THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 117

Appeal No. 2014/1181

[Article 64 Transfer]

Peart J.
Hogan J
Mahon J.
BETWEEN/

PAUL MCCANN AND PATRICK DILLON AND BY ORDER

BANK OF SCOTLAND PLC

PLAINTIFFS/RESPONDENTS

- AND –

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

DEFENDANTS/APPELLANTS

Judgment of Mr. Justice Mahon delivered on 10th day of June, 2015

1. This is an appeal from the judgment of the High Court (Gilligan J.) delivered on 29th November 2013 (mistakenly stated in the defendants' Notice of Appeal as having been delivered on 3rd December 2013) and the Order of the High Court dated 11th December 2013 and perfected on 14th January 2014. The said Order granted summary judgment to the Plaintiffs against the defendants in the sum of €18,758,244.88 and costs (including reserved and discovery costs), subject to taxation in default of agreement. The learned High Court judge's decision followed upon four days of hearing evidence, including oral evidence.

2. The first and second named Plaintiff's are Receivers appointed by the third named Plaintiff over a number of properties owned by the Victory Christian Fellowship ("the Fellowship") and which were provided by way of security to the third named Plaintiff ("the bank") in respect of substantial borrowings pursuant to facility letters dated 3rd November 2006 (as subsequently amended by letters dated 29th March 2007), and 18th December 2007. The date of appointment of the Receivers was 29th May 2013. The properties which are the subject of Deed of Mortgage and Charge dated 16th July 2007 are:-

> *(i) Killininny House and the Victory Centre at Firhouse Road, Dublin 24;*
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> *(ii) 35, Westland Road, Dublin 2;*
>
> *(iii) Kilmacud House, Kilmacud Road Upper, Stillorgan, Co. Dublin.*

3. The defendants are trustees of the Fellowship. A fourth and fifth defendant were released from these proceedings in July 2013.

4. While the defendants appealed, *inter alia*, that part of the Order of the High Court dated 11th December 2013 in which the bank recovered judgment against the defendants in the sum of €18,758,224.88, in the course of the hearing of the appeal, senior counsel on behalf of the defendants acknowledged that the said sum was due and owing to the bank and that the Order for Judgment in this sum is not now being appealed. Save for the foregoing the defendants have appealed against the said judgment of Gilligan J., and seek orders in lieu thereof granting the defendants:-

> *(a) A declaration that the appointment of the first and second named Plaintiffs as Receivers by the third named Plaintiff was unlawful and invalid by reason of the representations of the Respondent bank to the Appellants and therefore by reason of estoppel;*
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> *(b) A declaration that the appointment of the Receivers was invalid and ought promptly be set aside on the grounds that their appointment by the third named Plaintiff was unlawful and/or inequitable on the grounds that in so doing the third named Plaintiff was in receipt of information furnished to it in breach of confidence;*
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> *(c) Further or in the alterative a declaration that the third named Plaintiffs appointment of the Receivers was invalid and ought promptly be set aside on the grounds that in so doing the third named Plaintiff acted in whole or in part on information which it knew to have been imparted to it in breach of confidence;*
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> *(d) An order enjoining and requiring the Receivers, their servants and/or agents to vacate 35, Westland Road, Dublin 2, Kilmacud House, Kilmacud Road Upper, Stillorgan, Co. Dublin and the purpose built church building of the Victory (Ireland) Christian Fellowship otherwise the Victory Christian Fellowship of which the second, third and fourth defendants are trustees located at Firhouse, Dublin 24, and each of them as and when this court shall direct.*

5. The agreed schedule for the repayment of the loans granted under the said facility letters was not adhered to by the defendants, and as of March 2013 the cumulative arrears on the loan accounts stood at €1,836,477.60. Repayment of the full indebtedness (€18,125,865.44) was formally demanded from the defendants by letter of 29th May 2013. There was no response to this letter, and the first and second named Plaintiffs were duly appointed Receivers by the bank on the 29th May 2013.

