morning of 28th September, 2013, the Gardaí read the order to the individuals on board the *Loreley*. Mr. Ryan averred that although those on board indicated that they understood the terms of what had been outlined to them they did not comply with the instructions of the Gardaí to bring the ferry to the slipway, and the *Loreley* remained stationary, 50 feet from the slipway for the remainder of the night save for when an ambulance was called to the island to attend to a guest of the resort at approximately 1:30 a.m. Mr. Simpson averred that when the ambulance arrived it boarded the ship as normal and was taken to the emergency without delay. He further averred that there were no further incidents during the night, that the Gardaí subsequently withdrew from the location and that as soon as he became aware of the existence of an injunction at around 10 a.m. on the morning of the 28th September, he instructed his crew to land the vessel and hand it over to the plaintiffs.

48. At 8 a.m. a replacement ferry pilot was due to commence work. Mr. Ryan avers that when the pilot rang ahead to the ferry phone, the phone was answered by one of the individuals on board and no confirmation was given as to when the shift change would be undertaken. At 9:26 a.m. the plaintiffs' solicitor sent a further email to the defendant's solicitor attaching a further copy of the order with the appropriate penal endorsement.

49. According to the affidavit of Mr. Ryan sworn on 30th September, 2013, at 10:30 a.m. the Gardaí travelled from the slipway to the ferry on a small boat and provided the two individuals on board with sight of the court order with the penal endorsement. Around 15 minutes later, the *Loreley* was moved to the slipway and the two individuals who had been on board came ashore and departed.

50. The plaintiffs, through their solicitors, had arranged for a further application to be made to Ryan J. on 28th September, 2013 and their solicitor and counsel attended court on that date in order to move that application. However, ultimately an undertaking to comply with the order of 27th September was provided by the defendant's solicitor which obviated the need for such further application.

51. On 29th September, 2013, the plaintiffs' solicitors wrote to the defendant's solicitor rejecting the 14 day notice period stipulated in the letter of the 16th September, on the grounds that it was insufficient in circumstances where no period was stipulated in the charterparty agreement. The letter asserted that the charter agreement must be taken to incorporate a notice period which was reasonable in all the circumstances and which allowed appropriate time for the plaintiffs to source an alternative vessel. The letter sought the defendants' agreement to the continued use of the *Loreley* without interference until 7th October, 2013. The plaintiffs' solicitors stated that they would issue proceedings for an order to this effect if such consent was not forthcoming and use the communication in question to argue that the defendants should be liable for the costs of acquiring any such order.

52. On 30th September, 2013, the plaintiffs issued a plenary summons instituting the within proceedings. They claimed damages for trespass, breach of contract and/or negligence, and/or unlawful interference with business interests. Fabjoll Limited was named as a plaintiff in those proceedings along with Cendant and Mr. Eoin Ryan. The plaintiffs also sought orders restraining the defendants from interfering with the provision of ferry services to Little Island, Ballinakill, Co. Waterford by Fabjoll Limited and from interfering with access by patrons, employees or others to Little Island. On that date, 30th September, Hogan J. adjourned the proceedings until 4th October, 2013, on the basis of the plaintiffs' undertakings to discharge arrears for the months of August and September and payments due up until 4th October, 2013 and to maintain the vessel as per the terms of the charterparty agreement and the defendant's undertaking to continue to abide by the terms of the undertaking given by it on 28th September. A notice of motion was filed by the plaintiffs on 1st October, 2013.

53. On the same date, Fabjoll Limited completed their purchase of the Foyle Rambler from Lough Foyle Ferry Company Limited and was issued with a Bill of Sale in respect of same. Fabjoll Limited was subsequently required to complete a number of steps including applying to the Port Company for a licence, changing the vessel's plying area and procuring a method and safety statement. In his affidavit sworn on 4th October, 2013, Mr. Ryan averred to his belief that the *Foyle Rambler* would be operational from 7th October, 2013.

54. On 2nd October, 2013, the Loreley was the subject of an unannounced inspection by John Russell of the Marine Survey Office. Mr. Russell confirmed to Mr. Ryan at the conclusion of his inspection that he was satisfied with the condition of the Loreley. Mr. Ryan also avers that he was informed by the Marine Service Officer that there was no requirement to have a daily or standing attendance on site by maintenance personnel.

55. On 3rd October, 2013, the *Loreley* was arrested by a Mr. Christopher Hannon on foot of an arrest warrant issued by order of Butler J. in two sets of *in rem* proceedings ("the Admiralty Proceedings") issued by Mr. Hannon on that date. The Admiralty Proceedings concerned a claim maintained by Christopher Hannon for debts claimed to be owed to him by Cendant or Galtee Plant Hire Limited in circumstances where he had, since at least January, 2010, been the person retained to maintain the *Loreley* until his appointment was terminated by Mr. Ryan on 27th September, 2013. Mr. Ryan gave evidence that he had terminated the services of Mr. Hannon on 27th September, 2013, on the basis that his services gave rise to an excessive expense; that he did not believe the services of a marine engineer were necessary and that he did not consider that he and Mr. Hannon had a good working relationship. Mr. Ryan states that Mr. Hannon was paid by Fabjoll Limited for the period from 2nd August, 2013, to 27th September, 2013, and that from 27th September, 2013, SSL Marine Services were engaged to maintain the vessel.

56. At the time of the arrival of customs officials to execute the warrant of arrest, there were some 100 persons on the island, a number of hotel guests were due to arrive and a wedding reception was due to take place. On the evening of 3rd October, 2013, the plaintiffs applied successfully to the Admiralty Division of the High Court to vary the order of Butler J. so as to enable the plaintiff to continue to operate the *Loreley* until midnight on 7th October, 2013. The plaintiffs subsequently entered an appearance in the Admiralty Proceedings on 25th October, 2013, and the proceedings were ultimately discontinued as against the second and third plaintiffs, Fabjoll Limited and Eoin Ryan, on 1st November, 2013. The first defendants, Galtee Plant Hire Limited, entered an appearance to the Admiralty proceedings on 7th November, 2013. The Court has been told that the defendants subsequently agreed to pay €160,000 to Christopher Hannon in settlement of his claim, and state in their replies to the plaintiffs' notice of particulars in these proceedings of the 11th April, 2014, that they have incurred €50,000 in legal costs, arising from those proceedings. No evidence of such payments has been placed before the Court.

57. On 4th October, 2013, the within proceedings came before Hogan J. who adjourned them until 8th October, 2013, on the basis of the plaintiffs' undertakings to discharge all arrears for the months of August and September and up until 4th October, 2013, and to maintain the vessel pursuant to the terms of the charter agreement and on the basis that the order of Ryan J. of 27th September, 2013, and the defendants' undertaking of the 28th September, 2013 would continue until after midnight on 7th October, 2013.

58. The plaintiffs complied with the undertakings provided to the Court on 4th October, 2013, by paying the sum of €13,307 to Galtee Plant Hire Limited; by retaining SSL Marine International Limited to maintain the vessel, and by providing the defendants with the identity of the persons attending to the vessel's maintenance needs. The defendants do not appear to have raised any objection to this course.

59. On 7th October, 2013, at 3:27 p.m. Fabjoll Limited began operating the *Foyle Rambler* as the ferry to Little Island and ceased to have any further involvement with the Loreley.

60. On 14th October, 2013, the matter came before Hogan J. in the High Court whereupon it was indicated to Hogan J. that the only matter remaining was one of costs. Hogan J. ordered that the costs of parties be reserved and the matter be adjourned to 4th November, 2013, for case management.

61. On 1st November, 2013, the plaintiffs' solicitors wrote to the defendant's solicitor to indicate that the plaintiffs would consent to the proceedings being struck out with no further order on the basis that the parties would bear their own costs. According to the plaintiffs, this was in order to prevent the incurrence of further legal costs in circumstances where the plaintiffs had ensured the continuing provision of ferry services using an alternative vessel. The defendants did not consent to this proposal.

