



THE COURT OF APPEAL
Civil

UNAPPROVED
Appeal Number: 2022/148

Whelan J.
Noonan J.
Haughton J.

Neutral Citation Number [2023] IECA 89

IN THE MATTER OF THE COMPANIES ACT 2014
AND IN THE MATTER OF SECTION 438 OF THE COMPANIES ACT 2014
AND IN THE MATTER OF DAN MORRISSEY (IRL) LIMITED

Judgment of Ms. Justice Máire Whelan delivered on the 19th day of April, 2023

1. This is an appeal against the judgment and order of Mr. Justice Twomey made on 20th May, 2022 determining a discrete preliminary issue as to whether the appellant Philip Morrissey (Mr. Morrissey) was entitled to bring and pursue an application seeking to compel Allied Irish Bank plc (AIB) and/or Stephen Tennant and Paul McCann (the Receivers) to grant to him an agricultural lease over certain agricultural lands situate at Powerstown, County Carlow comprising approximately 110 acres, the property of an insolvent company Dan Morrissey (Irl) Limited (DMIL).
2. In his judgment delivered on the 13th May, 2022 Twomey J. held on the evidence before him that the High Court had no jurisdiction to make the order sought by Mr. Morrissey and dismissed his motion. He further ordered that the costs of the receivers and AIB be borne by Mr. Morrissey, such costs to be adjudicated by the Office of the Legal Costs Adjudicator in default of agreement.

Background and context

3. To more fully understand the real issues of principle arising in this appeal it is necessary to briefly outline some key aspects of the history of Mr. Morrissey's dealings with

and claims against DMIL and related companies and the receivers. In addition to a brief consideration of relevant litigation it is also necessary to consider in particular litigation between Mr. Morrissey, the receivers and AIB and also the current stated aims and objectives of the receivers *vis á vis* the DMIL lands.

4. Mr. Morrissey contends that he is entitled to seek from the High Court an order pursuant to s. 438 of the Companies Act, 2014 compelling the receivers/AIB to grant an agricultural lease over part of DMIL's land holding comprised in folios CW6160F, CW6161F, CW20894F, CW3349F, CW7387F and CW7388F comprising approximately 110 acres on terms proposed by him. The receivers are wholly opposed to the request for an agricultural lease and are desirous effecting a sale and disposition of the lands for the purposes of reducing the indebtedness of DMIL. They contend that the High Court has no jurisdiction under s. 438 to compel them to grant such a lease.

Loans and receivership of DMIL

5. DMIL was in receipt of loans of approximately €28m from AIB. Philip Morrissey had been an officer and member of DMIL and had guaranteed its indebtedness. Following default by DMIL in respect of the discharge of its indebtedness, on or about the 18th June, 2014 AIB appointed Stephen Tennant and Paul McCann as receivers over the assets and undertaking of DMIL which included the lands the subject of Mr. Morrissey's application. The receivers were appointed out of court on foot of AIB's security instruments which had been registered as burdens on Part 3 of each of the relevant folios. Subsequent to the appointment of the receivers, entries were made on Part 3 of the respective folios to the effect “.. *Crystallised charge arising on the appointment of STEPHEN TENNANT and PAUL MCCANN as receivers of DAN MORRISSEY (Irl) LIMITED by Deed of Appointment dated 18th June 2014 made between DAN MORRISSEY (Irl) LIMITED of the one part and ALLIED IRISH BANKS plc of the other part.*”

6. Subsequently in 2019 AIB disposed of its interest in the relevant charges to Everyday Finance DAC (Everyday) which came to be registered as owner of same on the relevant folios. Thereupon AIB ceased to have any interest in the said securities.

2015 proceedings – on foot of the guarantee

7. As of 2015 the level of indebtedness of DMIL to AIB stood in the region of €24,970,000. Mr. Morrissey was a 33% shareholder and director of DMIL. The judgment in proceedings 2015/2044S was obtained by AIB against Mr. Morrissey on a consent basis on the 17th December, 2015. On foot of that judgment AIB registered judgment mortgages against certain other folios in the beneficial ownership of Mr. Morrissey.

8. Thereafter an application was brought in the Commercial Court record no. 2015/2044S by AIB against Philip Morrissey for consequential orders. On the 13th April, 2016 McGovern J. made an order in the High Court pursuant to O. 45, r. 9 of the Rules of the Superior Courts appointing Stephen Tennant to be receiver over the interests of Philip Morrissey in 10,714 ordinary shares in a related company Dan Morrissey Limited and entitling the receiver to receive the interest of Philip Morrissey in one ordinary share in a company Dan Morrissey (UK) Limited. The receiver was authorised by direction of the High Court to use the powers set forth in the Schedule of receiver's powers exhibited to the grounding affidavit of Conal Regan sworn on the 23rd February, 2016 in the said proceedings. It appears that Mr. Morrissey had issued a petition on the 5th April, 2016 seeking to have himself adjudicated a bankrupt.

9. McGovern J. in the Commercial Court was also satisfied that Mr. Morrissey had, as the Order of 13 April 2016 recites, "... *failed to show cause why the Conditional Order made herein on the 25th day of February 2016 should not be confirmed and made absolute*". An absolute order was made pursuant to O. 46, r. 1 RSC and s. 23 of the Debtors (Ireland) Act, 1840 and s. 132 of the Common Law Procedure (Amendment) Act Ireland, 1853 that Mr.

Morrissey's "... *beneficial and legal interest in the DML Shares shall stand charged with payment to the applicant to the sum of €24,970,000 being the amount for which the Applicant has recovered judgment against the Defendant in the proceedings.*" The High Court further ordered:

"... The transfer, sale, payment out or other disposition of the DML Shares... shall be stayed pending further order".

10. The receiver was separately appointed, *inter alia*, to "... *receive the interest of the Defendant in Cessna 206 Aircraft registered in the Defendant's name and bearing serial number ...*". The said order was perfected on the 14th April, 2016. It is evident from the above that there is a highly fraught and conflictual relationship between Mr. Morrissey and the receivers.

11. As successor to AIB, Everyday now holds the benefit of the judgment and orders against Mr. Morrissey on foot of his guarantee in the sum of €24,970,000. The said sum remains unsatisfied. The receiver continues to be receiver over the aforementioned interest of Mr. Morrissey in the shares in Dan Morrissey Limited and Dan Morrissey (UK) Limited and over certain other assets and chattels of Mr. Morrissey as specified in the order.

2017 litigation by AIB

12. By proceedings 2017/2256P *Allied Irish Banks v Bradley & Ors.* the bank sought orders in respect of the realisation of security it held over Mr. Morrissey's properties in County Carlow including well charging orders and the appointment of receivers to effect a sale and disposition of the said lands. The bank also sought an order setting aside a charge which had been registered over Mr. Morrissey's property by a firm of solicitors on or about the 17th December, 2015 being the actual date on which the bank obtained judgment by consent against Mr. Morrissey in the sum of €24,970,000 in proceedings 2015/2044S.

2017 Litigation by Mr. Morrissey

13. By proceedings 2017/2361P Mr. Morrissey instituted a claim against DMIL, the receivers and Plazamont Limited. The available information concerning same suggests that Mr. Morrissey's claim asserts that he suffered loss and damage as a result of the receivership of DMIL. The claim pertains, *inter alia*, to Clonmelsh Quarry and asserted rights of Mr. Morrissey to same in the context of a 99-year Sand and Gravel Lease he had granted to DMIL in 1985.

14. In addition, on the 14th October, 2019 the appellant issued a notice of motion within the substantive proceedings *Morrissey v Dan Morrissey (Irl) Limited (In Receivership)*. The said application was brought invoking the directions of the court pursuant to s. 438 of the Companies Act and bore record no. 2019/294-COS.

December 2019 alleged compromise

15. The receivers allege that all of the above entitled proceedings were the subject of a mediation process in the month of December 2019 whereby AIB, Everyday and Plazamont Limited compromised all proceedings with Philip Morrissey. An application was brought before the High Court in February 2020 seeking the enforcement of the said alleged settlement against Mr. Morrissey. The hearing concluded in September 2020 and judgment was reserved. Judgment is awaited.

2021 Motions

16. In June 2021 Mr. Morrissey issued motions seeking, *inter alia*,
- (i) Orders setting aside the consent judgment obtained in proceedings 2015/2044S on the 17th December, 2015 whereby AIB obtained judgment against Mr. Morrissey in the sum of €24.97m.
 - (ii) A declaration that the receivership is void and of no effect.

- (iii) Orders rescinding mortgages granted by DMIL to AIB over the company's assets and the relevant charges registered on Part 3 of the various folios in the ownership of DMIL in favour of AIB at various dates including in 2008.
- (iv) Orders rescinding and setting aside all sales and dispositions of assets and property of DMIL carried out by the receivers from the date of their appointment on the 18th June, 2014.
- (v) Claiming damages against both AIB and the receivers.

The motions seeking the aforementioned reliefs stand adjourned in the Commercial List pending delivery of judgment which is awaited from Barniville P.

17. The existence of the above litigation is relevant to illustrate the highly conflictual nature of the relationship between the receivers and Mr. Morrissey over time and in particular at the date of issuing of the within motion by Mr. Morrissey against the receivers and AIB on the 29th March, 2022.

Mr. Morrissey's motion of 29 March 2022

18. The motion the subject matter of this appeal invokes s. 438 of the Companies Act, 2014 and seeks an order against AIB and the receivers directing them to grant to Mr. Morrissey "*an agricultural lease of part of the Agricultural Lands at Powerstown, County Carlow and comprised in folios CW6160F, CW6161F, CW20894F, CW3349F, CW7387F and CW7388F comprising circa 110 acres*". The application was grounded on an affidavit and supplemental affidavit of Mr. Morrissey sworn on the 29th March, 2022 and 22nd April, 2022 respectively together with a further affidavit sworn on the 27th April, 2022 together with exhibits attached thereto and also correspondence and letters submitted to the court circa the 20th May, 2022.