6. On 5th October 2012, the defendants notified Certus (a company appointed by the third named Plaintiff to manage its loan book in Ireland and which I will also refer to herein, for convenience, as "the bank") of the appointment of an accountant, Mr. L, to represent them in discussions and negotiations in relation to their indebtedness to the bank. Between that date and 29th May 2013 a number of

meetings took place between Mr. L and the bank, and there was also email and telephone contact during this period. The focus of the contact between Mr. L. and the bank was to arrive at a consensus to deal with the Fellowship's very substantial indebtedness to the bank, and more particularly the transfer of that indebtedness to another bank.

7. The defendants maintain that at a meeting with the bank on 26th March 2013, a so called strategy was agreed in relation to the indebtedness. Paragraph 5 of the defendants defence pleads that:-

> *"The bank agreed a strategy ("the agreed strategy") to permit the trustees secure alterative finance in an orderly way, and in the interim the trustees would*
>
> > *(a) proceed to sell the trust's property at 35 Westland Row, Dublin 2, and use their best endeavours to secure a purchase thereof as soon as possible;*
> >
> > *(b) apply for planning permission and agree with the Health Service Executive to lease the Kilmacud property as a primary health centre;*
> >
> > *(c) reduce operating costs and improve revenue at the trust's purpose built place of worship, the Victory Centre;*
>
> *and*
>
> > *(d) seek alternative funding from a financial institution for a reduced capital sum of €5.1m"*

8. An internal note in the bank's file referred to the meeting on 26th March 2013 under the heading *"agreed next steps",* and further stated Mr. L. was to *"put forward a proposal within a three month time frame (€5.5m/€6m range)…and have giving trustees two options; (i) trustees buy out the bank or, (ii) commence process of proceedings".*

9. An email of 27th March 2013 indicated that at a meeting between the parties on 26th March 2013 the possibility of reaching a consensual solution was discussed. Clearly, it was agreed at this meeting that some further time would be afforded to the defendants to arrive at a solution acceptable to both sides. An email from the bank at that time stated that *"if the bank and borrower cannot agree on a number for a consensual sale or funding/refinance is not concluded within, say, three/four months, the bank will require to explore other options and this could involve taking control of the assets through an insolvency process."* It was accepted by the learned High Court judge that evidence from Mr. Arkinson, a bank official, satisfied him that as of 26th March 2013 no agreement had been reached between the parties, but that a consensual solution strategy was being discussed at that time.

10. By April/May 2013 emails from Mr. Arkinson were indicating an element of frustration on the part of the bank. Clear references were being made to the possible appointment of Receivers. It is clear that by this time the prospect of a refinancing by another financial institution of the defendant's indebtedness to the bank was doubtful. On 29th May 2013 a letter of demand was issued on behalf of the bank by Arthur Cox Solicitors seeking the full repayment of the debt, including principal, interest and arrears. Repayment was not forthcoming, and the Receivers were appointed on the same day.

11. It is the defendants case that there was in reality an agreement in place whereby the 'agreed strategy' would be put in place, and that this would take place within three months, and that in this way the Fellowship would remain in possession of the various premises and a satisfactory outcome for all concerned would be achieved. Specifically, it is contended had that process run its course as envisaged by the defendants, the Receivers would not have been appointed.

12. Central to the defendant's case is their contention that in the course of crucial negotiations between their representative, Mr. L, and the bank relating to their indebtedness to the Plaintiff and which they believed had a reasonable prospect of avoiding or delaying any move by the Plaintiff to actively enforce repayment (and including, in particular, the appointment of a Receiver), the bank was in receipt of confidential information relating to the Fellowship which it knew was confidential, and that this confidential information directly led to, or triggered, its decision to appoint the Receivers approximately two months after the 26th March 2013 meeting. This confidential information was, the defendants maintain, wrongfully provided to the bank by their agent, and was wrongfully received by the bank, and was information which was potentially detrimental to their financial reputation and their relationship with the bank.