62. On 4th November, 2013, the matter returned before Hogan J. and he made an order directing exchange of the necessary pleadings between the parties within specific timeframes.

63. Eventually, the proceedings came before this Court for hearing on 14th April, 2015. On the morning of the hearing the Court was advised by the parties that the preliminary determination of the issues of the *locus standi* of the plaintiffs and the validity of the assignment of the bareboat charter agreement from the official liquidator of the first plaintiff, Cendant Limited (in Liquidation and Receivership), to the second plaintiff, Fabjoll Limited, would ultimately shorten the case, because those issues are at the core of the case and the entitlement of the parties to remedies claimed was dependent thereon.

Locus Standi

64. In the context of the facts set out herein, the defendants take issue with the *locus standi* of each of the plaintiffs. They submit that Cendant, the first plaintiff, being a company in liquidation, required the prior sanction of the Court or the Committee of Inspection which, as per s. 231 of the Companies Act 1963 (the operative provision at the time in question), to bring legal proceedings in the name and on behalf of Cendant. Further, the defendants note that both Cendant and Mr. Ryan maintain that as and from the execution of the deed of assignment on 2nd August, 2013, Cendant ceased to have any legal interest in the charterparty agreement, such interest having been purportedly assigned to Fabjoll Limited and therefore, they contend Cendant at the relevant time had no *locus standi* to initiate these proceedings. Insofar as the second plaintiff Fabjoll is concerned, the defendants submit that its locus standi to bring these proceedings depends on the validity of the assignment of the charterparty agreement as determined by the Court and further contends that Fabjoll Limited was not a party to the original application to the Court of 27th September, 2013.

65. In this regard, the defendants draw the Court's attention to the rule in *Foss v. Harbottle* as summarised by O'Flaherty J. in *O'Neill v. Ryan & Ors. (No.1*) [1993] I.L.R.M. 557 at 559:-

> *"The basic theme of Foss v. Harbottle (1843) 2 Hare 461 is that where a wrong has been done to a company it is for the company itself to seek redress for the injury done to it, though in appropriate circumstances a derivative claim by a minority shareholder may be allowed."*

66. The defendant therefore submits that, as per Foss v Harbottle, only the wronged company is entitled to sue for redress regarding a wrong alleged to have been perpetrated against it and as the assignment of the bareboat charter was not valid, it is not possible for Mr. Ryan to assert that on the night of the 27th August, 2013 he was prosecuting these proceedings against Galtee Plant Hire Limited and Mr. Simpson in his capacity as a director of Fabjoll Limited or on behalf of that company.

67. Therefore, according to the defendants Mr. Ryan must be considered to have acted in his capacity as receiver of certain assets of Cendant. They argue that while paragraph 15 of Schedule 1 of the National Asset Management Agency Act 2009 gives a receiver power *"to bring, prosecute, enforce, defend and abandon any action, suit or proceedings both in his or her own name and in the name of the chargor in relation to any secured asset which he or she thinks fit",* such capacity is restricted to those assets of the company set out in the deed of charge of 2nd May, 2007, in favour of Allied Irish Bank pursuant to which Mr. Ryan was appointed as receiver. Those assets do not include the benefit of the charterparty agreement.

68. The defendants therefore submit that neither Mr. Ryan nor Cendant had any justiciable rights in respect of the charterparty agreement on the night of 27th September, 2013, when they sought interim orders from the High Court restraining the termination of the charterparty agreement and the taking possession of the *Loreley* by the defendants. If this is the case, then it follows, they contend that the orders obtained and which enured to their benefit were obtained without lawful authority. The defendants contend that it is of particular note that the order of 27th September, 2013, sought to restrain the termination of the charterparty at the behest of parties who did not have standing to assert rights under the charterparty.

69. The defendants further submit that all injunctive relief was obtained on the basis of undertakings to the Court in the absence of which no injunction could or should have been obtained. They contend that just as Mr. Ryan had no *locus standi* to maintain the proceedings he had no *locus standi* to offer undertakings which had the effect of charging all of the assets of Cendant. In addition, the failure to secure the sanction of the Court or the Committee of Inspection in relation to the bringing of proceedings in the name of Cendant, as required by s. 231 of the 1963 Act means that all undertakings given on Cendant's behalf are without lawful authority. Therefore the defendant contends that all injunctions obtained are further undermined.

70. The defendant further submits that no cause of action in contract has been shown to exist between the plaintiff and the second defendant because Mr. Ryan confirmed in his evidence to the Court that at the time the injunction was sought Mr. Simpson was no longer on the vessel; that neither plaintiff had any contractual relationship with Mr. Simpson personally; that any dealings with Mr. Simpson were in his capacity as a director of Galtee and that Mr. Simpson never held himself out other than as a director of Galtee. Therefore the defendants contend that all claims against Mr. Simpson in these proceedings must fail. The defendants did not however address the issue of possible claims against Mr. Simpson in tort.

71. In response, the plaintiffs deny that the official liquidator of Cendant, the first plaintiff, was obliged to secure the sanction of the Court or of the Committee of Inspection prior to the institution of the within proceedings. The plaintiffs point out that the letters sent by the first defendant's solicitor on 29th August, 2013, and 16th September, 2013, were addressed to Eoin Ryan in his capacity as

receiver of Cendant and in his capacity as director and secretary of Fabjoll Limited. The plaintiffs submit that it can be seen from this that the first defendant was entirely clear that the correct person to correspond with in relation to its intended or purported termination of the charterparty was Eoin Ryan, in particular in his role as statutory receiver over certain assets of Cendant. No suggestion has been made to the Court that the official liquidator of Cendant was written to in similar terms. The plaintiff therefore submits that the position taken now by the defendant is at the very least curious having regard to the manner in which correspondence was conducted, since if it were seriously thought that Eoin Ryan did not have carriage of the issues regarding the charterparty then surely Galtee Plant Hire Limited would have been corresponding with the official liquidator in this regard yet it seems this was not done.

72. In addition, the plaintiffs contend that s. 150(2) of the National Asset Management Agency Act 2009 is a complete answer to this objection as it provides that the appointment of a liquidator does not displace the statutory receiver or affect his or her powers, authority and agency. The extent of the receiver's powers in the context of this application is dealt with by the submissions below.

73. In relation to the standing of Fabjoll Limited, the plaintiffs note that Mr. Ryan, in the course of giving evidence to Ryan J., told him that he was a director of Fabjoll Limited, the company which had taken the assignment of the charterparty and which had operated the ferry since doing so. During the within proceedings Mr. Ryan gave evidence that he had applied to the Court on behalf of Cendant, in his capacity as statutory receiver and on behalf of Fabjoll Limited as a director of that company. The plaintiffs note that this evidence has not been disputed.

74. While the plaintiffs acknowledge that the relief granted in the order of Ryan J. of 27th September, 2013, was personal to the parties as intended plaintiffs being Cendant and Eoin Ryan, they note that Mr. Ryan gave evidence in the within proceedings that his intention on 27th September was to apply also on behalf of Fabjoll and his belief is that he did so. The plaintiffs submit that having regard to the fact that Mr. Ryan told Ryan J. in evidence of the role of Fabjoll Limited in connection with matters and of the fact that it had taken an assignment of the charterparty and was operating the ferry, the relief granted makes perfect sense and is consistent with the evidence on these themes. This is consistent with the relief granted at paragraph 3 of the order of Ryan J. which states:-

> *"the intended Defendants or any of them or servants or agents be restrained from interfering with the use of said vessel by the intended Plaintiffs".*

75. The plaintiffs further submit that the absence of Fabjoll Limited from the order of Ryan J. on 27th September, 2013, does not in fact have any real significance even if one proceeds on the basis that no application was made on its behalf which, they submit, is not borne out by the undisputed evidence. The plaintiffs submit that the first important matter which arises on the making of such an application is whether it is conducted in accordance with the requirements for *ex parte* applications. Secondly, it is typically necessary that the party seeking relief provide a meaningful undertaking as to damages which may arise from the fact of the making of the order. Mr. Ryan gave evidence to the Court that the position resulting from the order Ryan J. was underpinned by NAMA and therefore the requirement for an actionable undertaking as to damages was also in place.