19. A preliminary issue raised by the receivers and which fell to be determined was whether on the facts disclosed the High Court had jurisdiction under s. 438 of the Act to make the orders by Mr. Morrissey against the receivers.

Grounding Affidavit of Mr. Morrissey

20. In his first affidavit sworn on the 29th March, 2022 Mr. Morrissey outlines that he was a minority shareholder, member and officer of DMIL. He set out his extensive experience in farming, crop production, livestock and the production of biofuels on the subject lands and also details of his credentials in terms of land user and husbandry. He outlined his views and concerns regarding the management and operation of the DMIL folios by the receivers subsequent to their appointment and the importance of crop rotations on the lands. “... [M]y family and I have farmed these lands up to the alleged appointment of the Receivers in 2014, and I would like to be able to farm and maintain these lands properly and to use Department of Agricultural Entitlements on them.” The DMIL folios about other lands in the registered ownership of Mr. Morrissey. He deposed that certain of the lands the subject of the application were more readily accessible to Mr. Morrissey from his own farmyard and from the public highway. An earthbound boundary was said to have been put in place by another party Plazamount (not involved in this appeal) in respect of the adjoining “*privately owned Clonmelsh quarry, Milford Co. Carlow.*” He deposes that the bank and/or the receivers had permitted user of the lands, five of which folios are in the ownership of DMIL and one (Folio 7387F County Carlow) in the ownership of Dan Morrissey Limited that permitted usage by various farmers “*with no disclosure of the basis of such usage nor is there any financial returns being made*”. He further sets out particulars alleging poor farmland management by the bank and the receivers. He deposes he was willing to pay €200 per farmable acre based on an IFA Master Lease of agricultural land for a term of not less than 10 years.

Supplemental Affidavit 22nd April, 2022

21. He deposes to receipt of a letter from McCann Fitzgerald LLP solicitors for AIB and the receivers requesting that he identify the relevant statutory provisions and legal basis which confer jurisdiction on the High Court to grant the order he sought. They had further requested clarification as to why AIB had been named as a respondent to the motion and what orders were being sought against the said bank. He deposed:

“I have included the Bank as a Respondent because it appointed the Receivers, and no application has been made to date to have a successor substituted by Order of the Court.”

The receivers are referred to throughout as “the purported receivers” consistent with the fact that Mr. Morrissey has proceedings in being before the courts seeking declaratory relief that their 2014 appointment is void. He expresses dissatisfaction that the receivers had *“commissioned/condoned the cultivation and sowing of the lands the subject of this application notwithstanding that my motion is before the courts.”* He sets out with particularity his criticisms regarding the manner in which the lands have been cultivated and the cultivation of same pending determination of this application and further with the condition of the lands whilst under the control of the “purported receivers” for the past 7 years and more.

Asserted Legal basis

22. The legal basis for the claim is articulated, *inter alia*, at para. 10 of the said affidavit:

“I say that in respect of my claim to an Equitable Beneficial Ownership of the subject land, the basis is my shareholding in DMIL 33%, DML (DMIL indirect 37% and direct 22%) equating to roughly 33% and my contribution to DMIL with raw materials from my private lands and continuing today without consent or

compensation and the receivers are in breach of the Sand and Gravel Lease of 1985.”

23. Reliance is placed by Mr. Morrissey on the order of Mr. Justice McGovern made on the 13th April, 2016 “*wherein he granted an Order giving Stephen Tennant Receiver an interest in my shares in DMUK and DML shares with a stay on sale of said shares until further Order. I’m not aware of any settlement of my co shareholders with the Receivers or the Bank in mitigation of their liabilities on foot of their guarantees.*”

24. The appellant exhibits various B1 and B10 forms and notices filed in the Companies Registration Office in respect of the said companies. He further exhibits a schedule of lessees put into occupation by the receivers. Reference to the appellant’s private lands appears to encompass, *inter alia*, the lands in Folio 2075F. Paragraph 10 appears to be directed towards the assertion of a beneficial ownership over the DMIL folios.

25. A range of assertions are advanced in regard to the Sand and Gravel Lease of the 6th August, 1985. Its execution predated the appointment of the receivers by almost 19 years. It is asserted that Andrew Morrissey (now deceased) contributed sand and gravel from his private lands at a value of €825,000. Further, that Kevin Morrissey contributed sand and gravel from his private lands at a value of €900,000 and that the deponent Philip Morrissey had contributed sand and gravel to a value of €6,750,000. It is further deposed at para. 21 of the said affidavit:

“... I Philip Morrissey contributed overall 28,700,000 Tonne of Sand and Gravel and Rock from my private land at a value of €53,050,000 including 6,750,000 as per extract from Planning Reference 300034 24th October 2017 and an SLR email dated 28th January 2016.”

It is further deposed –

“...the purported Receivers are engaged in a complete mismanagement of the affairs of DMIL to its detriment when it is their obligation to preserve and get the best possible results and, in this instance, they have not done so and have seriously prejudiced the company and they are not coming to court with clean hands and are operating in silence behind closed doors and are totally biased towards me.”

He reiterates:

“...I am willing to take on the responsibility of bringing these lands up to an optimal standard level while continuing to farm the lands with the appropriate crops due to its farming history, and to pay €200 per acre.”

He deposes that:

“...this is a reasonable request...it will ensure that there is no diminution of the quality of the land.”

It is noteworthy that there is no evidence of any judgment ever having been obtained by Mr. Morrissey for any sum against DMIL.

26. Prior to the execution of the said affidavit, McCann Fitzgerald had written to Mr. Morrissey on the 1st April 2021 contesting jurisdiction and reserving AIB’s and the receiver’s respective positions in relation to the motion *“... including the right to seek an order dismissing the Motion either on the return date or at any subsequent hearing on the basis the Court does not have jurisdiction to grant the order sought. We will rely on this letter for the purpose of applying to fix you with the costs of such application.”*

The Sand and Gravel Lease

27. The Sand and Gravel Lease exhibited is over the lands in Folio 2075F and was granted for the term of 99 years from the 1st August, 1985 at a yearly rent of £1.00. The appellant Philip Morrissey was the lessor. DMIL was the lessee. *Prima facie* therefore the receivers are receivers over, *inter alia* the lessee’s (DMIL’s) interest in the Sand and Gravel Lease if

at the time of their appointment on the 18th June, 2014 it formed part of the assets of DMIL or was the subject of the security/debenture. Many of the issues agitated by Mr. Morrissey in these affidavits and the correspondence against the receivers and AIB are not properly before this court, nor can this court on appeal form any view as to the veracity of same; they appear to be advanced to buttress Mr. Morrissey's core contention that he is entitled to obtain from the High Court an order pursuant to s. 438 compelling AIB and/or the receivers to grant to him an agricultural lease over the subject five folios of DMIL and one folio of DML comprising circa 110 acres for the term and at the rent as specified by him in the notice of motion which issued on the 29th March, 2022.

Claim to beneficial ownership over DMIL Folios

28. It is to be observed in passing that assertions by Mr. Morrissey of equitable beneficial ownership in or over any part of DMIL's property though agitated in the grounding affidavit fall entirely outside the ambit of the orders being sought in the notice of motion. Indeed the claim for an agricultural lease for the term of 10 years at a conacre rent of €200 per acre might be said to be fundamentally inconsistent with the claim to an equitable beneficial ownership of the subject property.

29. A surprising feature of the application brought pursuant to s. 438 of the Companies Act, 2014 invoking the court's jurisdiction for making directions with regard to the carrying out of any function by a receiver, is that Mr. Morrissey characterises the receivers throughout as "*purported receivers*". Further, the application is moved against a backdrop of there being substantive proceedings before the High Court in which judgment is pending and where a key contention of Mr. Morrissey is that the receivers were not validly appointed and that their appointment is null and void.

30. Furthermore, assertions being advanced that the estate of Andrew Morrissey deceased had contributed sand and gravel at a stated valuation and that likewise Kevin Morrissey had

contributed a substantial tonnage of sand and gravel from his private lands at a further substantial valuation are not assertions that can be properly countenanced in this application in circumstances where neither the estate of Andrew Morrissey deceased nor Kevin Morrissey are parties to the within application or appear to be on notice of the said application nor is their stance in regard to same apparent.

31. Insofar as Mr. Morrissey contends that he is a creditor of DMIL in respect of the supply of sand and gravel to the value of €6.750m – and that was not an issue which was or could have been determined by the High Court in the within Motion – even if proven he would appear to be constituted, in the absence of evidence to the contrary, merely an unsecured creditor of DMIL. On the face of it, it would appear that the lessee’s interest (DMIL) in the Sand and Gravel Lease was subject to AIB’s security/charge registered in favour of the bank and was thereby charged with the indebtedness to AIB in the first instance.

Further Affidavit of Mr. Morrissey

32. Mr. Morrissey’s third affidavit was sworn on the 27th April, 2022. It was made in response to a letter received by him from McCann Fitzgerald on the 25th April, 2022. I will consider its terms with reference to the said letter where relevant. The paragraph designated “paragraph 9” by Mr. Morrissey in the said letter states:

“In your supplemental affidavit, you say that the Bank has been named as a respondent to your motion ‘because it appointed the Receivers, and no application has been made to date to have a successor substituted by order of the Court’. This is incorrect.