13. The two pieces of confidential information apparently disclosed to the bank were, firstly, that the Revenue Commissioners had withdrawn the charitable status of the Fellowship with retrospective effect from 1st January 2009 and, secondly, allegations against the defendants that a number of fraudulent invoices facilitating VAT fraud were purportedly presented for payment to the bank during the construction of the defendant's premises by a party connected to the Fellowship. The Revenue Commissioners did indeed notify the defendants on 14th May 2013 that the charitable status of the Fellowship was revoked with retrospective effect from 1st January 2009. The status of, or outcome to, the fraudulent invoices allegation (in terms of its accuracy or otherwise) was not disclosed to the court. Undoubtedly, both matters which were the subject of this disclosure of information to the bank were matters which, at a minimum, had the potential to adversely affect the financial position of the Fellowship.

14. Documentation discovered to the defendant in the course of these proceedings included a number of attendances, minutes and emails of meetings involving personnel of the bank and, on occasion, the defendant's agent, Mr. L.

15. A memorandum of a meeting on 22nd April 2013 related to a meeting between the defendants agent, Mr. L, and Mr. Hession, a bank official that recorded the following:-

> *"(Mr. L.) arrived at Certus offices at approximately 14.45. (Mr. L.) stated at the outset that anonymity was of paramount importance. AH gave no commitment on this matter. (Mr. L.) stated he had a meeting with two of the trustees of VCF, Brendan Haide and Gerry Byrne, in the afternoon of Wednesday April 17th. One of the trustees, Brendan Haide, raised an email from the Revenue Commissioners requesting copies of all bank statements for VCF from 2009 to 2012, with specific emphasis on the period 2009 to 2010. (Mr. L.) had been sent a copy of this email earlier that day.*
>
> *VCF are currently in negotiations with Revenue in respect of a VAT refund for 2012 as VCF is a registered charity. (Mr. L.) advised that VCF usually dealt with someone from the Revenue Commissioners in Tallaght but that an individual from Revenue in Nenagh, which deals specifically with charities, would also be involved in this case.*
>
> *(Mr. L.) stated that he advised Brendan Haide that from his experience that this was highly unusual that Revenue would request statements from this far back and particularly to remove "off site". At this point (Mr. L.) advised that Brendan*

Haide stated that there maybe an issue with invoices during the period of the development of the Victory centre in Firhouse. (Mr. L.) stated that he was shocked on hearing this, and following this he had undertaken his own investigation of the books of VCF. He advised that it would appear that an invoice(s) was submitted to the bank by a company which purported to have provided equipment in respect of the development of the Victory centre. On receipt of payment this company lodged the cheque to its accounts, took a commission and remitted the balance of the funds to the trustees. According to (Mr. L.) this company was connected to an employee of the VCF. (Mr. L.) was also advised by Brendan Haide that his son, who was unconnected to the Victory centre, was also dealing with Revenue and Brendan Haide was unsure if this was coincidental."

16. On the same date, 22nd April 2013, an internal bank memorandum of a telephone conversation between bank personnel stated the following:-

"(Mr. L.) stated that following this conversation with BH and GB he investigated and located an invoice dated 7th September 2009 for €240,452.42 (including VAT) to Final Cut Productions. LCR said that this was included for payment in a certificate number 223460 that was submitted by CBF to Bank of Scotland (Ireland) Limited for payment. This certificate was signed by the banks Q.S. O'Brien Jenkins and MBO Project Architects. (Mr. L.) stated that as far as he was concerned nothing had been supplied for this and this transaction did not appear on VCF's statement. (Mr. L.) stated as far as he was concerned a "fraud" had been perpetrated on the bank. He further went on to say that VCF reclaimed the VAT on the Final Cut invoice. …(Mr. L.) advised that he has not had any discussions with the Revenue Commissioners on this and that he wanted to advise the bank to enable the bank take whatever action they deemed necessary. He again emphasised retaining his anonymity. He advised that he was unsure of his continuing role with VCF in light of these revelations and the status of any potential refinance proposal to BOI."