76. With regard to the defendants' argument that the standing of Fabjoll Limited is dependent on the validity of the assignment of the charterparty, the plaintiffs submit that this plea confuses the issue of whether Fabjoll Limited will succeed in its case with whether it has standing to take the case in the first instance.

77. Insofar as the standing of Mr. Ryan is concerned, while the plaintiffs accept that the charterparty agreement may not have been a secured asset under the deed, the foreshore of the River Suir between Little Island and Ballinakill, to which the ferry is attached is a secured asset. The secured assets included anchor points affixed to slipways on the island and at Ballinakill. The *Loreley* was at all times materially engaged as the sole ferry service to the island and operated while attached to chains themselves affixed to the anchor points. The secured assets relevant to Cendant also included the golf course and holiday lodges forming part of the WCHGC resort, access to which cannot be gained otherwise than by ferry.

78. In this regard, the plaintiffs point to paragraph 15 of Schedule 1 of the National Management Agency Act 2009 which grants the statutory receiver the power "*to bring, prosecute, enforce, defend and abandon any action, suit or proceedings both in his or her own name and in the name of the chargor in relation to any secured asset which he or she thinks fit"* [emphasis added]. The plaintiffs thus contend that the receiver has locus standi "in relation to" any assets affecting secured assets, and that in this case, there is such an exceptionally close and indivisible link between the charter agreement and the secured assets that the third plaintiff, Mr. Ryan, does have standing.

79. The plaintiffs contend that the defendants' interpretation of paragraph 15 of Schedule 1 of the National Management Agency Act 2009, to the effect that unless the proceedings involve the assertion of a right over a secured asset or the defence of such a right if attacked, then the proceedings are not within the ambit of the clause, is an overly narrow reading of the clause which fails to afford the words used therein in their normal and ordinary meaning. The plaintiffs point to the undisputed evidence of Mr. Ryan illustrating the exceptionally close and indivisible link between the charterparty and the secured assets. In those circumstances the plaintiffs submit that to suggest that the application before Ryan J. and the proceedings subsequently instituted are not proceedings "*in relation to"* the secured asset lacks any willingness to apply common sense to the reading of paragraph 15.

80. The plaintiffs also point to paragraph 34 of Schedule 1 of the 2009 Act which gives the receiver the power:

> *"To exercise in relation to a secured asset all the rights, powers and authorities that he or she could exercise if he or she were the absolute beneficial owner of the secured asset".*

The plaintiffs contend that this clause entitles the statutory receiver to stand in the shoes of the owner of the secured asset and to do anything whatsoever that the owner could do which must include instituting or defending proceedings which have as their subject matter the asset or assets in question. The plaintiffs submit therefore that the defendants are contending that paragraph 15 be read as nothing more than a duplication of paragraph 35 and, on the presumption that words used in a statute are of meaning and effect and are not moot and meaningless, it is submitted that the reading of paragraph 15 contended for by the defendants must be incorrect. In order to succeed, they argue, the defendants must convince the Court that proceedings specifically targeted at preserving the sole ferry access to the secured assets, where the vessel in question is physically affixed in real terms to the secured assets, are not proceedings "*in relation to*" the secured assets.

81. The plaintiffs note that paragraph 15 of Schedule 1 of the 2009 Act has not as yet it seems, been the subject of the jurisprudence of the Superior Courts. While they are content that the ordinary principles of statutory interpretation apply in favour of the interpretation canvassed by them, they draw the Court's attention to the decision of the English Court of Appeal in *Cawsand Fort Management Company Limited v. Stafford & Ors* [2007] EWCA Civ 1187, which contains a useful interpretation of the precise phrase

at issue. That case concerned s. 21 of the Landlord and Tenant Act 1987 as amended by the Commonhold and Leasehold Reform Act 2002 which provides:-

> *"The tenant of a flat contained in any premises to which this Part applies may, subject to the following provisions of the Act apply to a Leasehold Valuation Tribunal for an order under Section 24 appointing a manager to act in relation to those premises."*

82. An application was made to the Tribunal by a number of tenants of a premises to which the legislation applied. Outside of those premises there was a nearby amenity over which the tenants had been granted various rights of entry and use for recreational purposes. On the tenants' application, the Tribunal appointed a manager over both the multi-building and the amenity land, on the basis that the appointment was made "in relation to" the premises to which the legislation applied, although the amenity land was not such a premises. Cawsand Fort Management Company Limited, the owner of the freehold interest in the leased premises and the owner of the amenity land accepted the appointment of the manager over the leased residential units but submitted that the power given to the Tribunal under the Act to appoint a manager did not extend to granting powers over property outside the residential units and their curtilages. Lord Justice Mummary in giving judgment of the Court of Appeal held as follows:-

> *"This submission, which concentrates on 'the premises' does not give full effect to the language of section 24(1), which refers to the appointment of a manager to carry out functions 'in relation to' any premises to which Part II applies. This clearly requires a causal link or nexus between the functions to be carried out by the manager and the premises…but it does not confine the manager's functions to buildings and their curtilages. The power of [the Tribuna]) is broader than simply appointing a manager of or over the premises as a building or part of a building."*

83. The plaintiffs submit that both the company in the Cawsand Fort Management Company Limited case and the defendant in this case fail to acknowledge the actual language used by the draftsmen in formulating the legislation concerned, and the broad ambit of the term "*in relation to"* in its ordinary meaning. The language of the Court of Appeal in *Cawsand Fort Management Company Limited* which focused on whether there was a "*causal link or nexus"* between the matters said to be related demonstrates, in the plaintiff's submission, a sensible approach.

84. The defendants respond to this argument by submitting that this is a completely novel proposition in law which asks the Court to disregard the rules of privity of contract and hold that because a contract has some bearing on receivership assets, third party contracts can be interfered with. In the Court's view, this argument confuses the issue of privity of contract with the issue of locus standi. A party may have *locus standi* to maintain a claim but fail in that claim because of a lack of privity.

85. In addition, the plaintiff submits that nothing has been put forward by the defendants to support the proposition that anything of consequence flows from the defendants' argument that Cendant and Mr. Ryan, as receiver, somehow lacked standing to apply to Ryan J. The plaintiffs note that it is a matter of fact and record that on 30th September, 2013, when proceedings were issued, Fabjoll was then a party to same. They further note that when the proceedings came before the Court on that day, the defendants raised no issue whatsoever in relation to the manner in which the proceedings were constituted and in fact, to the contrary, agreed to the continuation of their own undertaking to comply with the order of Ryan J. until the adjourned date of 4th October and thereafter consented to the preservation of the *status quo* as it then subsisted.

86. The plaintiffs also draw the Court's attention to Order 53, rule 3 of the Rules of the Superior Courts which provides as follows:-

> *"In any case the Court, if satisfied that the delay caused by proceeding by motion on notice under this Order would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to the costs or otherwise and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside."*

87. The plaintiffs submit that the application made by Eoin Ryan on 27th September was a classic example of an appropriate application covered by Order 53, rule 3 of the Superior Courts, noting the real exigencies of the situation present at the slipway in Ballinakill on the night in question. The plaintiffs point to the fact that at no stage did the defendants seek to set aside the orders granted, and the proceedings on 30th September, 2013 were ultimately dealt with on a consent basis.