On the contrary, in the motion of 6 February 2020 issued in the proceedings between the Bank and Malcomson Law Solicitors (2017/2256P), to which you are also a party and which motion was served on you, an order was sought substituting Everyday Finance DAC as plaintiff in substitution for the Bank. The affidavit of

Ronan Hopkins, filed on 6 February 2020, which grounded that motion, explained in detail that the Bank disposed of its interests in the security some time ago and is no longer the secured lender. The motion in question was that heard by Mr Justice Barniville, in respect of which judgment is awaited. Accordingly, it remains our clients' position that there is no basis to seek any order as against the Bank."

In response to those assertions at para. 9 of his further affidavit under consideration Mr.

Morrissey deposes:

"... paragraph 9 of the said letter indicates that I am seeking an Order against the Bank, which is true to the extent that I believe the Bank is directing the Receivers on what to do and in this instance they ought to direct them to create the Lease sought in my favour."

Mr. Morrissey deposes that he does not have a copy of the motion of the 6th February, 2020 brought in proceedings 2017/2256P. He does not however dispute that same was served upon him and it is evident that he fully participated in the proceedings before Mr. Justice Barniville in respect of which the said motion formed one aspect of the litigation the subject matter of that hearing wherein judgment is awaited. Neither does Mr. Morrissey dispute that the motion was heard by Mr. Justice Barniville.

33. McCann Fitzgerald in the said letter state at para. 11:

"... we refer to your letters of 7 April 2022 and 13 April 2022 in which you take issue with certain ploughing and sowing activities on the lands the subject of the within Motion and request the Receivers' consent to the appointment of your farm consultant to inspect and prepare a report in relation to the lands. We are instructed to respond to your letters as follows:

- (a) We reject any suggestion that the Receivers have withheld any relevant information from you.*

- (b) *You appear to ignore the fact that the lands the subject of the within Motion are lands upon which the Receivers stand appointed. These are not 'private lands' in your ownership.*
- (c) *The lands the subject of the within Motion are subject to a Conacre Lease entered into between Dan Morrissey (Irl) Limited (in receivership) as Landlord, (2) the Receivers and (3) Mr Kevin Morrissey as Tenant for an original term of 11 months from 1 November 2020 to 30th September 2011 (the 'Conacre Lease').*
- (d) *The Conacre Lease has been extended for a further term of 11 months by mutual agreement of the parties.*
- (e) *In accordance with the terms of the Conacre Lease, Mr Kevin Morrissey is entitled to farm, sow, plough, till or otherwise farm the lands the subject of the Conacre Lease. ...*
- (f) *Contrary to the position asserted in your grounding affidavit sworn on 29 March 2022, the lands the subject of the within Motion have not been sown for tillage of potatoes in over 4 years. On the contrary, cereals and root crops have been sown on the lands for the last 4 years and again this year in line with Government guidelines. In addition, as you should be aware, in or around 2015, Mr Philip Morrissey Junior spread human waste as fertiliser on the lands comprised in Folio CW6160F and CW6161F which meant that the Receivers' tenant could not plant potato crop on these lands for at least one season.*
- (g) *We are also instructed that you and Mr Philip Morrissey Junior have over many years, and again in recent weeks, trespassed on the lands the subject of the within Motion at the time of sowing and harvesting and attempted*

to intimidate those working on the lands. This is simply unacceptable behaviour and cannot be continued.

(h) *We reject your suggestion that the Receivers have permitted the lands the subject of the within Motion to be mismanaged since their appointment in 2014.”*

34. Mr. Morrissey in his further affidavit criticises the said letter but does not appear to contradict key assertions therein. He outlines that his correspondence of the 7th and 13th April, 2022 had taken issue with the ploughing activities on the lands. He complains that McCann Fitzgerald had withheld details of any current lease of the lands “*its (sic) telling that only now that a lessee is identified*”. At para. 13 he deposes:

“...I have not disputed that the Receivers are in control of the subject lands, nor have I claimed them to be my personal private lands.”

That averment appears to flatly contradict para. 10 of Mr. Morrissey’s supplemental affidavit filed on the 22nd April, 2022 wherein he asserts a claim to “*equitable beneficial ownership of the subject land...*”. Certainly in his earlier affidavits disputes the entitlement of the receivers to be in control of the subject lands and alludes to them as “*purported receivers*”. He complains of the lateness of the letter provided which provides the detailed information regarding the tenancy the conacre letting granted by the receivers over the land. “*... this information is only now being divulged over a month after my letter 16th March 2022 requesting consent to the leasing of the subject lands.*”, he complains. “*... it is convenient to state that a pre-existing Lease has been extended by 11 months whilst the subject lands were idle for over 7 months with only 4 months remaining does not make any logical sense.*” He demands proof on affidavit that the two named individuals who were working upon the land were employees of the conacre lessee. He complains that potatoes were permitted to be sown twice in a three year period between 2015 and 2017 by

a named conacre lessee “... which is not permitted as it can damage the soil it is recommended at least every 4 years preferably every 7 years and I know that no potatoes were not sown over the last 4 years.”

35. At paragraph 19 Mr. Morrissey deposes that he:

“... recently went on the lands to inquire of the machine drivers who they were and for whom are they working for, in relation to the allegation that Philip Morrissey Junior spread human waste as fertiliser is untrue. This is an attempt to suggest that Philip Morrissey Junior did this maliciously. ... The spreading of the Fertilizer used was by ENVA Organics with a technical name of WWTP Biosolids and was done under the auspices of the Local County Council on foot of a licence issue by the Council and applied by their own contractor. ENVA Organics was used on 9 acres immediately adjoining my private lands on Folio CW6160F 1st week September 2014.”

The appellant further requires that his own farm consultant be permitted to inspect the subject lands to consider whether they are being mismanaged by the receivers.

36. Mr. Morrissey thus appears to acknowledge, obliquely, that human waste was spread on the lands of DMIL after commencement of the receivership comprised in Folio 6160F in the first week of September 2014. The receivers, it will be recalled, had been appointed in the month of June 2014. On balance it is to be inferred from para. 19 of his affidavit that the process of land fertilization engaged in by Philip Morrissey Junior was entirely appropriate and environmentally proper. The issue is not of relevance in the determination of any specific issue arising in this appeal, however.

37. It was against the above background that the High Court directed a preliminary issue to be determined as to whether it had any jurisdiction pursuant to s. 438 of the 2014 Act to compel the respondents to grant the lease sought by Mr. Morrissey.

38. Put in context the receivers were appointed out of court by AIB on foot of the relevant security instruments. The net effect of such appointment by act and operation of law was that the powers of DMIL and the authority of its directors was suspended in relation to all assets covered by the receivership. The receivers were entitled, once they considered same to be in the interests of the charge holder, to dispose of any and all assets of DMIL including, if considered appropriate, its entire undertaking. Section 437 of the Companies Act, 2014 sets forth comprehensively the specific powers vested in the receivers which, as s. 437(2) makes clear, are conferred without limiting the general power conferred on receivers to do all things and take all steps necessary for or convenient to the attainment of the receivers' objectives.

39. Whilst a myriad of ancillary issues are raised in the affidavits and exhibits and in the written legal submissions put before the High Court and before this court on appeal, sight must not be lost of the net issue that fell to be determined by the High Court and which is the subject of this appeal, namely whether the High Court has power pursuant to s. 438 to compel receivers to grant a lease over property to an individual, Mr. Morrissey, who is acknowledged to be a person entitled to apply to the High Court for directions pursuant to s. 438(1) of the Companies Act, 2014, on any of the particular bases advanced by him as conferring such an entitlement.

Bases advanced as entitling Mr. Morrissey to Order sought

40. In the High Court the appellant had based his claim on the affidavits and exhibits and correspondences put before the Court as referred to above and also in reliance on rights contended to be derived from sections 16 and 27(1) and (2) of the Supreme Court of Judicature Act (Ireland) Act, 1877 and an extract from *Kerr and Hunter On Receivers and Administrators*, (18th Edn., 2005, Sweet & Maxwell).

41. In his submission to the High Court he asserted *“It is my belief that in accordance with extract above [from Kerr and Hunter] that the receivers are prohibited from executing any farm lease without the approval of the court. Any purported leases and/or licences ought to be rescinded and the receivers held liable for any consequence.”*

42. He further relied on an excerpt from *Lawson v Hosemaster Co. Ltd* [1966] 1 WLR 1300 which he asserted was authority for the proposition that:

“It is my believe (sic) that the Receivers does (sic) have immovable statutory obligations which have been stated in the extract from the Weekly Law Reports... I do not believe that the Stephen Tennant and Paul McCann purported Receivers over Dan Morrissey (Irl) Limited are conducting themselves in the best interest of the company.”

He lays particular emphasis on the following excerpt from the said judgment:

“But the primary duties of a receiver of this character was to get in the property charge, and to carry on and manage the businesses of the company in that process. It was his duty to carry out those duties to the best advantage of the company and, therefore the debenture holders.”

The matter came on for hearing as a preliminary issue in the High Court on the 29th April, 2022. Judgment was delivered on the 13th May, 2022.

The judgment

43. Twomey J. noted that Mr. Morrissey was representing himself and relied on s. 438 of the Act to seek an order from the High Court requiring the receivers to lease the lands to him for a period of 10 years noting that the bases underpinning the application included his complaints that the lands were being mismanaged by the receivers. He noted that the lands comprised a valuable quarry and agricultural lands once owned by his father and subsequently by DMIL *“... in which he has invested very considerable sums. He therefore*

has very strong personal reasons for seeking to ensure that the lands are not being mismanaged.”