17. In an internal bank document entitled "Risk Event Reporting Form" dated 26th April 2013, the following is stated:-

"If the bank progresses with the appointment of a Receiver over the VCF assets, significant media interest may arise given the nature of the business. We also consider that the trustees may attempt to frustrate the appointment of a Receiver by the bank. We have been unable to verify how the funds were utilised once paid into Final Cut Productions account. Our whistleblower alleged that when payment in respect of the fraudulent invoices were made to the Final Cut Productions account, a commission was deducted and the balance remitted to the trustee of VCF. There is a potential impact for the customer as the balance and the loan is inflated by the amount of the allegedly fraudulent invoices. However, it is alleged that the trustees of VCF were complicit in the potential fraud, it should be highlighted that the trustees of Victory Christian Fellowship are the effective borrowers in this case.…Certus have examined historic documentation to quantify potential loss to the bank. CREBSU Ireland (Edinburgh) has been involved in the process in conjunction with Certus and they have liaised with the whistleblower to determine the full impact of this fraud…..Certus FCB are currently reviewing documentation to access the potential financial and statutory impact of this event. Certus FCB will meet with Certus Legal to assess the potential to claim for any losses under the QS Professional Indemnity Insurance Cover, which will only be possible upon appointment of a Receiver (i.e. access to the required information)."

(The 'whistleblower' is a reference to Mr. L.).

18. A 'meeting note' dated 24th April 2013 in the bank's internal file relating to a meeting at which Mr. L met with four bank officials, again made reference to the information concerning the alleged fabricated invoices having been made available by Mr. L to the bank on 22nd April 2013.

19. In an email to Mr. L. on 24th April 2013, Mr. Arkinson wrote:-

"As discussed earlier the bank is increasingly frustrated by the lack of progress around the borrower organising a re-finance of our debt. We met with you and the Trustees on 26th March and we have held a number of subsequent calls with you since and no business plan has been produced, far less Heads of Terms agreed with Bank of Ireland, which we would have expected by this juncture.

"It is vitally important that the matter is progressed in short order or the bank will need to consider what other options are available to it including the possibility of appointing a Receiver to the assets. I know you are out meeting with the borrower tomorrow and I am happy to come to Dublin next week to meet you and Trustees if that would be happy."

20. On 17th May 2013 Mr. L. emailed Mr. Atkinson. He referred to the report prepared by him and submitted to the bank on 21st March 2013. With his email, he enclosed a copy of the letter from the Revenue Commissioners (Charities Section) addressed to the second named defendant, and dated 14th May 2013. In this letter, the Revenue Commissioners notified the Fellowship that it had withdrawn its charitable tax exemption with effect from 1st January 2009. The letter stated that the charities registration number, CHY10645, was no longer a valid charitable tax exemption number and should not in any circumstances be used by the Fellowship in the future. The provision of this copy of the Revenue Commissioner's letter (or its content) was not authorised by the defendants, until approximately six days later when on 28th May 2013, in an email to Mr. Arkinson, Mr. L. openingly referred to the cancellation of the Fellowship's charitable tax exemption status by the Revenue Commissioners. The disclosure on this occasion was authorised by the defendant. There was no authorised disclosure of the alleged fraudulent invoices issue at any stage. The Receivers were appointed on the following day, 29th May 2013.

21. The Report dated 21st March 2013, and furnished to the bank by Mr. L. with the consent of the defendants, was a document intended to provide the bank with detailed information relating to the Fellowship's financial difficulties, its proposals to restructure its debt and settle its indebtedness to the bank. In that report reference is made to draft financial statements prepared by the Fellowship's auditors, and Mr. L.'s criticisms relating thereto. It was a document prepared, it is assumed, on the basis that its content was accurate and truthful.

22. On 17th May 2013, (the date on which Mr. L. informed the bank of the decision of the Revenue Commissioners to withdraw the Fellowship's tax designation status with effect from 1st January 2009), Mr. L. wrote the following to Mr. Arkinson:-

"I refer to my report in relation to Victory Christian Fellowship dated 21st May 2013 which was issued to you on that date. Enclosed with this email is a letter from Revenue's Charities Section in which the Trust's charitable tax exemption is withdrawn effective 1st January 2009. I have spoken to William Keogh of Revenue and he advises me that Revenue will be seeking repayment of any donation based income taxed refunds made to VCF for the tax years 2009 and 2010 and that the refund applications for 2011 and 2012 are now invalid. He has further advised me that the donations made to

the Trust since 1st January 2009 are no longer classed as tax free donations but are now classed as income subject to income tax. Mr. Keogh also stated that the principal reason for the withdrawal was the failure of VCF or its then advisors to inform Revenue of the additional activities of the Trust commencing in 2009 (principally trading activity at the Firhouse Development) giving rise to taxable income activity which would automatically invalidate the charitable tax exemption.