Decision of the Court

88. The Court rejects the defendants' submission as to the standing of Cendant Limited (in liquidation) *ad limine*. Cendant Limited (in liquidation) took no part in these proceedings. While, in the title of the action, Cendant is correctly described as being a company in liquidation and receivership, it is manifestly clear on the facts of this case, that the liquidator of Cendant, having divested himself of the assets of the Company, including the bareboat charter agreement, with the prior approval of the court, on conditions specified in the court's order of 2nd August, 2013, took no further part in the running of WCHGC and took no part in these proceedings.

89. Similarly, the Court rejects *ad limine* the defendants' contention that Fabjoll had no *locus standi* to bring these proceedings. It is undoubtedly the case that at the time of the institution of these proceedings, Fabjoll held an assignment of the bareboat charter from the liquidator of Cendant and thus *prima facie* had an entitlement to sue on foot of that agreement. Should it ultimately transpire that the Court determines that the agreement was not validly assigned such a finding does not operate retrospectively so as to deprive the company of standing to bring its claim. It is precisely because the parties were in dispute about the effect and validity of the assignment of the bareboat charter that these proceedings were necessary.

90. The defendants' complaint that Fabjoll Limited was not originally named as a party to the proceedings is equally without foundation. The Court notes that no plenary summons had been issued at the time the application for an injunction was brought before Ryan J. on the evening of the 27th September, 2013. On 30th September, 2013, when the proceedings were ultimately issued, Fabjoll was a party to same. The Court accepts Mr. Ryan's evidence that in the course of giving evidence to Ryan J. he informed him that he was a director of Fabjoll Limited, the company which had taken the assignment of the charterparty and which had operated the ferry since doing so.

91. As to the defendant's contention that Eoin Ryan, as receiver of Cendant, had no standing in that capacity to bring these proceedings, paragraph 15 of Schedule 1 of the National Asset Management Agency Act 2009 gives a receiver power "*to bring, prosecute, enforce, defend and abandon any action, suit or proceedings both in his or her own name and in the name of the chargor in relation to any secured asset which he or she thinks fit*". The Court agrees with the plaintiffs that, on the particular facts of this case, there is such an exceptionally close and indivisible link between the charterparty agreement and the secured assets that the current action can be considered one "*in relation to*" the secured asset such that Mr. Ryan, in his capacity as receiver has *locus standi* to bring the current proceedings, both in his own capacity *qua* receiver, and in the name of Cendant Limited (in receivership)

as the chargor of the secured assets. The Court adopts the language of the Court of Appeal in *Cawsand Fort Management Company Limited* which focused on whether there was a *"causal link or nexus"* between the matters said to be related. In that regard, the Court notes that the ferry in question was, at the material time, the only means by which access to the secured asset could be procured and indeed, was attached and anchored to the secured asset.

92. It is also notable in this regard that the correspondence sent by the defendants' solicitor was addressed to Mr. Ryan in his capacity as receiver of Cendant and in his capacity as director and secretary of Fabjoll Limited. Having accepted that, by virtue of his status as receiver and director, he was the person to whom issues should be addressed, it sits ill with the Court to hear the defendant now complain that he lacked the necessary standing to maintain the within proceedings.

93. It is undoubtedly the case that as of 27th September, 2013, Mr. Ryan both in his capacity as statutory receiver and in his capacity as a director of Fabjoll was in de facto control of the business of WCHGC. Even if the Court is wrong in its assessment of Mr. Ryan's standing as receiver, his position, it appears to the Court, is met by the provisions of Order 53, rule 3:-

> *"In any case the Court, if satisfied that the delay caused by proceeding by motion on notice under this Order would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to the costs or otherwise and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside."*

94. Mr. Ryan, as the person in de facto control was the appropriate person to seek injunctive relief in the emergency that was created by the defendants on 27th September, 2013. The defendants' actions potentially marooned people on Little Island. Their actions required the intervention of the Gardaí at a cost to the public purse in what was essentially a civil dispute. Faced with such a situation, the Court had no option other than to intervene. Order 53, rule 3 gave the defendants the option to seek to have the order of Ryan J. set aside if they had concerns as to the *locus standi* of the plaintiffs or any of them. However, when the proceedings came before the Court on 30th September, 2013, the defendants raised no issue in relation to the manner in which those proceedings were constituted and in fact, those proceedings were ultimately dealt with on a consent basis, the defendants agreeing to the continuation of their undertaking to comply with the order of Ryan J. until 4th October, 2013. The defendant thus failed to avail of the provisions of Order 53, rule 3 and the first time the issue of locus standi appears to have been raised on the pleading is in the defence and counterclaim filed on 27th March, 2014.

95. Finally, on this aspect of the issue of standing, the defendants asserted that the undertaking given by Mr. Ryan, not being underpinned by a prior consent from the Court and the Committee of Inspection on the part of Cendant Limited, was without weight. For the reasons set out above, this argument is without merit. Mr. Ryan gave evidence, and the Court accepts, that his undertakings will be discharged if necessary, by the secured assets and National Asset Loan Management Limited. In this context, the Court notes that the very purpose of the requirement of an undertaking as to damages is to ensure that in the event that it transpires at the full hearing of the case that the original injunction should not have been granted, compensation will be available for any party adversely affect by the making of the order. The undertaking given by Mr Ryan in his capacity as a receiver appointed by NAMA is quite sufficient for this purpose.

96. The last issue on this aspect of the case is that the defendant contends that no cause of action has been disclosed against Noel Simpson, the second defendant and director of Galtee Plant Hire Limited, on the grounds that he is not personally a party to any of the contracts in issue. Insofar as the proceedings against Mr. Simpson are concerned, the Court notes that, on Mr. Simpson's own averments, he was the person controlling the actions of those on board the *Loreley* on the evening of the 27th September, 2013 and it was on his instruction that the persons remaining on the vessel on the morning of 28th September, 2013, landed the vessel and returned control of it to the plaintiffs. While Mr. Simpson may not have had a contractual relationship with the plaintiffs or any of them, he is answerable to the plaintiffs' claims in tort if not in contract.

97. For these reasons, the Court is satisfied that the plaintiffs and each of them had at the material time the necessary *locus standi* to initiate these proceedings and had at the material time the necessary standing to seek injunctive relief.

Assignment of the Charterparty Agreement

98. The second issue which the Court has been asked to determine is the validity of the assignment of the charterparty agreement by the liquidator of Cendant to Fabjoll Limited on 2nd August, 2013. The plaintiff contends that since the charterparty at issue in this case is expressed to be a charter on a "*bareboat basis*" it is a charter by demise operating as a lease of the vessel itself. Therefore, the plaintiff submits that the charterparty at issue in this case is nothing more and nothing less than an agreement for the hire of a chattel and is therefore governed by the general law applicable to such contracts. In this regard the plaintiff relies on the position laid out in Chitty on Contracts, 31st Ed., (London, 2012) at paragraphs 19-056 and 19-054 of Volume I:-

> *"Rights arising under ordinary commercial contracts…are prima facie readily assignable, at least if there is no question of credit being granted to the assignee. But commercial contracts may sometimes be drafted so as to make the requirements of one of the parties a material consideration in determining the obligations of the other".*

At paragraph 19-054 the case of *Tolhurst v. Associated Portland Cement Manufacturers Limited* [1903] A.C. 414 is cited and Chitty states as follows:-

> *"The benefit of a contract is only assignable in '…cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it'."*

99. In relation to the requirement to give notice of assignment, the plaintiff cites McDermott, *Contract Law*, 1st Ed., (Dublin, 2001) at pp. 968-969:-

> *"Notice to the debtor is not necessary to perfect an equitable assignment. However lack of notice may prejudice the title of an equitable assignee in two ways:*
>
> *(i) An assignee will be bound by any payments which the debtor might make to the assignor in ignorance of the assignment.*
>
> *(ii) Under the rule in Dearle v. Hall an assignee must give notice to the debtor in order to secure his title against other assignees."*

The plaintiffs submit that the position is the same regarding assignments of other choses in action and that while a failure to give

notice may compromise the position of the assignee, it has no effect on the validity of the assignment in the absence of some requirement provided for in the contract that notice be given to the other party.