44. The judgment focuses on the preliminary question characterised at para. 5 as “*whether this Court has jurisdiction to grant the order sought by Mr. Morrissey. This case is therefore primarily determined on the basis of an interpretation of s. 438.*” He considers the statutory provision, noting that s. 438(1) provides “... *The court may give such directions, or make such order declaring the rights of persons before the court or otherwise, as the court thinks just.*” Section 438(2) provides that “*an application to the court under subsection (1), except an application under that subsection by the receiver, shall be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed act or omission of the receiver as the court may require.*” He noted that the receivers dispute that s. 438 granted the court power to compel them to grant Mr. Morrissey the agricultural lease he sought. He considered a key decision to be *In the matter of HSS (in Receivership)* [2011] IEHC 497 which had considered s. 316 of the Companies Act, 1963, the predecessor section which operated, as amended, prior to the coming into operation of s. 438 on the 1st June, 2015. He noted:

“...while this section (like a lot of statutory provisions granting similar powers to courts) does appear to grant the court a wide discretion, this wide discretion is granted to a court in order to deal with the wide variety of circumstances which arise in receiverships... It is not granted so as to enable a court to ignore the well-established rights of secured lenders and the receivers they appoint and then make any order that appears reasonable to the court.”

He emphasised that the context in which the court must exercise its discretion pursuant to s. 438 “... *is crucial*”.

“... just because the court is entitled to give directions or make orders as it ‘thinks just’ does not leave the court with a completely free hand regarding the order that it can make.”

45. He then considered the contentions advanced by Mr. Morrissey that certain provisions of the Supreme Court of Judicature (Ireland) Act, 1877 provided a legal basis for the making of the directions sought, observing at para. 20:

“...it will be seen that s. 16 of the 1877 Act simply confers certain duties and powers, which were previously conferred on judges of the Superior Courts at that time, on the High Court. This section does not confer a power upon the High Court to order a receiver to lease lands, to which he has been appointed, to a borrower or a shareholder in a borrower.”

46. Arguments had been advanced by Mr. Morrissey relying also on s. 27(1) and (2) of the 1877 Act. Mr. Morrissey’s contentions, both before the High Court and on appeal were to the effect that directly and/or indirectly he held a one third beneficial interests in DMIL. This operated to confer upon him, he contended, a beneficial and equitable ownership in the lands of DMIL. Thereby, it was said, he achieved a footing to invoke the equitable remedies of the court. Twomey J. unpacked the proposition being advanced by Mr. Morrissey that a shareholder in a company was, having due regard to s. 27(1) and (2) of the 1877 Act thereby regarded as a beneficial owner of the property vested in a company, noting, *inter alia*, that such a proposition –

“...flies in the face of the well-established principle of the separate legal personality of a company (Salomon and Salomon [1897] A.C. 22). Under this principle property owned by a company is owned by that separate legal person and is not owned by the shareholders in the company.”

He further observed at para. 24:

“... even if Mr. Morrissey was the beneficial owner of the lands in question, this section does not assist Mr. Morrissey. This section simply confers on the High Court powers to make orders of an equitable nature which previously had been made only by the Court of Chancery. There is nothing in this section which would entitle this Court to order a receiver to lease lands, to which they have been validly appointed, to the beneficial owner of those lands.”

47. Twomey J. rejected as not relevant the extract being relied on from *Kerr and Hunter On Receivers and Administrators* noting *“this extract does not assist Mr. Morrissey since it is clear that it is concerned with court-appointed receivers.”* The order dismissing the motion was made on Friday 20th May, 2022.

Appeal

48. Mr. Morrissey contends that the trial judge erred in ruling that;

- (1) the case raised the proposition *“that a borrower or a shareholder in a corporate borrower may compel a receiver to lease secured property to that borrower”*.
- (2) He contends that the trial judge erred *“in ruling that there was an obligation on the Applicant to provide authority to support the view that a borrower (or connected third party) has a right to be granted a lease of the secured property by the receiver when no such proposition was advanced by the Applicant and was moot.”*
- (3) The judge erred in ruling that *“the High Court does not have jurisdiction to make an order obliging the Receiver to grant the Applicant agricultural lease of the lands in question”*
- (4) That the trial judge erred *“finding that the Applicant was a borrower and that the High Court would, if it made the Order sought, in effect be implying*

that there, was a right on the part of a borrower who has defaulted on his loan to dictate how the receiver manages the assets to pay off the secured debts, a proposition that was not advanced by the Applicant and was moot.”

- (5) The judge erred “... *in ruling that there is nothing in the section which would entitle the Court to order a Receiver to make an order to lease the lands to the Applicant.*”
- (6) The judge erred “*in finding that the company owned the quarry lands and that his father was the original owner of the quarry lands when infact (sic) the applicant is 95% owner of all the lands including the discrete portion on which the quarry is located.*”
- (7) The ruling of the court “*was against the evidence, the weight of the evidence and was perverse.*”

Appellant’s Submissions

49. The appellant filed written legal submissions dated the 14th October, 2022. A wide variety of propositions are advanced. Many are extraneous to the net legal issue which falls to be determined, namely whether the trial judge erred in his conclusions that Mr. Morrissey is not entitled to an order compelling the receivers appointed out of court to grant him a lease on the terms he has nominated, essentially for a term of 10 years at a rent of €200 per acre. His submissions outline details concerning adjoining lands some of which, a perusal of the papers suggest, were purchased by DML a separate legal entity. He outlines details of grievances concerning a grant of planning permission said to have been obtained by the receivers in 2019 “*through an unlawful planning application*”. The highly conflictual nature of the relationship between Mr. Morrissey and the receivers is very evident from the submissions which are replete with assertions of wrongdoing against the receivers and AIB. The substance of several assertions are not matters that were before the High Court in the

preliminary issue and a perusal of the papers suggested they have been the subject matter of an extensive hearing before Mr. Justice Barniville in the High Court in respect of which judgment stands reserved.

50. With regard to AIB it is asserted “*relations were good until a Debenture was executed and Receivers were appointed thereunder, wrongfully, and unlawfully, and this will be established in the High Court, in due course.*” The receivers were appointed in 2014 over 8 years ago. The appellant’s rationale for pursuing AIB, notwithstanding that they have effected a disposition of all their interests under the security in respect of the property to Everyday is stated thus:

“Notwithstanding the disposal of the loans to a third party, the Applicant proposes to continue to pursue AIB as the primary wrongdoer for its unlawful acts which include stepping outside its role as a licenced banker, and its breach of contract.”

A broad range of assertions are advanced against the bank. It is alleged that the bank levied “*unlawful charges*” and that there was no default by DMIL before a guarantee signed by Mr. Morrissey “*was invoked*”. It is asserted that no letter of demand was properly served on the company prior to proceedings seeking to enforce the guarantee, that there was no bona fide default, and that “*the Company was ambushed by AIB*”.

Various wrongdoings are alleged against the receivers including facilitating trespass and concealment of information.

51. In the context of his personal guarantee Mr. Morrissey asserts that he was “*wrongfully induced to enter the personal guarantee*”. He suggests an entitlement to information concerning the terms of guarantees provided by others for the liabilities of DMIL “*by other guarantors*”. It is alleged that agents of the receivers trespassed upon his own private property. None of the above issues are of any relevance whatsoever to the specific issue which fell to be determined before the High Court and cannot have any relevance in the

context of this appeal. They merely are a rehearsing of a wide variety of grievances and complaints, several predating the calling in of the loans by AIB and the appointment of the receivers and also misconduct alleged to have occurred in the course of the receivership, by various acts or omissions, from 2014 onward. A variety of criminal conduct is alleged against the receivers including, *inter alia*, theft and other wrongdoing. One need only consider the fraught and highly litigious history between the parties including proceedings 2015/2044S, proceedings 2017/2256P and the ancillary myriad of motions, applications, enforcement proceedings pertaining to an alleged compromise in which judgment is awaited, to understand that the receivers do not consent to the creation of the relationship of landlord and tenant between the parties.

52. With specific reference to the s. 438 application that was before the court and of relevance in this appeal, the appellant firstly asserts:

“There does not appear to be any authority for or against the proposition advanced by the Applicant in the within application. It is respectfully submitted that the application made herein is envisaged by the section.”

He cites s. 438 in its entirety. The second basis he identifies is stated thus:

“I have a Beneficial Equitable Interest in the Lands the Subject Matter of this Application through my Share Holding in Dan Morrissey Irl. Limited, and as a contributor from the company’s use of the raw material extracted from my private lands. I therefore have an equitable and beneficial interest in the use of the said LANDS in priority over all others. The Court of Judicature Act (Ireland) 1877 gives the Court the Jurisdiction to Grant the Orders as sought, in the interest of Justice and the relevant sections 16 and 27(1) and (2) thereof.”

53. In reliance on the said sections of the Judicature (Ireland) Act the appellant asserts:

“I believe that this can be explained in the following manner, I have a 33.3% shareholding in Dan Morrissey (IRL) Limited in receivership and whilst my role as a director is suspended by virtue of the purported appointment of Receivers. I am still a director, a shareholder and also a contributor, as defined in paragraph 21 of my sworn Affidavit dated 22nd April 2022 therefore entitled to a lease the company lands and pay the current market conacre rental.”

He outlines the respective shareholding of various members of the Morrissey family as offering the basis for his contention that he enjoys *“a Beneficial Equitable Interest in the Lands the Subject Matter of this application through my Share Holding in Dan Morrissey Irl. Limited”* which is offered as a fundamental legal basis for his being granted an order compelling the receivers to grant him a lease in the terms he proposes. He advances *“in addition and/or in the alternative”* the extract from *Kerr and Hunter on Receivers and Administrators* referred to above which had also been relied upon by him before the High Court in support of his contention. He argued:

“It is my believe (sic) that in accordance with extract above that the receivers are prohibited from executing any Farm Lease without the approval of the Court any purported leases and or licences ought to be rescinded and the Receivers held liable for any consequence.”