On the basis of the withdrawal of the charitable exemption and the necessity to restate the Trust's financial statements for 2009, 2010, 2011 and 2012 to take accounts of the amounts which will become due to Revenue, the assumptions upon which the projections in my report were based are now invalid. I therefore herewith withdraw my report dated 21st March 2013.

I have advised the Trust to write to Revenue for the purposes of seeking to appeal the decision to withdraw the exemption. I cannot comment on the likely success of any such appeal or the duration of the appeal process itself."

23. The defendants were at all material times unaware that their agent, Mr. L., had disclosed information relating to contact with them from the Revenue Commissioners, or relating to the issue of the alleged fraudulent invoices. It appears to be the case that the bank received this information in the knowledge that Mr. L had not been authorised to disclose such information to them. Indeed, Mr. L is referred to in internal bank documentation as a 'whistleblower'. The learned High Court judge was not in a position to identify the reason why Mr. L chose to reveal such information to the bank without authorisation from his clients. Neither is this court in a position to throw any light on the motivation of Mr. L in disclosing such information to the bank, other than to make the observation that it did not serve the interests of his clients. Undoubtedly, Mr. L. must have known that such information would, as a minimum, cause the bank additional concern in relation to how it viewed its prospects of recovering its indebtedness from the defendants at a time when matters (relating to such recovery) were coming to a head. It may have been the case that Mr. L. believed it necessary and/or appropriate to so inform the bank that his report of 21st March 2013 was no longer valid in the light of such information.

24. The defendants maintain that the Receivers were appointed primarily as a result of the unauthorised confidential information disclosed to the bank prior to the 28th May 2013, and seek to invalidate their appointment on that basis. For its part, the bank maintains that the motivation on their part to appoint Receivers was the level of outstanding arrears on the defendants' debt repayments, and the lack of any definite progress in relation to the sourcing of alternate finance from Bank of Ireland, rather than the receipt by it of any unauthorised disclosure of information from Mr. L. The bank emphasise that in any event the information in relation to the withdrawal of the defendant's charitable tax status was legitimately known to them prior to the appointment of the Receivers.

25. The point is made by the bank that the alleged fraudulent invoices issue was for it a relatively minor matter in the overall scheme of things and, viewed in the context of the defendants' substantial indebtedness to the bank, and the increasingly unlikely prospect, as it appeared in late May 2013, of any resolution being found. For their part the defendants' maintain that they were actively engaged in resolving their difficulties with the bank in the period immediately prior to the appointment of the Receivers. They believe that it was the unauthorised disclosure of confidential information to the bank by Mr. L. that precipitated the appointment of the Receivers.

26. It is not disputed that the defendants were very heavily indebted to the Plaintiff, that they had defaulted in making repayments to the bank and that the bank had, in general, an entitlement in such circumstances, pursuant to its contract with the defendants, to appoint Receivers as part of a process to secure the repayment of the outstanding debt, and that this contractual entitlement existed entirely independently of the receipt of information concerning the defendants, whether disclosed to, or received by, them with or without the defendants' authority. It is the bank's case that the decision to appoint the Receivers was prompted by its anxiety to realise its security in respect of the defendant's outstanding and substantial indebtedness to it in circumstances where the prospect for so doing in the absence of such appointment was unlikely, and had not been triggered by information disclosed to it by Mr. L. prior to 28th May 2013.

27. The bank's internal documentation includes a "request to appoint a *receiver*" dated 26th April 2013. Under a paragraph headed *"Key risks and mitigants"* it is indicated that the confidential information relating to the alleged VAT fraud was being relied on for the purposes of supporting the request for leave to appoint a receiver. Another part of the report clearly refers to the fact that the Revenue Commissioners were requesting copies of five year's bank statements from the defendants, and that this was *"highly unusual request".* The document states that the early appointment of a receiver by the bank would protect the bank's security from any potential challenge by the Revenue Sheriff.