100. The plaintiff submits that the analysis in both McDermott and Chitty is to the effect that if the parties to a commercial contract which is otherwise assignable wish to restrict the right to assign the benefit of that contract so as to require consent in advance of assignment then it is for the parties to provide that this shall be so in the contract itself.

101. The plaintiff submits that the leading case on these issues in an Irish context is *O.E. Telephones Limited v. Alcatel Business Systems Limited & National Telephones Limited* (Unreported, High Court, McCracken J., 17th May 1995). In that case, the plaintiff was a seller of telephone systems and entered into a written distribution agreement with NTL, the second defendant, which granted the plaintiff exclusive rights to sell and distribute four of NTL's products in Ireland. The plaintiff then entered a subsequent agreement with NTL by virtue of which another company, TEIS, would take over the benefit of some of the exclusivity agreement on the basis that TEIS would deal directly with NTL and the plaintiff would be paid commission on any business received. A similar agreement was later entered into concerning two other companies. Alcatel, the first defendant, subsequently acquired control of NTL and approximately six months later the plaintiff received a notice purporting to terminate the agreement and giving three months notice. The plaintiff accepted that the agreement could be terminated on reasonable notice but contended that such notice should amount to twelve months. McCracken J. found that the defendants were liable in damages to the plaintiff but held that the plaintiff could not recover against Alcatel on foot of its rights against NTL. He held that the plaintiff's argument that when Alcatel took over NTL it also took over the rights and liabilities of NTL on foot of NTL's contract with the plaintiff was untenable as "*the only way in which a direct contractual relationship could have come into being between the plaintiff and Alcatel would be by way of novation*" and "*there is no evidence before me that the plaintiff ever released NTL from its obligations under the contract in consideration of these obligations being performed by Alcatel"*. McCracken J. went on to identify that even though there was no evidence of "any actual assignment" by NTL to Alcatel there was evidence that NTL had ceased trading but that the relevant products continued to be supplied to TEIS after the date of cessation and that he should therefore infer by the evidence that they were supplied by Alcatel.

102. The plaintiffs submit that the above case thus gives a very satisfactory illustration that the benefit of a commercial contract of the sort at issue in the present case can be assigned without any prior notice to the other party and indeed that such an assignment can be inferred on the facts of the case without evidence of any express agreement to do so. In the present case, there was an express assignment executed between the official liquidator of Cendant and Fabjoll Limited through Mr. Ryan and the plaintiff submits that lack of notice that this was to be done is in reality no proper basis on which to hold that the assignment was ineffective.

103. The plaintiffs also note the following statement by McCracken J. at p. 14:-

> *"The basis of the plaintiff's claim in this case is that the defendants, or one or other of them, are bound to pay commission to the plaintiff, which commission was in consideration of the plaintiff having introduced the customers to the defendants. As I have held that this commission is payable subsequent to the termination of the agreement, for so long as the products continued to be supplied to the customers, it would be quite unreal to suggest that the only liability is that of NTL and that it ceased at the end of December 1991 because NTL ceased trading. Quite clearly, from that date, the benefit of the introduction, and therefore the benefit of the contract passed in some way from NTL to Alcatel, and while it would be unreal to oblige NTL to pay commission on sales which it never made and which took place after it had ceased to carry on business, it would be equally unreal to allow an associated company to simply take over the benefit of the plaintiff's introduction without having to discharge the consideration which NTL would have had to discharge."*

McCracken J. went on to make clear the reasoning for this conclusion:-

> *"In Tito v. Waddell (No. 2) (1977) Ch. 106 a distinction was made between what was called the conditional benefit principle and the pure principle of benefit and burden. It was recognised in that case that situations may arise where a right or benefit under a contract is assigned but the assignment is conditional on certain burdens being assumed by the assignee, and that this condition is an intrinsic part of the right which the assignee takes. In my view the present case is a good example of this, and as Alcatel took over or had assigned to it in some form the benefit of the contract, including the benefit of the introduction to the customers by the plaintiff, the obligation to pay a commission was an intrinsic part of the benefit, and Alcatel must be deemed to have taken the benefit with the burden or obligation to discharge the commission to the plaintiff."*

104. Applying this principle to the present case, the plaintiffs contend that the benefit to Cendant under the charterparty was the use of the *Loreley*. Its liabilities were the payment of the applicable charter hire together with the other contractual requirements including the indemnity clause. Therefore, it is the plaintiffs' position that on the assignment of the benefit of the charterparty to Fabjoll it became liable to discharge the appropriate consideration which Cendant would have had to discharge, but only as and from the point in time Cendant ceased to be so liable. Thus the plaintiff submits that it is not correct to suggest that Fabjoll, by taking the benefit of the charterparty had transmitted to it such historic debt or other liability as Cendant and/or Newgold Limited may have built up arising from their dealings with the vessel and/or with Galtee Plant Hire Limited otherwise. The plaintiffs submit that for this to occur there must necessarily have been some novation to which all three companies *i.e.* Fabjoll, Cendant and Galtee, were party or the entry into a new contract by Fabjoll with Galtee containing appropriate terms and neither took place in this case.

105. The plaintiff notes that there has been no evidence put forward by the defendants to support the proposition that the charterparty was non-assignable, or that consent on Galtee's part was required for an assignment to take place. The plaintiff further notes that the defendants' position in this regard is inconsistent since they have maintained that the assignment is invalid throughout the proceedings and if they are correct in this contention there can have been no question of Fabjoll Limited becoming liable for historic debts owed by Cendant.

106. Finally, the plaintiffs note that, as has been established by the evidence before the Court, even when Galtee Plant Hire Limited first sought to terminate the charterparty, the letter sent by its solicitor on 29th August, 2013, proferred terms on which Fabjoll could continue to operate the *Loreley*, albeit that it would have been required to begin to pay debts of €733,000 claimed to subsist in favour of Galtee. This is highly suggestive of the fact that notwithstanding its protests in regards the assignment Galtee had in fact no objection to Fabjoll as the charterer qua charterer; otherwise it would have insisted that Fabjoll simply cease all dealings with the *Loreley* unconditionally. The plaintiffs note that there has been no evidence on these matters from Galtee Plant Hire Limited.

107. While the defendants accept that the general rule is that rights under commercial contracts are amenable to assignment, they point out that Chitty recognises at para 19-056 that this general rule does not apply to a wide variety of situations, for example where there is a question of credit being granted to the assignee. The defendants in this regard rely on *Tolhurst v. Associated*

Portland Cement Manufacturers Limited [1902] 2 K.B. 660 in which Collins M.R. considered at some length the circumstances in which contractual benefits and burdens can be assigned. According to the defendant, although the contract in *Tolhurst* was considered to be assignable, the decision of Collins M.R. is useful in the current proceedings as it identifies the following factors which inform the determination as to whether a contract can be assigned in the absence of prior consent:-

> i. The benefit can be assigned where the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration;
>
> ii. The special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient of the benefit is confined to cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it;
>
> iii. Contracts where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed cannot be assigned.