Again, the excerpt from *Lawson v Hosemaster Co. Ltd.* [1996] WLR 1300 is cited. He expresses his belief that Twomey J. did not have sight of his further affidavit sworn on the 27th April, 2022 asserting;

“...it is evident that, Twomey J worked from a booklet of documents presented to him by the respondents containing 194 pages as my Affidavit of the 27th April 2022 it is not included in the documents referred to in the High Court Order made and perfected on the 20th May 2022. The correct booklet is 290 pages long.”

He also asserts that “*the Authorities relied upon by the Respondents in this application do not apply in any manner whatsoever and were not known or available to the Applicant on the day of the Court hearing.*”

54. Comprehensive written legal submissions settled by Mr. Neil Steen SC engaging with the key issues the subject matter of the preliminary hearing and the grounds of appeal were filed in response, opposing the application and contending for the upholding of the order of the High Court dismissing the motion were filed. Same will be considered hereafter in the context of analysis of the legal issues engaged.

Context

55. In considering the preliminary issue in the context of this appeal, certain key factual aspects are to be borne in mind in this case.

Claim against AIB

56. Firstly, with regard to the position of AIB the ambit of the preliminary issue to be determined was considered by McDonald J. in the Commercial Court on the 4th April, 2022 and is essentially directed to the issue of whether the High Court had jurisdiction under s. 438 to make the order sought in all the circumstances of this application. On the 16th September, 2019 some two and a half years prior to the appellant’s motion being filed, Everyday Finance DAC had acquired the interests of AIB under the said securities and came to be registered as owner of the relevant charges. As a matter of law having due regard to that fact alone, the appellant has identified no legal basis for a contention that orders might be made against AIB that could in terms achieve the outcome of compelling the receivers to grant the lease as sought in circumstances where AIB has demonstrably long ceased to have any interest in the loans or the underlying security. Mr. Morrissey’s bare assertion that in effect AIB controls the conduct of the receivers was not supported by a single shred of evidence and appears to be at most a bald assertion not bolstered by any fact. Further, even

were it the case that AIB retained an interest in any of the loans or security, on the facts obtaining in the instant case and in circumstances where the receivership is and was at all material times and continues to be based on appointments of the receivers made out of court on foot of the terms of contractual security instruments the appellant's assertions are wholly misconceived and based on a misunderstanding of the respective powers and functions of the receivers and the original mortgagee.

57. The receivers were put into possession of the property in 2014 and demonstrably have actively managed same over the years, including by the granting of conacre leases in respect of part thereof. In the context of the application and this appeal their appointment is to be deemed to be valid unless and until an Order to the contrary is obtained by Mr. Morrissey in a court of competent jurisdiction.

58. Mr. Steen SC convincingly argued at the hearing that the joinder of AIB was inappropriate and would further have been inappropriate even if it had never effected a disposition of the loans in question to Everyday. Hence the basis advanced in his affidavit sworn on the 22nd April, 2022 at para. 5 by Mr. Morrissey for joinder of AIB to the effect "*I have included the Bank as a Respondent because it appointed the receivers, and no application has been made to date to have a successor substituted by Order of the Court*" is plainly on the facts incorrect in circumstances where such an application had been brought and heard before the High Court and has been the subject of a reserved judgment wherein judgment of the court is awaited.

No basis identified to enforce specific terms of lease contended for

59. It is to be observed that Mr. Morrissey identifies no general basis, either in law or in equity, apart from s. 438 simpliciter, as a basis for his contention for what in substance amounts to a claim that he is entitled to an order equivalent to a decree of specific performance compelling the receivers against their will to grant the lease sought on the exact

terms nominated by him as to the identity and extent of the property being 110 acres, the rent of €200 per acre and the term of the lease being 10 years. Normally, such a claim that contends for equitable relief is based on cogent evidence of a concluded agreement between the parties for the grant of such a lease based on a sufficient memorandum of the key terms and clear evidence that a valid contract which complies with any necessary statutory formalities exists between the parties or ought to be deemed to have come into existence. Mr. Morrissey does not invoke the equitable jurisdiction of the court whether in respect of specific performance, part performance, any iteration of estoppel or otherwise as offering a legal or equitable basis for the contended for lease.

The Sand and Gravel Lease

60. In large measure from his submissions and also from his arguments before the court it is evident that Mr. Morrissey attaches great significance to the fact that he is the beneficial owner of the lands the subject matter of the Sand and Gravel Lease. Same is comprised in Folio 2075F County Carlow. It will be recalled however that the said lease was granted on the 6th August, 1985 for a term of 99 years at a yearly rent of £1.00 payable on the 1st August in each year. The lessee of this valuable lease in respect of lands which include quarry was DMIL, now in receivership. The benefit of the lessee's interest *prima facie* forms part of the assets of DMIL, the operation of which forms part of their functions in the discharge of the receivership. Mr. Morrissey owns the reversionary interest. He is indeed correct that the demise was of "*all sand and gravel which may be got by quarrying and excavation from the surface on, in or under the lands comprised in said Folio 2075F...*". Clearly that is a very substantial interest where the property comprises a quarry. It is noteworthy that in his submissions he indicates that the Folio in question comprises 140 acres. To an extent the issues of the respective rights of the parties, namely Mr. Morrissey and DMIL in receivership/the receivers, under the Sand and Gravel Lease are wholly extraneous to the

preliminary issue that falls to be determined since the lease contended for by Mr. Morrissey does not encompass the lands in Folio 2075F and warrants no further consideration.

The bases advanced

Ground One – Section 438

61. Section 438 provides as follows:

“(1) Where a receiver of the property of a company is appointed under the powers contained in any instrument, any of the following persons may apply to the court for directions in relation to any matter in connection with the performance or otherwise, by the receiver, of his or her functions, that is to say:

- (a)(i) the receiver;*
- (ii) an officer of the company;*
- (iii) a member of the company;*
- (iv)*

and, on any such application, the court may give such directions, or make such order declaring the rights of persons before the court or otherwise, as the court thinks just.

(2) An application to the court under subsection (1), except in application under that subsection by the receiver, shall be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed act or omission of the receiver as the court may require.”

62. The Supreme Court considered s. 316 of the 1963 Act, as amended, which is substantially mirrored in s. 438, in *Salthill Properties Limited v Porterridge Trading Limited* [2006] IESC 35 where the receiver had sought directions from the High Court as to whether three identified leases contravened a negative pledge clause contained in three indentures of

mortgage between the company and the bank which had appointed the receiver. McCracken J. observed, in the context of an application brought by the receiver, that:

“The purpose of the procedures set out in section 316, and indeed the equivalent procedures relating to applications by liquidators, is to permit a person who has been effectively put in control of a company either on behalf of a specific creditor, in the case of a receiver, or on behalf of creditors in general as in the case of a liquidator, to control the affairs of the company and obtain the advices of the court in as efficient and speedy a manner as possible. It must be borne in mind that receivers and liquidators frequently find themselves in a position where the knowledge which they have of the affairs of the company derives mainly or solely from the written records of the company and documents in the possession of the company which may or may not be reliable, and where at times, and I am speaking in general terms and not in relation to this particular company, the receiver or liquidator may receive little or no co-operation from those who previously controlled the company.”

He continued:

“The primary issue is the priority of charges on the assets of the company. If a receiver is to perform his functions properly, and in particular if he were to wish to sell the relevant assets, it is, of course, essential for him to know and identify such priorities. Furthermore, the section specifically empowers the court to make orders declaring the rights of persons before the court, in this case the rights of Porterridge as a lessee.”

63. Some assistance can be gleaned from the decision of Clarke J. (as he then was) in *Re HSS* [2011] IEHC 497 as to the approach to be adopted when the provisions of s. 438 are invoked. Clarke J. made clear that the statutory provision does not confer upon the court a

broad discretion to decide disputes arising in the course of a receivership in such a manner as may seem appropriate or fit to the court but rather obliges the court to apply and operate the established principles of corporate insolvency law. In that case a third party had asserted that the company had granted him possession of part of the property in and towards satisfaction of a liability for unpaid services provided to the company at a time prior to the appointment of the receiver. The latter had been appointed by the bank which held a first legal charge over the lands. On the face of it the bank had the benefit of a covenant which precluded the company from giving any interest in or over the lands in question to a third party without the bank's prior consent.

64. Unlike in the instant case there was no question or dispute with regard to the validity of the appointment of the receiver. The borrowings had been secured through a debenture. The claimant advanced three arguments to the High Court. Firstly, that the individual was a significant creditor of HSS and had been put into occupation of part of the property on which basis it continued to provide further services to HSS. Secondly, that following the appointment of the receiver an agreement had been reached between the claimant and the receiver whereby the claimant would continue to provide property management services. The receiver denied the existence of any such agreement and in the alternative argued that even had same existed, at best it would have entitled the claimant to recover sums due and owing for services rendered. Thirdly, the claimant made assertions that he had encountered difficulties in carrying on his business and operations at the subject property subsequent to the appointment of the receiver who had taken active occupation of all of the surrounding property.

65. As Clarke J. observed at para. 3.5:

“The real issue of principle which arose between counsel is as to whether any of the matters raised... are matters which a Court could legitimately take into account in deciding whether to make an order under s. 316.”

Having considered the provisions and scope of s. 316 Clarke J. observed at para. 4.2:

“The starting point has to be the recognition of the fact that the receiver was appointed by a debenture holder who holds the first legal charge over the Property and who had the benefit of covenants which would have precluded HSS from, without Bank of Scotland’s permission, giving any interest in the Property to [the claimant].”

Further he observed at para. 4.3 –

“Insofar as [the claimant’s] claim can be characterised as one in which he is asserting some form or lien or security over the property in consideration of monies outstanding: his position vis-à-vis Bank of Scotland is clear. As a creditor, [he] could not be given any security by HSS in priority to that previously given to ... [the bank] without its consent.”

Clarke J. had also emphasised that the existence of the charge in favour of the bank was registered in the Land Registry and available to be checked by any party who wished to do so.