28. There is no evidence to suggest that the bank actively sought the disclosure of confidential information from Mr. L. By all accounts, that confidential information was voluntarily disclosed to it by him. That being so, it raises the question, *What was the bank to do with this information?,* on its receipt. Obviously, it could not pretend that it did not have the information or to, in any practical way, exclude it from its thinking in terms of its overall approach to the defendants' indebtedness*. Did the fact that it was in possession of this confidential information in circumstances where it knew that it ought not have been impose on it an obligation to stay its hand from taking active steps (such as the appointment of a Receiver) to secure its debt?. Did it follow that its contractual entitlement to appoint a Receiver was thereby lost, or subject to delay, because of its receipt of this information, and if delayed, for how long?*

29. It is appropriate at this point to consider the status of confidential information disclosed to a third party without authorisation, and what is expected of that third party on receipt of such confidential information. In this case, Mr. L disclosed confidential information to the bank without his client's authority and, undoubtedly, the bank received this confidential information, and willingly did so, in circumstances where it knew that the information was being disclosed to it without the authority of the defendants. It did not advise the defendants that it had been provided with the information by Mr. L..

30. The legal status afforded to confidential information and consequences of its disclosure have been considered by the courts in a number of cases.

31. In *Mahon v. Post Publications Limited* [2007] 3.I.R., 338, Fennelly J. (at p. 382), stated:-

"The law with regard to confidential information is of comparatively modern origin. It was above all developed to regulate the behaviour of private parties and was based on the doctrine of trust. It is independent of contract. A recipient of a confidence must not breach it by communicating the confidential information to third parties. It is, of course, capable of application both to purely personal and non commercial information. The case of Prince Albert v. Strange [1849] 1Mac.G.25 concerned drawings and etchings made by Queen Victoria and Prince Albert of subjects of private and domestic interests to themselves. Certain plates had been confided to a printer for the purposes of printing

impressions for private royal use. They had found their way by surreptitious means into the hands of persons wishing to publish a catelogue of them. An injunction was granted based on breach of confidence and trust

The law of confidence has however developed more generally in a commercial context. Dismissed or defecting employees have not infrequently purloined their former master's technical or commercial information. While employees can be restrained in contract without resort to the equitable doctrine, the latter becomes relevant when the information is convened to third parties who are on notice of the confidential character of the information. A more specific type of application of the equitable principle has arisen where information has been conveyed during negotiations with the establishment of a joint commercial venture. Many of the cases have arisen from cases of failed negotiations. The recipient of the information is deemed to have received the confidential information on trust solely for the purposes of the intended joint venture. If the negotiations fail, that recipient will, if necessary, be restrained from using it or authorising use of it without permission, for his own purposes. Kelly J. cited a passage from the judgment of McGarry J. in Coco v. Clarke (A.N.) Engineers [1969] RPC41 at p. 47. It neatly encapsulates the requirements for a successful action based on breach of confidence, at least in a commercial setting. He said:

> *"In my subject three elements are normally required. If, apart from contract, a case of breach of confidence is to be succeed. First, the information itself and the words of Lord Green M.R. in Saltman Engineering Company v. Campbell Engineering Company [1948] RPC203 on p. 215, must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."*

32. The issue of breach of confidence was also considered in the case of *House of Spring Gardens Limited v. Point Blank Limited* [1984] I.R.611. The head note to that case (at p. 613) states the following (referring to the decision of Costello J.):-

> *"In relation to the breach of confidence claim; in such an action the court is asked to enforce what is essentially a moral obligation. In so doing it must firstly decide whether there exists from the relationship between the parties an obligation of confidence regarding the information which had been imparted and it must then decide whether the information which was communicated could properly be regarded as confidential."*
>
> *"Once it is established that an obligation of confidence exists and that the information is confidential, then the person to whom it is given has the duty to act in good faith, and this means that he must use the information for which it was imparted to him and cannot use it to the detriment of the informant."*

33. In the same case (on appeal to the Supreme Court) McCarthy J. stated (at p. 709):-

> *"An individual might be in possession of such information for a variety of reasons and in a variety of ways; I would venture the view that the obligation of secrecy whilst enforced by equitable principles, depends more upon commercial necessity than moral duty."*