108. The defendant further refers to the decision of *Kemp v. Baerselman* [1906] 2 K.B. 604 in which Farwell J. held that where a contracting party's obligations include undertakings the identity of the provider of such undertakings may be a material factor:-

> *"In my opinion this agreement contains two considerations moving to the defendant, one being the payment of the price, and the other being Kemp's undertaking not to purchase eggs from any other merchant. It is obvious that the value of the latter consideration must in a large measure depend upon the person who gives the undertaking and the business carried on by him, and to that extent the personal element enters into the question."*

109. The defendants therefore submit that the bareboat charterparty agreement entered into between Cendant and Galtee in January, 2012 was clearly not assignable in the absence of the owner's consent given that many of the factors described by Chitty in *Tolhurst* and *Kemp* arise. First, in relation to the issue of credit, the defendants submit that an assignment would in effect require Galtee, without any reference to it whatsoever, to grant credit and to be exposed to the creditworthiness of Fabjoll for the remaining duration of the charterparty agreement which was not due to expire until 2017.

110. Second, the defendants submit that the consideration in the form of a monthly rental had not been executed at the time of the purported assignment. More than three years of monthly rentals remained to be paid at the time of the purported assignment.

111. Third, the identity of the person giving the undertakings in relation to the maintenance, upkeep and insurance of the boat is a material factor. The defendants draw the Court's attention to the unique characteristics of a bareboat charterparty which involves the owner passing possession of a moveable asset of considerable value to the charterer who then assumes, inter alia, responsibility for the safe operation of the vessel on the high seas. The responsibilities of the charterer include liability for the wages of the crew, collision, personal injuries to the master, crew and third parties, pollution damages and loss or damage to the chartered vessel. The defendants therefore submit that the shipowner in effect fades into the background for the duration of the charter and merely collects his hire payments for the period. Thus, the defendant contends that an essential underlying feature of such a contract is the shipowner's trust and confidence in the skill and competence of the charterer to safely operate the vessel for the duration of the charter period and his assessment of the honesty and integrity of the charterer to whom he will pass possession of a valuable moveable asset. Thus, it is the defendants' position that a bareboat charterparty is entirely distinguishable from a contract such as was at issue in *Tolhurst* and by virtue of these characteristics is not assignable without the owners prior consent.

112. Finally, the defendants note that the charterparty agreement imposed a variety of undertakings or non-financial obligations on the charterer, as was the case in Kemp. Those undertakings included obligations to maintain the vessel to the highest standards, to maintain the annual passenger and river licences, to secure insurance cover for the vessel and to indemnify the owners from claims. The defendants submit that clearly in that context the owner of the vessel has a significant role and interest in assessing whether any potential charterer is a suitable contracting party possessing the necessary competence and resources to meet these onerous obligations and renders such a contract unassignable without the vessel owner's consent.

113. The plaintiffs reply however that this is not a contract in which the personality of the charterer matters in any significant way to the owner and notes that the assignee in this case turned out to be more reliable than the charterer. However the plaintiff accepts that this is a matter to be objectively ascertained by the Court.

114. On the basis of the above, the defendants submit that the unlawful assignment of the charterparty agreement by Cendant represented a fundamental breach of the charterparty agreement and gave rise to an immediate right to recover the vessel on the part of Galtee Limited. The defendants submit that *Commissioner of Works v. Hull* [1922] 1 K.B. 205 is authority for the proposition that in the absence of consent to assignment, the assigned contract is determinable, at the defendants' option, in the hands of and as against the assignee. This, the defendants submits, occurred by virtue of the letter of 29th August, 2013 when solicitors for Galtee wrote to Cendant and Eoin Ryan in unambiguous terms advising them of the termination of the charterparty agreement in the hands of the purported assignee and seeking out the terms on which a temporary facility could be provided in order to maintain access to the island.

115. The defendants further submit that *O.E. Telephones Limited v. Alcatel Business Systems Limited & National Telephones Limited* is of no assistance to the plaintiff in the determination of the issue of the assignability of the charterparty agreement. In this regard, the defendants draw the Court's attention to the finding McCracken J. at pp. 13-14:-

> *"There is also no evidence of any actual assignment by the second defendant to the first defendant of the rights or obligations under the contract with the plaintiff.*
>
> *However I do have evidence that the second defendant ceased trading on 1st January, 1992, but that the Mercury 8 and Mercury 16 continued to be supplied to TEIS until November, 1994, and I can only infer from the evidence that they were supplied by the first defendant. The basis of the plaintiff's claim in this case is that the defendants, or one or other of them, are bound to pay commission to the plaintiff, which commission was in consideration of the plaintiff having introduced the customers to the defendants. As I have held this commission is payable subsequent to the termination of the agreement, for so long as the products continue to be supplied to the customers, it would be quite unreal to suggest that the only liability is that of the second defendant, and that it ceased at the end of December, 1991 because the second defendant ceased trading. Quite clearly, from that date, the benefit of the introduction, and therefore the benefit of the contract passed in some way from the second defendant to the first defendant, and while it would be unreal to oblige the second defendant to pay commission on sales which it never made, and which took place after it*

had ceased to carry on business, it would be equally unreal to allow an associated company to simply take over the benefit of the plaintiff's introduction without having to discharge the consideration which the second defendant would have had to discharge."

116. In addition, the defendants submit that the case is of no assistance to the plaintiffs in seeking to circumscribe their liability for historic arrears on the charterparty agreement since it is noteworthy in that case that the Court was not required to consider the position in relation to the transfer of historic burdens as the commissions which the plaintiff was seeking were commissions arising on sales to customers made by the first defendant after the second defendant had ceased trading and after the purported termination of the agreement made between the plaintiff and the first defendant. The defendants further submit that insofar as it has now been established as a matter of fact that the plaintiffs were at all material times aware of the outstanding hire fees due under the charterparty agreement, it would be unconscionable to permit the plaintiffs to arrange matters inter se, without any reference or regard to the position of the owner of the Loreley, so as to pass the possession and usage of the vessel to Fabjoll and to jettison the outstanding hire fees in Cendant and to then deprive the vessel's owners of its right to recover possession of the ferry which right flows from the unlawful assignment of the charterparty and from Cendant's failure to honour its contractual commitments.

Decision of the Court

117. The Court agrees with the defendant's contention that the case of *O.E. Telephones v. Alcatel & NTL* is of no assistance to it in this case. The issue in O.E. Telephones was the payment of commission, not the assignability of the contract. The plaintiff's claim in that case was that one or other of the defendants was bound to pay him commission arising out of an agreement which he had with the second defendant and which agreement McCracken J. inferred on the evidence had been assigned to the first defendant. No issue was raised in that case that the contract was not assignable. Furthermore, *O.E. Telephones* was not a case in which liability for arrears accrued prior to assignment of the contract was in issue. The Court is not persuaded that the contract in the instant case is an ordinary commercial contract, readily assignable in the absence of an express prohibition. The contract at issue in this case is one under which the defendants, as owners of the vessel, the *Loreley*, agreed to charter it to Cendant on condition that Cendant would discharge certain continuing obligations including obligations in relation to the upkeep and maintenance of the vessel. Thus the facts of the instant case readily distinguish it from *O.E. Telephones v. Alcatel & NTL.*

118. On the facts of this case, the Court is persuaded that the bareboat charter agreement in issue falls into that category of contract which is non-assignable without prior consent. The Court considers the principles laid down by Collins M.R. in the case of *Tolhurst v. Associated Portland Cement Manufacturers Limited* to be of most assistance to it in determining the assignability of contracts in the absence of prior consent. The Court adopts the reasoning of Collins M.R. p. 668 – 669 of that decision:-

"It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor: see Liversidge v. Broadbent, and cases collected in the notes to Lampleigh v. Brathwait. On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice. Whether the right so created involves privity between the debtor and the assignee is, I think, doubtful; and the rule of the common law that the action must be brought in the name of the assignor shews that it did not regard such a transaction as equivalent to a novatio. The right seems rather to be based on the equitable principle that it would be against conscience on the part of the person on whom the obligation lay to discharge it to the original contractee after he had notice that the latter had assigned the benefit of it to another person. The special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient of the benefit would seem in principle and in common justice to be confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it, and I think the right of dropping the original contractee out of the discussion must be limited to those cases only in which the contract—that is, the benefit of all that remains to be done under it has been assigned; and it is in this sense only, as it seems to me, that contracts can be said in strictness to be assignable. There is, however, another class of contracts, where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person".