66. On the facts in light of the evidence before the court, Clarke J. was of the view that the claimant was *“.. no more than an unsecured creditor for a significant sum. While I have very considerable sympathy with someone in the position... he is, in reality, in no worse position than any other unsecured creditor of HSS, or indeed, the many unsecured creditors of various companies which have gone to the wall in recent years who have received little or nothing from receiverships or liquidations.”*

67. Most relevant for present purposes was the court’s consideration of the contention which has also been asserted in the instant appeal by Mr. Morrissey, namely that the court enjoys a wide discretion under s. 316. At para. 4.8 Clarke J. observed:

“It is true that the Court is entitled to give directions or make orders declaring the rights of persons, as the Court thinks just. However, it does not seem to me that that section confers on the Court any entitlement to change the proper implementation of the regime for dealing with assets of insolvent companies as set out in the Companies Acts. The reason why the Court has been given a wide discretion is that the types of directions or orders that might be required may vary enormously depending on the facts with which the Court is faced. The Court is, therefore, given a very wide discretion as to the type of intervention which may be appropriate.

4.9 However, it does not seem to me that s. 316 confers on the Court any discretion to alter the legal rights of parties as determined by corporate insolvency law. The Companies Acts contain very many measures designed to determine who gets what out of the assets of insolvent companies. The Court can, in an application under s. 316, decide issues that arise as to who is to get what and make whatever directions or orders are appropriate to ensure that parties get what they are entitled to. The section does not, however, give the Court carte blanche to reassess whether the carefully crafted provisions of corporate insolvency law are to apply.”

(Emphasis added)

68. Clarke J. further considered the ambit of “*unfair prejudice*” referred to in s. 316(1A) of the Act of 1963, as amended, the cognate provision now to be found in s. 438(2) of the 2014 Act. He observed:

“... It seems to me that the prejudice that is spoken of in s. 316(1A) is prejudice to the actual rights of individuals. In other words, a creditor applying under s. 316

needs to show that that creditor's rights might be unfairly prejudiced by an act (or, indeed, inaction) of a receiver. It does not give the Court some general jurisdiction to consider whether things are fair or unfair. (4.10)"

He continued –

"4.11 It seems to me, therefore, that s. 316 is concerned with determining the rights of parties in the context of corporate insolvency law and making whatever orders or giving whatever directions are necessary to ensure that parties, having regard to those rights, are not dealt with in an unfair way. The starting point has to be, however, a determination of the parties' legal rights." (Emphasis added)

Has Mr. Morrissey shown a legally enforceable right to the claimed lease?

69. The fundamental issue accordingly for determination is whether Mr. Morrissey has demonstrated— the burden of proof resting with him pursuant to statute— that he has a legal or equitable entitlement subtending his application for a direction under s. 438 against the respondents— to secure an order from the High Court compelling the execution of the lease on the terms nominated by him notwithstanding the opposition of the receivers to same. The concern of the court in the case of such an application by a member or officer or other interested party being to ensure that a claimant gets what it is they have established an entitlement to receive.

70. Firstly, no evidence has been adduced by Mr. Morrissey that there ever was a concluded agreement between him and the receivers (or AIB) for the grant by the receivers to him of a lease in the terms asserted. Neither is there any sufficient evidence of a contract for same. Section 4 of Deasy's Act, 1860 sets forth the formalities required for the valid grant of a lease. The broad definition of a "*disposition*" to be found in the Land and Conveyancing Law Reform Act, 2009, as amended, identifies the requirement for written

evidence in the case of, *inter alia*, contracts for the grant of a valid lease. There is little point in exploring with any degree of particularity the requirements governing a valid memorandum or note of a contract to grant a lease since in effect it is no part of Mr. Morrissey's case that such an agreement ever came into existence. Neither does he assert a specifically enforceable parol agreement for same.

71. The absence of an asserted right that a binding agreement exists or a contract for a lease on such terms is significant because in substance it follows that what Mr. Morrissey is contending is that he, by virtue of either his position of being a director/officer of DMIL and/or a shareholder/member in same, has an entitlement in law to unilaterally compel the receivers to grant to him a lease in the nature of an agricultural lease over an acreage of his choosing (circa 110 acres) for a duration of his nomination (10 years) at a rent of his election (€200 per acre).

72. The practical consequence of the granting of such an order as is sought by Mr. Morrissey against the receivers would be as follows:

- (1) That he would be put into possession of 110 acres of the subject land against the wishes of the receivers;
- (2) That the stated, and undisputed, intention of the receivers to effect a sale and disposition of *inter alia*, the said lands for the purposes of reducing the liabilities of the company DMIL in receivership would be thwarted – contrary to the professional assessment of the receivers and, apparently, the wishes of Everyday – for a period of at least 10 years,
- (3) That the receivership already now in its ninth year, would be extended for at least that further additional period of 10 years;

- (4) That the creditor of the company now beneficially entitled to the former charge holder's interest would be for that duration of time deprived of the benefits and entitlements of a valid charge holder under receivership law;
- (5) That the receivership which derives from the contractual arrangements concluded between the original mortgagee AIB and the mortgagor DMIL would be coerced to operate contrary to all established principles of corporate insolvency law;
- (6) That the lease in question would be granted to a guarantor against whom judgment was obtained, by consent, over seven years ago in a sum in excess of €24m which remains unsatisfied.
- (7) That the lessee is a party who denies the validity of the appointment of the receivers.

73. That Mr. Morrissey could be granted such a lease in circumstances where he not alone denies the validity of the appointment of the receivers but has litigated that issue in the High Court up to and including a reserved judgment speaks to its unstateability. He has put no evidence before the court to support such a right in law or in equity. Even had he done so a court of equity would be very slow to grant equitable relief in such circumstances. The proposition would usurp the rights of the party now constituted by assignment the successor to AIB namely Everyday Finance DAC. Such an order would effectively render same nugatory or substantially diminish same in a manner inconsistent with the terms of the charge pursuant to which the receivers were appointed in the first instance which said instrument and the appointments thereunder are and must be deemed to be valid pending a declaration of a court of competent jurisdiction to the contrary.

S.438 (2) –“unfairly prejudiced”

74. Furthermore, Mr. Morrissey has failed to adduce the prerequisite evidence for the purposes of s. 438(2) that he is being “*unfairly prejudiced*” as construed by Clarke J. in *Re HSS (in Receivership)*. In *Kinsella v Somers* [1999] IEHC 44, Budd J. considered the obligations on a claimant under the predecessor provision of s. 438(2) observing:

“Unless the receiver is the Applicant, the application must be supported by such evidence that the Applicant is being unfairly prejudiced by any actual or proposed action or omission of the receiver as the Court may require. Accordingly, the right to apply for directions is rather limited and would seem not to cover an application for clarification of the Receiver’s powers or any other general application for directions. If the application is being made by a director or shareholder then it would appear that a prerequisite is that proof is adduced that the Applicant is being unfairly prejudiced by some action or omission on the part of the receiver.”

This accords with the observations of Clarke J. in *HSS* who, as outlined above, made clear that the prejudice under consideration in the statutory provision is to the “... *actual rights of individuals*”. It is demonstrable that in its terms the operation of s. 438 does not *per se* confer upon the court any discretion to alter the legal rights of parties as determined by corporate insolvency law which in the instant case includes in addition to all relevant statutory provisions, all of the relevant security instruments made between AIB and DMIL and all consequential instruments and orders made in pursuance of the enforcement of the security.

Appellant’s arguments based on s.16 and s.27(1) and (2) of the Supreme Court of Judicature (Ireland) Act, 1877

75. The appellant’s approach to statutory remedies and the enlargement of their appropriate ambit by reference to the 1877 Act was rejected by the Supreme Court in the context of planning law in the case of *Mahon v Butler* [1997] 3 IR 369. In that case the

Supreme Court in granting remedies and making orders pursuant to a section of the relevant act— in effect a statutory planning injunction – observed that the statutory regime was distinct from the general equitable jurisdiction of the High Court derived from the 1877 Act. It furthermore was of the view that in making an order or granting relief under a statutory provision the court could not exceed the jurisdiction conferred by the section itself. Denham J. (as she then was) observed:

“The respondents’ third preliminary submission was that the remedy under s. 27 is a statutory injunction which is distinct from the general equitable jurisdiction of the High Court and that the learned High Court Judge had no jurisdiction to expand the statute by invoking the court’s equitable jurisdiction. I am satisfied that this is correct. Section 27 provides a precise statutory remedy. In making an order under that section, the court cannot exceed the jurisdiction conferred by that section. It is a clear and comprehensive code which should be construed strictly.”

76. Subsequent decisions such as *Byrne v Dublin City Council* [2009] IEHC 122 suggest that where a specific statutory right or remedy is provided same ought to be viewed as the only remedy. Exceptional circumstances may dictate otherwise, such as where the clear scope and language of the statute in question demonstrates that the legislature did not intend the right or remedy – such as in the case of *Byrne* case itself – to be exclusive.

77. In the instant case the legislature by virtue of s. 438 has made specific provision for applications. The appellant seeks to buttress his s. 438 application by invoking the full original jurisdiction of the High Court in the administration of justice as finds expression in sections 16 and 27(1) and (2) of the Supreme Court of Judicature Act (Ireland), 1877. The marginal notes, though not taken to be part of the 1877 enactment and not relied on for the purposes of construction, provide in the case of Section 16 is directed towards “*Provisions*

for extraordinary duties of judges of the former courts”, in the case of Section 27 “Law and equity to be concurrently administered.”