34. Useful passages relating to the consequences of receiving confidential information are to be found in *Force India Formula One Team v. Malaysia Racing Team* [2012] EWHC616(C). At paras. 239 and 240 that judgment states the following:-

> *"It is important to distinguish between three questions which are sometimes confused. First, whether there is an equitable obligation of confidence at all; secondly, if there is a obligation of confidence, whether contractual or equitable, what conduct amounts to breach of the obligation; and, thirdly, who is liable for such a breach."*
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> *"As discussed above, whether an equitable obligation of confidence arises as a result of the acquisitions or receipt of confidential information depends on the acquirer or recipient knowing or having noticed that the information is confidential. Once an equitable obligation of confidence has arisen, however, the decision of the Court of Appeal in Seager v. Copydex Limited [1967] IWLR923 establishes that the person subject to the obligation may be held liable for acting in breach of it even through he is not conscious of doing so."*

35. At para. 224, the following is stated:-

> *"An obligation of confidence may, of course, be imposed by contract. In the absence of any contractual obligation, an obligation of confidence may arise in equity. An equitable obligation of confidence will arise as the result of the acquisition or receipt of confidential information if, but only if, the acquirer or recipient either knows or has notice (objectively accessed by reference to a reasonable person standing in his shoes) that the information is confidential."*

36. Clearly, there is normally an obligation on a party not to disclose confidential information without authorisation. There maybe, and indeed almost certainly are, circumstances where an individual possessed of confidential information is legally entitled to pass on such information to third parties and, indeed, arguably in some instances, will have an obligation to do so in particular circumstances. As already indicated the reasons why Mr. L in this case passed on information which was clearly confidential to the defendants and which he had become aware of in the course of his professional relationship with the defendants are unknown.

37. Having regard to the content of Mr. L.'s email to the bank of 17th May 2013, it may well have been the case that he felt himself under a legal obligation to inform the bank of information (albeit received by him in confidence from the defendants, and which was information which was potentially detrimental to the interests of the Fellowship) which had the effect of invalidating some or all of the content of his Report to the bank of 21st March 2013.

38. Insofar as there was a disclosure by Mr. L. on 17th March 2013 when he advised the bank that the Revenue Commissioners had informed his clients that the Fellowship's charitable tax status had been withdrawn with effect from 1st January 2009, it is arguable that this was information publicly available (by checking the Charities Register) and therefore could not be described as confidential information, nor could its disclosure (unauthorised by the defendants) be properly described as a breach of confidence *(Saltman Engineering Company v. Campbell Engineering Company* [1948] R.P.C. 203 at p. 215).

39. In his oral submissions to this court, Mr. O'Reilly, S.C., on behalf of the defendants, argued that the acknowledged receipt by the bank of confidential information and information which was by its nature detrimental to the interests of the defendants, deprived the bank of the right to appoint Receivers on 29th May 2013, notwithstanding the fact that the bank was contractually entitled to take that step in the face of the defendants' failure to meet their financial commitments to the bank. Mr. O'Reilly contended that in those

circumstances the bank should be prevented in equity from appointing Receivers and that accordingly their appointment on 29th May 2013 should be declared invalid. He did, however, concede that the appointment of Receivers could not, on that basis, be prevented for all time. The defendants acknowledged their indebtedness to the bank. It was also acknowledged by the defendants that the bank was contractually entitled to take steps to enforce their security from 2011, (including by the appointment of a Receiver), but had delayed doing so during the course of ongoing negotiations in an effort to reach a compromise.

40. It was also argued by Mr. O'Reilly that the banks receipt of the confidential information relating to the existence of the fraudulent invoices issue was not disclosed at the time of the making of the *ex parte* application for an interim injunction to Ryan J. on 31st May 2013, and that this lack of disclosure on the part of the bank undermines the relief granted by the court on that occasion *(he who comes into Equity must come with clean hands)*. Gilligan J., in relation to that particular submission, stated in the course of his judgment (at p. 18) the following:-

> *"However, the court is prepared to accept the explanation of counsel for the plaintiff to the effect that any affidavit sworn in that application on behalf of the plaintiff would have been in response to affidavits sworn by the defendants and would have been limited to the application at hand and therefore would not have been required to include an in depth explanation of the reasons behind the appointment of the Receivers."*

41. However, it is this Court's view that the receivers, in seeking equitable relief, objectively, had a duty of candour to disclose all relevant information relating to their appointment and this duty obliged them to make reference to the disclosure of confidential information to the bank by Mr. Dillon in his grounding affidavit. It is information which the High Court should have been made aware having regard to the fact that application sought relief in aid of the receivership. The extent to which a disclosure of such information might have altered the outcome of that application can only be the subject of speculation at this remove.