119. The above considerations can be distilled into three principles, as noted by the defendants:-

(i) The benefit can be assigned where the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration;

(ii) The special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient of the benefit is confined to cases where it can make no difference to the person on whom the obligation lies to which of the two persons he is to discharge it;

(iii) Contracts where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed cannot be assigned.

120. In relation to (i) above, the Court notes that the consideration provided to the defendants in their capacity as owners under the bareboat charterparty agreement is ongoing and requires the performance of obligations, including maintenance, insurance and licensing obligations as well as payment obligations, on a regular basis throughout the term of the agreement. In relation to (ii), the Court considers that, on the facts of this case, the contract cannot be considered one in which it makes no difference to the defendants, on whom the ongoing obligations lie. Indeed, the facts of this contract strike the Court as being akin to a landlord and tenant contract, in which a tenant is not entitled to sub-let a property without the consent of his landlord, or indeed a car-hire contract, in which it would not be permissible for the hiring party to assign the benefit of the hire-car to be used by another party, without the permission of the hiring company. Finally, in relation to (iii), it is quite clear that the charterparty agreement is a contract in which there are mutual obligations still to be enforced and consideration to be executed and, as such, is not a contract assignable without prior consent. The plaintiffs' assertion that Fabjoll Limited was probably a better charterer than Cendant is, in the Court's view, irrelevant to this issue.

121. Accordingly, the Court concludes that the assignment by the liquidator was invalid and of no effect. In this regard, the Court notes that the liquidator of Cendant, Mr. Aiden Murphy, clearly had concerns and required, before the purported assignment, an indemnity in respect of monies then owing to Galtee by Cendant. Similarly, the court order of 2nd August, 2013, approving the

transactions made specific reference to "*satisfactory escrow terms concerning those assets which are the subject of potential retention of title claims".*

Liability for arrears
122. The plaintiffs maintain that on the assignment of the bareboat charter Fabjoll Limited did not assume liability for historic arrears owed by Cendant to Galtee Plant Hire Limited. In circumstances where the Court has found that the bareboat charter was not assignable without the prior consent of the defendant and in circumstances where the defendants have rejected the assignment and clearly terminated the bareboat charter by reason of the wrongful assignment, the Court does not have to determine this issue. The Court observes however, that had the first defendant chosen to accept and endorse the assignment to Fabjoll it would have been unjust to allow Fabjoll to cherrypick the benefits of the contract while denying liability to pay the burden historic or otherwise.

Requirement of Reasonable Notice Period
123. The plaintiffs accept that failure by Cendant to pay sums owing to Galtee under the charterparty did give rise to an entitlement to terminate the agreement but submit that such termination must be subject to reasonable notice. The plaintiffs contend that since there is no express term in the contract allowing for immediate termination, the Court should imply a term of reasonable notice, having regard to all the circumstances including the requirement of a ferry to service the hotel. The plaintiffs submit that the Court is entitled to take into account the factual matrix in this case in order to determine whether it could have been within the contemplation of the parties that the charterparty agreement could be summarily terminated. The plaintiffs point again to O.E. Telephones in which McCracken J. implied a notice period of nine months.

124. The defendants also rely on *O.E. Telephones* as authority for the proposition that when implying a reasonable notice period into a contract, the Court has to have regard to the nature of the business and the products involved and to the general commercial practice in the particular industry or field of endeavour. Again the Court notes that O.E. Telephones is of little assistance to it in this case. The Court agrees that the approach adopted by McCracken J. in that case is a sensible one, but again notes that the contract in O.E. was assignable and the case concerns post assignment liabilities. The Court has found that the contract in this case is not assignable without the prior consent of the first defendant and thus, different considerations apply.

125. In relation to the issue of notice the defendants rely on general commercial practice in the context of a bareboat charterparty agreement. This, they say, is reflected in the industry standard *pro forma* bareboat charterparty agreement published by the Baltic and International Maritime Council (BIMCO) commonly referred to as BARECON 89. BARECON 89 provides at Clause 10:-

> *"In default of payment beyond a period of seven running days, the owners shall have the right to withdraw the Vessel from the service of the Charterers without noting any protest and without interference by any court or any other formality whatsoever."*

The defendants also draw the Court's attention to the authoritative textbook on the subject Davis, *Bareboat Charters*, 1st Ed., (London, 2000). In relation to the rights conferred on an owner by BARECON where there has been a default in payment Davis states as follows at paragraph 9.25:-

> *"There is no English law authority as to what is necessary as a matter of law in order to withdraw a vessel from a bareboat charter. The question therefore arises as to whether it is sufficient to determine a bareboat charter simply to serve a notice of withdrawal, or whether it is also necessary for the owners physically to regain possession.*
>
> *It is submitted that the better view is that a bareboat charter can be determined by the owners by service of a valid notice of withdrawal, terminating the charterers' right to remain in possession and control of the vessel. If the charterers wrongly refuse to surrender possession in accordance with such a notice, the owners would be entitled to enforce their rights to possession by injunction and/or claim damages. It is submitted that it would be plainly wrong in principle if the charterers were entitled to treat the charter as continuing simply by virtue of their wrongful refusal to deliver up possession of the vessel.*
>
> *It should be noted, however, that regaining possession of a bareboat chartered vessel is unlikely as a matter of practice to be straightforward. This is primarily because the master and crew are the servants of the charterers and may not readily follow the orders of the owners."*

126. Davis also considers the effect of an unlawful assignment of a bareboat charterparty and the rights conferred on the owner of a vessel where such unlawful assignment occurs concluding at paragraph 15.19:-

> *"Any assignment or sub-demise without the owners' consent would entail the giving up by the charterers of possession and control of the vessel to a third party whom the owners had not approved and yet the owners would have no recourse against the charterers for entering into the assignment/charter by sub-demise. The owners could not simply ignore with impunity an assignment which had been entered into by the charterers without their consent since they would run the risk of losing any means of controlling or safeguarding their asset.*
>
> *It is submitted therefore, that in the case of contracts which involve the transfer of possession…that an assignment (or sub-demise) entered into by the charterer without the owners' consent will ordinarily constitute a clear demonstration by the charterers that they no longer intended to be bound by the contract and would entitle the owners to terminate the charter as a result."*

127. The defendants therefore submit that having regard to the nature of the business and to general commercial practice in the context of bareboat charters as reflected in the *pro forma* BIMCO industry standard agreement and in the views of one of the leading authorities on the subject, the actions of Galtee in notifying the plaintiffs on 29th August, 2013 that the charter arrangement had been terminated and in offering the plaintiffs an opportunity to put in place an interim arrangement which was not pursued by the plaintiff, conferred a right on Galtee to recover possession of its vessel on 27th September, 2013.

128. The plaintiff in reply submits that even if no notice period is implied there is still the issue of the characterisation of the letter sent by the defendant's solicitors of 16th September, 2013 which stated:-

> *"We have already notified your client that they should now make arrangements to source an alternative ferry within the next 14 days as our clients will be taking the appropriate steps to take control of the ferry which our clients own."*

The plaintiffs claim that the failure to abide by this period constitutes a misrepresentation both in tort and in contract on the basis

that the hire fee was being tendered and the representation was thus supported by consideration.

129. The defendants acknowledge that the letter sent by Galtee Plant Hire Limited's solicitors on 16th September, 2013 provides for a 14 day notice period. However, the defendants submit that such notice is not in a contractual setting since the contract was validly terminated on 29th August, 2013. Therefore, the defendant submits that the 14 day period is merely a voluntary concession in the context of commercial negotiations concerning the potential purchase of the *Loreley*. Thus, they contend the 14 day notice period was dependent on contractual negotiations being entered into in good faith and gave rise to no actionable rights on the part of the plaintiffs. The defendants submit that the plaintiffs did not act in good faith noting that on 27th September, 2013, the day the plaintiffs' solicitors were seeking to engage with the defendant's solicitors in relation to negotiations for the purchase of the *Loreley*, the Foyle Rambler was being insured.