78. In substance what the appellant contends, is that the general equitable jurisdiction of the High Court as articulated in, *inter alia*, s. 16 and s. 27(1) and (2) of the 1877 Act is available to establish an entitlement to orders declaring rights or remedies not otherwise available pursuant to law, equity or statutory provisions such as, in this instance, s. 438 of the 2014 Act. This is to misunderstand what the 1877 Act achieved. The independent scholar Dr. Thomas F Cope in his essay in the text *Palles: The Legacy of the Last Lord Chief Baron* (Four Courts Press, 2022) at p.50 notes; “...in Barber, Palles CB emphasised the *Judicature Act had changed procedure not rights or remedies.*”

79. The appellant has not established and has put no cogent evidence before the court to support his bare assertion that he has “*a Beneficial Equitable Interest in the Lands the Subject Matter of this Application through my Share Holding in Dan Morrissey Irl. Limited*”. His status as a shareholder *per se* does not confer any such beneficial equitable interest in the lands upon him that could rank ahead of the rights and entitlements of the secured creditor and its successor company Everyday. Neither s. 16 nor s. 27(1) or (2) of the 1877 Act can displace the clear statutory provisions of s. 438(1) and (2). Mr. Morrissey’s contention that his shareholding in DMIL (in receivership) *per se* vests in him a beneficial equitable interest in the lands is not sound in law and no authority for such a proposition has been identified. Whilst various propositions have been advanced as to how such an asserted entitlement came about, closer analysis makes clear that Mr. Morrissey had no interest in or over the subject properties specified in his notice of motion which ranked in priority to the secured rights and entitlements of AIB over the folios on foot of which the receivers were appointed in the first instance for the purposes of realisation of the indebtedness. Likewise with regard to the contention that he has acquired a beneficial equitable interest in the lands as a contributor

from “*the company’s use of the raw material extracted from my private lands*”, on the basis of the documentation he has exhibited same is not established and one infers that this is referable to the benefits of the lessee DMIL under the Sand and Gravel Lease of 1985.

80. However, DMIL (in receivership) is the lessee and the bank has secured judgment against it. Mr. Morrissey has simply established no stateable basis for his contention that he has “... *an equitable and beneficial interest to the use of the said LANDS in Priority over all others*”. Neither section of the 1877 statute avail him in that regard. Both are measures primarily directed to procedure rather than rights or remedies. The net effect of Mr. Morrissey’s contentions is that the High Court should have regard to the general language of sections 16, 27(1) and (2) of the 1877 statute and thereby circumvent the regime ordained by law for dealing with the assets of an insolvent company in an out-of-court receivership. Likewise that the said 1877 provisions should enlarge the powers of the High Court under s. 438 such that the said provisions could be selectively construed by the court in a manner which could very significantly dilute a valid security the realisation of which is in train at the behest of a secure creditor who has proceeded to appoint receivers to receive and get in all of the assets of an insolvent company on its behalf. This is precisely the contention that was roundly rejected by Clarke J. in *HSS* when he observed as stated above, *inter alia*:

“It does not seem to me that that section confers on the Court any entitlement to change the proper implementation of the regime for dealing with the assets of insolvent companies as set out in the Companies Acts.”

81. In my view the High Court has power pursuant to s.438 to identify and determine the respective vested interests or rights of various claimants and parties in or over the charged property over which the receiver has been appointed. That section does not confer on the court a broad discretion, of the kind contended for by Mr. Morrissey, to alter, vary or diminish the existing established property rights of parties. Before the court might grant

equitable injunctions within the statutory regime envisaged under the Supreme Court of Judicature Act (Ireland), 1877 s. 28, as Mr. Steen SC observed citing *Siskina (Cargo Owners) v Distos SA* [1979] AC 210 at 256:

“... It is well established that this section does not confer an unfettered discretion and that the Court ‘has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment.’”

Siskina has been cited with apparent approval in subsequent Irish cases including *Caudron v Air Zaire and Anor* [1985] IR 716. O’Higgins J. in *Murphy v GM PB PC Limited & Anor*. [1999] IEHC 5 accepted the analysis of the so-called *Siskina* doctrine provided by the House of Lords in *Channel Tunnel Group Limited v Balfour Beatty Construction Limited* [1993] 1 All ER 664 at 686 where Lord Browne-Wilkinson observed:

“... The doctrine of the Siskina put at its highest, is that the right to an interlocutory injunction cannot exist in isolation but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action.”

82. Entitlement to the orders to compel the receivers to grant the lease he seeks, of necessity is predicated on a requirement that Mr. Morrissey demonstrate to the satisfaction of the court that he has an established legal and/or equitable entitlement to the grant of such a lease for the tenure and upon the terms he has nominated and furthermore, that he is being “*unfairly prejudiced*” by the refusal and omission of the receivers to grant him same. He has adduced no evidence as to the existence of any basis on which such a claim entitlement could be grounded.

83. As Hilary Biehler in the text *Equity and the Law of Trusts in Ireland* (7th edn., Round Hall, 2020) explains at p. 8:

“A major reform of the system of the administration of justice was effected in England by the Supreme Court of Judicature Acts of 1873 and 1875 (followed in Ireland by the Supreme Court of Judicature (Ireland) Act, 1877), which established a Supreme Court of Judicature and replaced the system of separate courts exercising common law and equitable jurisdiction.”

She cites Palles CB as having summarised the effect of the 1877 Act in *Barber v Houston* [1884] 14 LR Ir 273 at 276 as follows:

“The same system of jurisprudence now prevails in all Divisions of the High Court; and if, upon the facts pleaded, the Plaintiff could, before the Judicature Act, have had in Equity the relief which he seeks in this action, he is now entitled to it in this Court. That Act changed forms of procedure, but did not alter rights or remedies.”

Mr. Morrissey’s contentions to the contrary are wholly devoid of merit contrary to precedent and all authority.

Arguments based on Kerr & Hunter

84. The appellant’s contentions that extracts from the text *Kerr and Hunter on Receivers and Administrators* support his contentions is not well made in my view. He selectively cites from the said text and in particular chapter 7 clause 17. However, chapter 7 is in Part 2 of the text which deals with *“The Structure of Court-Appointed Receiverships”*. Court-appointed receiverships in this jurisdiction are indeed governed by the provision of the 1877 statute and the Rules of the Superior Courts particularly O. 50, r. 6. However, the receivers in the instant case were not appointed by the High Court. In my view Mr. Steen SC is correct in his submissions where he points out that the objective of a court-appointed receivership *“... is to get in and safeguard funds or other property, on an interlocutory basis, until the court can make an order about the distribution of the property to those entitled to it: Kerr and Hunter, para. 1.6. The scope of the powers of a court-appointed receiver are set out in*

the order appointing the receiver. Certain actions by a court-appointed receiver require the sanction of the court. In practice, it is rare for Irish courts to make interlocutory orders appointing receivers under Order 50, rule 6.”

Mr. Morrissey offers no answer to that.

85. Mr. Steen SC further placed reliance on *Silven Properties v RBS* [2004] 1 WLR 997 for his contention that:

*“The purpose and procedure for court-appointed receiverships are fundamentally different from the purpose and procedure for receivers appointed under a deed. Where a mortgage deed creates a contractual right to appoint a receiver, that right may be exercised by the charge holder without any court order. A receiver appointed by deed ‘is not managing the mortgagor’s property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee.’ (para. 27, *Silven Properties*)”*

The said decision was approved by this court in *ACC v Cunniffe* [2017] IECA 261 at paras. 53 – 54 and represents good law in this jurisdiction.

86. Mr. Steen SC further asserts:

*“A receivership is an ‘indirect means’ of the mortgagee ‘securing a sale in order to achieve repayment of his secured debt’ (para. 28, *ibid*). The powers of the receiver are set out in the mortgage, the deed of appointment, and in legislation (including, in company receiverships, section 437 of the 2014 Act).”*

Mr. Steen SC further correctly contended that even in the case of a court-appointed receiver who cannot grant a letting of property without the sanction of the court; *“It does not follow from this that the Court has the power to compel a receiver to enter into a lease with a particular party.”*

87. In the absence of any legal or equitable right or entitlement demonstrated on the part of the applicant, be they an officer, member or creditor or other materially interested party, the High Court has no power to coercively compel a receiver to enter upon or grant a lease over any particular property on terms or conditions asserted by the claimant and rejected by the receiver in circumstances where no entitlement either in law or in equity for the grant of such a lease has been established on the part of the claimant and the making of such an order on the terms and in the circumstances as contended for by Mr. Morrissey would amount to an unwarranted trenching on the rights of the creditor who appointed the receivers and a disproportionate interference with the exercise of their powers, functions and duties by the receivers themselves pursuant to statute and pursuant to law.

88. That such is the case is but a logical extension of the principles enunciated by Dunne J. in *Fennell & Anor v N17 Electrics Limited* [2012] 4 IR 632, [2012] IEHC 228. The court in that instance had to consider whether leases entered into by the mortgagor in circumstances where the security instruments executed by the lessor with the lender precluded the leasing of the premises without the prior consent in writing of the lender. Analysing the authorities, Dunne J. was satisfied that in light of the terms of the loan in the event that consent was not sought the lease entered into would not bind the mortgagee save in exceptional circumstances. The mere fact that the mortgagee had knowledge of the lease agreement and where the rental funds were being deployed to pay and discharge the outstanding mortgage fees did not give rise to a relationship between the mortgagee and the lessee.

89. Dunne J. in *Fennell v N17* cited with approval the decision in *Re O'Rourke's Estate* [1889] 23 LR Ir. 497 which had considered, *inter alia*, the act of a receiver who upon taking office had accepted rent from tenants put into occupation by the mortgagor without the prior written consent of the mortgagee. The receiver on taking office had accepted rent from the

tenants and had applied the said rents, to pay interest in and towards satisfaction of liabilities under the mortgagee. The court had held that this conduct on the part of the receiver had not created a new tenancy, Monroe J. stating:

“I take it that the law on this subject is free from all manner of doubt. A lease made by a mortgagor, subsequent to the mortgage and not coming within the provisions of the Conveyancing and Law of Property Act, 1881 is absolutely void as against the mortgagee. He can treat the tenant as a trespasser, and evict him without notice.”