42. The reality in this case is that the defendants, by the end of May 2013 were rapidly heading towards a fairly hopeless situation in terms of reaching a compromise with the bank. Refinancing through Bank of Ireland had not been realised (and was unlikely to be so), the indebtedness to the bank was substantial, and was increasing. The bank had a contractual entitlement to appoint Receivers, and had a reason for so doing in any event in the absence of the confidential information being disclosed to them. To this extent a bank, in making a decision to appoint a Receiver, will usually take into consideration a variety of factors and information. It may have been the case and probably was the case, that the confidential information provided to it by Mr. L did go some way to prompt the bank to make its decision to appoint Receivers. However, it has not been established as a matter of probability that the confidential information disclosed to the bank caused or contributed in any major way to its decision to appoint Receivers, or that in the absence of such information, the bank would have not moved in any event to appoint Receivers. It is also a fact that the withdrawal of the charitable tax status by the Revenue Commissioners, and which was clearly of concern to the bank, was information disclosed to it on 28th May 2013 with the authority of the defendants, and this information was therefore properly available to the bank prior to the appointment of the Receivers, albeit only shortly before their appointment. It is almost certainly the case that the decision to appoint Receivers had been taken, at least in principle, prior to this information being disclosed to the bank on 28th May 2013.

43. The best case that can be made for there being any restriction, in equity or otherwise, on the appointment of the Receivers, is that their appointment ought to have been delayed for some time after 29th May 2013. However, leaving to one side the disclosure of unauthorised information to the bank, it is important to emphasise once again that the bank was contractually entitled to appoint Receivers both prior to, and after the receipt of such information, and in the absence of such information. The most that can be said is that the disclosure of the unauthorised information heightened, to some degree, concern (concern that was present in any event because of the extent of the indebtedness and the failure to make repayments) within the bank as to the prospect of recovering its debt. As I have already indicated, I believe that the bank's knowledge of the confidential information was not, ultimately, a significant factor in the decision to appoint Receivers. I agree with the view expressed by Gilligan J. (who had the benefit of hearing oral evidence) in the following passage of his judgment (pp. 15/16):-

> *"This court is willing to accept the general tenure of the evidence given by Mr. Alan Hession and Mr. Arkinson to the effect that the primary reason behind the appointment of a receiver was the outstanding arrears on the debt and the lack of any progress in relation to the sourcing of alternative finance from Bank of Ireland or in relation to the realisation of other elements of the consensual solution strategy which had been outlined by the parties at the meeting of 20th November 2012. Even if the potential fraud event was taken into account by the bank it could only have been of minor importance and cannot outweigh the fact that the bank was increasingly frustrated by the existence of mounting arrears on the debt owed by the defendants, which amounts to at almost €1.5 m. on the date of the last reservation of rights letter of 13th March 2013, sent by the bank to the defendants. This frustration is expressed in a number of emails from Mr. Arkinson to the defendants' accountant and in the general tone of the oral evidence given to the court in the course of these proceedings. I am satisfied that while the bank may have placed some reliance on the existence of this potential fraud event, it was not a significantly precipitating factor in the decision of the bank to appoint the Receivers."*

44. Having so concluded it is unnecessary to consider, in circumstances where the receipt of the unauthorised confidential information solely or primarily precipitated the appointment of Receivers, whether equity could intervene to prevent or invalidate such appointment where there existed in any event a contractual entitlement to make such appointment because of a breach of a debt repayment provision.

45. I would therefore dismiss the appeal. I am satisfied that in the circumstances the appointment of the Receivers is valid.