130. The plaintiffs counter that both parties were manoeuvring in a commercial situation and that therefore the question of bad faith does not arise. However, the plaintiffs point out that the defendants set a purchase price for the *Loreley* at €1.45 million which seemed to be on the basis that Mr. Ryan as receiver was under some pressure to acquire a boat. The plaintiffs also point out that no binding contract was in place in respect of the purchase of the Foyle Rambler on 27th September, 2013.

Decision of the Court on the issue of Notice

131. Having determined that the bareboat charter is a contract which is not assignable without the prior consent of the first defendant, Cendant was in clear breach of the charter agreement. Such a breach would, in the Court's view, allied to the facts that Cendant was in liquidation and had accrued serious arrears in respect of charter fees, have entitled the first defendant to terminate the charter forthwith and recover their asset on the occurrence of the liquidation and receivership. Alternatively, the defendants could have demanded payment as a condition of continuing the contract with the liquidator/receiver. Indeed, leaving aside the nature of the contract itself, *W & L Crowe Ltd et al v. ESB* (Unreported, High Court, Costello J, 9th May, 1984) is authority for the proposition that a person dealing with a company may insist upon the company or receiver paying sums owed prior to the receiver's appointment before continuing to contract with the company.

132. The defendants did not take this course and instead accepted fee payments from the liquidator from 19th July, 2013, to 2nd August, 2013. The Court notes that Mr. Hannon, the marine engineer retained by Cendant to maintain the boat was also paid during this period. Having been notified of the purported assignment to Fabjoll Limited on 8th August, 2013, again the defendants did nothing. They waited three weeks before sending a letter on 29th August, 2013, terminating the bareboat charter agreement but at the same time indicating their willingness to enter "*a temporary little arrangement*" pending the resolution of the issues between the parties. A condition of the defendant's proposed arrangement was that Eoin Ryan and Fabjoll Limited would begin to discharge charterparty debts which as claimed exceeded by a multiple, the total value of the bareboat charter. The plaintiffs made it clear that this was not acceptable to them and queried whether the first defendant was willing to sell the boat. On 16th September, 2013, the defendants, in a letter addressed to the plaintiffs, Cendant Limited (in receivership), Fabjoll Limited and Eoin Ryan, gave the plaintiffs 14 days to locate a new boat and sought a price of €1.4 million for the purchase of the boat. It is difficult to escape the impression that as of the 16th September, 2013, the Defendants considered that they had the receiver "*over a barrel*". They gave him a limited period of 14 days to find a replacement boat or the alternative option of purchasing the boat for €1.4 million. Interestingly, the price sought of €1.4 million is equivalent to the total of the arrears in excess of €700,000 claimed by the defendants in their letter of the 29th August, 2013 together with the purchase price of the replacement vessel the *Foyle Rambler* for €640,000. Whatever the genesis or status of the defendants' letter of the 16th September, the fact is that they chose to give these plaintiffs 14 days in which to find a replacement boat. Having done so, they were not entitled to resile from that notice period and by their conduct on 27th September, 2013 to create a public safety concern in respect of access to the island and it was that conduct that prompted the intervention of this Court.

133. The invalidity of the assignment means that the bareboat charterparty agreement was at all times between Galtee Plant Hire Limited and Cendant Limited. Given that Cendant failed to discharge its obligations pursuant to that agreement such that significant arrears in excess of €100,000 were due and owing to the defendants and that Cendant attempted to assign the benefit of the charterparty agreement to Fabjoll Limited without the consent of the defendants, the Court considers that such fundamental breaches of contract rendered the contract terminable at the behest of the defendants.

134. Following the purported assignment of the charterparty to Fabjoll Limited, the defendants chose not to pursue the appropriate remedy. Instead, they treated with the plaintiffs and represented to them and each of them, in their letter of 16th September, 2013, that the plaintiffs had 14 days in which to procure another vessel. They then resiled from this position without warning and in doing so, created a situation which gave rise to a public safety risk to those patrons and staff members present on Little Island at the time of their taking control of the *Loreley*. Their actions also necessitated the use of public resources in the form of a continued Garda presence. In so doing, the defendants transformed a private dispute into an issue of public safety necessitating the involvement of the court and the procuring of a court order. Indeed, this was the primary basis upon which Ryan J. considered the granting of an injunction necessary.

135. It appears to the Court that on the expiration of the 14 day notice period, that is 1st October, 2013, the defendants were entitled to recover their vessel and thus the Court considers that the continued presence of Fabjoll Limited on the vessel from that date amounted to a trespass.

136. Insofar as any contractual debts are concerned, the invalidity of the assignment to Fabjoll Limited, as contended for by the defendants and as found by the Court, results in a situation where the arrears owing to the defendant in respect of the bareboat charterparty agreement are owed by Cendant Limited (in liquidation). The liquidator of Cendant is not a party to these proceedings. The Court notes, however, that the purported assignment of the bareboat charter on 2nd August, 2013, contains an indemnity from the third defendant to the liquidator in respect of the debts then due on foot of the charterparty.

137. Again, having regard to the Court's finding that the assignment of the bareboat charter was not a valid assignment, it follows that any claim by Mr. Christopher Hannon for works done and services rendered to the boat, which claim appears from the admiralty papers to date back to 2007, lies between him and Cendant pursuant to the bareboat charter of 16th January, 2012, and prior to that between him and REFL Limited who, according to the agreed statement of facts, owned the boat at that juncture. At the time of its arrest, on the basis of the Court's finding, the vessel was the subject of a trespass by Fabjoll. The Court has no evidence to suggest that the vessel would not have been amenable to arrest had it been in the possession of either Cendant or the first defendant. Any sums paid by the first defendant on foot of the arrest of the vessel by Mr Hannon are prima facie payable by Cendant to the first defendant pursuant to the indemnity contained in the bareboat charter agreement of the 12th January, 2012.

138. On a consideration of all the facts in this case, the Court is of the view that from the moment of the liquidation/receivership the parties hereto were engaged in a high stakes poker game in which each side sought to bluff and counter-bluff the other. The plaintiffs

who were anxious to maintain WCHGC as a going concern needed ferry access and they sought to get the benefit of the bareboat charter agreement without being willing to discharge the burdens attaching to such agreement, namely the €119,000 then due in arrears of charter fees together with any maintenance costs due under the agreement to Mr. Hannon. While a receiver has a duty to discharge his functions efficiently, he is not entitled to take unfair advantage of the rights of third parties. In the Court's view, had the receiver honoured the terms of the bareboat charter agreement of the 16th January, 2012, these tortuous and no doubt expensive proceedings could have been avoided. On the other hand, the Court is also of the view that the defendants sought to use their position as owners of the boat to extract monies from the plaintiffs which were not in fact due under the bareboat charter of 16th January, 2012, and alternatively sought to sell the boat for what appears to be a grossly inflated price, having regard to the price of €640,000 paid for the *Foyle Rambler*. When the defendants gave the plaintiffs 14 days notice on 16th September, 2013, to find a replacement boat, the Court is satisfied to draw the inference that they did so believing that there was no reasonable prospect of the plaintiffs accomplishing that task. The Court also considers it a reasonable inference to draw that it was the information that the plaintiffs had in fact located a replacement ferry that prompted the unilateral action of the defendants on the night of 27th September, 2013. The defendants quite simply overplayed their hand. That being said, the Court is satisfied that the assignment of the bareboat charter from Cendant to Fabjoll is invalid and will hear from the parties as to what should flow from that finding.