90. The position of the receivers is far stronger in the instant case. In *Fennell v N17* the mortgagor had advanced certain arguments in support of a contention that he ought to be entitled to avail of the statutory power of leasing conferred by s. 18 of the Conveyancing Act of 1881 based on the facts proven in evidence, notwithstanding that the said power had been expressly excluded under the terms of the charges in question in that case.

91. In the instant case by contrast, Mr. Morrissey identifies no basis whatsoever on which it could ever be suggested or asserted that the receivers or indeed AIB or its successor Everyday had agreed, expressly or implicitly, in the granting of the Agricultural Lease sought. Dunne J. in *N17* considering the authorities noted J.C.W Wylie, *Wylie on Irish Landlord and Tenant Law* (2nd Edn, Bloomsbury, 1998) at para. 6.10 where Wylie had observed although section 18 of the Conveyancing Act, 1881 had conferred a statutory power of leasing both upon the mortgagor and mortgagee exercisable while either is in possession of the mortgaged land “... *it is also important to note that most mortgage deeds restrict the mortgagor’s power of leasing, by requiring the consent of the mortgagee, if the power is not excluded altogether. The point is that the existence of a tenant on the land may hinder the exercise by the mortgagee of his powers to realise his security, e.g. to take possession or to sell the land. If a tenancy is binding on the mortgagee, it may also affect the value of his security, especially if the tenant acquires renewal rights.*” Wylie had cited

ICC Bank v Verling where Lynch J. had held in light, *inter alia*, of restrictions to the granting of the said lease and the express provision that any such rights were not exercisable by the borrower to the purported lease granted by the mortgagor was null and void when first granted. Dunne J. also considered Megarry and Wade, *Law of Real Property*, (7th edn., Sweet & Maxwell, 2004) at para. 25-080 which had observed:

“If the power is excluded and the mortgagor nevertheless grants an unauthorised lease, the lease is void against the mortgagee and his successors in title (unless they are estopped from asserting this), but valid as between the parties to it. The statutory powers of leasing do not deprive the parties of their common law rights to create leases not binding upon each other. For example, if the mortgage contains a covenant by the mortgagor not to exercise a statutory power of leasing without the mortgagor’s written consent, the mortgagor may, nevertheless, grant a yearly tenancy which binds the mortgagor under the principle of estoppel but which does not bind the mortgagee.”

Parity of reasoning with *Fennell v. N17*

92. If, prior to the appointment of the receivers in June 2014, DMIL had granted a lease to any third party, of any duration, and if the prior consent of the charge holder AIB had not been obtained for same in full compliance with the terms of the security instruments, such a lease would be binding as between DMIL and such a third party but would not bind AIB, the secured lender. Thus is illustrated the underlying unstateability of the appellant’s contention that he is entitled to be granted a coercive order against the receivers compelling the grant of a lease on terms of his own choosing over the secured property, which would indefinitely and at a minimum for 10 years preclude the realisation of the said property by the receivers and the application of the proceeds in and towards satisfaction of liabilities of DMIL where such sums remain unsatisfied and in respect of which Mr. Morrissey himself

is a guarantor who effectively consented to judgment in a sum in excess of €24m on the 17th December, 2015 in proceedings 2015/2044S.

93. There exists a well-established corpus of authority based on the law of specific performance, the doctrine of part performance, the doctrine of promissory estoppel, proprietary estoppel, estoppel by convention and otherwise whereby a claimant can establish a right enforceable at law for the granting of a lease. Where the evidence supports it, such a right might well be found to be enforceable as against a receiver. Mr. Morrissey has not engaged at all with the elementary principles governing such entitlement and simply advances his proposition unmoored from precedent or principle based on selective extrapolations, from statute and authority and textbooks which are simply not apposite to the prevailing facts in the instant case and are either clearly distinguishable or wholly irrelevant to the proposition he advanced.

94. Were Mr. Morrissey correct in his assertion that he is entitled to secure the order he seeks from the High Court this would have potential and far reaching consequences for commercial loan transactions since any party who *prima facie* had *locus standi* under s.438(1) could at will apply to the High Court and insist on being granted a lease for any duration of their choosing at a rent nominated by them over all or any part of the secured property notwithstanding the unequivocal opposition of the receivers (and/or the mortgagee/charge holder). This would readily achieve the outcome of effectively defeating the right of a mortgagee to have their security enforced by securing possession and effecting a sale and disposition for the purposes of realisation of the secured asset in accordance with the terms and conditions of the security instrument. Such would render nugatory the underlying security and have a chilling impact on the availability of loans granted on foot of charges or mortgages with inevitable social and economic consequences for the availability of credit.

95. The appellant is simply wrong in his contention that *Kerr and Hunter* is authority for a proposition that the receivers were prohibited from executing any farm lease and in particular the conacre lettings without the prior approval of the High Court. No valid basis has been identified for the court interfering with the management and operation by the receivers of the property and, in particular, the said conacre letting agreements referred to in the documentation.

Arguments based on *Lawson (Inspector of Taxes) v Hosemaster*

96. The appellant furnished an excerpt from the decision of *Lawson (Inspector of Taxes) v Hosemaster Co. Limited* [1966] 1 WLR 1300 at p. 1314. The excerpt does not support his contentions. The judgment of the English Court of Appeal (Sellers, Danckwerts and Wynne LJ) was concerned with the powers of receivers emphasising that the primary duty of the receiver was to get in the property charged and to carry on and manage the businesses of the company in that process. At issue was the delegation of authority by a receiver to a third party and the validity - or otherwise - of the acts of the latter when acting as *de facto* receiver and manager and whether the provisions of s. 369(2) of the England & Wales Companies Act 1948 were effective to enable retrospective ratification of the acts of the unauthorised agent. Such issues do not arise in the instant case. It is noteworthy in the Irish context that as *Keane on Company Law* (5th edn., Bloomsbury, 2016) observes at para. 22.09:

“In practice a debenture invariably provides that the receiver is to be deemed to be solely the agent of the company and that the company is to be solely responsible for his or her acts or defaults and for their remuneration.”

Mr. Morrissey refers to the decision in *American Express International Bank v Hurley* [1985] 3 All ER 564, where the court stated, *inter alia*, that the following propositions represent the law:

- (i) The mortgagee when selling mortgaged property is under a duty to a guarantor of the mortgagor's debt to take reasonable care in all the circumstances of the case to obtain the true market value of that property.
- (ii) A receiver is under a like duty.
- (iii) The mortgagee is not responsible for what a receiver does whilst he is the mortgagor's agent unless the mortgagee directs or interferes with the receiver's activities.
- (iv) The mortgagee is responsible for what a receiver does whilst he is the mortgagee's agent and acting as such.

Mr. Morrissey suggests this judgment bolsters his arguments based on *Lawson v Hosemaster* to the effect that a receiver owes a duty to act in the best interests of the company and the receivers in this case have acted in breach of this duty. However, the said decision does not avail him in respect of the net preliminary issue to be determined in the instant case for all the reasons stated above nor does it provide any legal basis to support his contention that he is entitled to the specific order sought against the receivers in his Notice of Motion.

Conclusion

Grounds 1 and 2

97. Whereas it may be the case that the judgment of the High Court alludes to the appellant as a “*borrower*” rather than an officer of the company and/or a member of the company and/or a guarantor nothing material turns on this point. The issue in the case and the proposition to be determined was crystal clear to all parties and to the judge. Likewise with regard to Ground 2, given the nature of the propositions being advanced by Mr. Morrissey there was nothing untoward in the trial judge's observation that no authority had been identified for the proposition in question. It was a statement of fact. Given Mr. Morrissey's circumstances and the unsatisfied (and apparently stayed) order and judgment obtained

against him on foot of the terms of a guarantee provided by him for the benefit of the company, it was incumbent upon him to identify authority for the novel proposition he was advancing.

Ground 3

98. I am satisfied that the trial judge was entirely correct in his assessment that the High Court does not have jurisdiction to unilaterally make an order of the kind being sought by Mr. Morrissey against the wishes of the receivers and in respect of which they are clearly and unequivocally opposed, compelling them to grant to him an agricultural lease of the lands identified by him at the rent suggested by him and for the duration and terms proposed by him. No such obligation has been demonstrated to exist and no basis has been identified to cast doubt on the correctness of the trial judge's assessment of the preliminary issue in that regard.

Ground 4

99. The appellant is correct that he is not a "*borrower*". He is an officer and a member of the company. He contends he is a creditor of the company though there was no evidence adduced that he ever obtained judgment against the company in receivership or otherwise in that regard. He certainly is a guarantor against whom judgment has been obtained for a sum in excess of €24m. Nothing turns on the erroneous assignment of the description "*borrower*" to Mr. Morrissey in the course of the High Court judgment.

100. There is substance in the assessment of the trial judge that were the order sought by Mr. Morrissey to be made it would carry an underlying implication that there was an entitlement on the part of a member or officer of a company or indeed a creditor to invoke s. 438 and through that mechanism dictate to the receiver how the assets of the company are to be managed and operated in the course of the receivership. This would defeat the dominant purpose of a receivership to discharge the secured debts of the creditors in

accordance with the relevant priorities. Whereas the word “*borrower*” may appear out of place the point does not avail Mr. Morrissey.

Grounds 5 & 6

101. I am satisfied the trial judge was entirely correct, both in fact and law in determining that nothing contained within s. 438 conferred an entitlement on the High Court to make the order compelling the receivers to grant a lease of the lands to Mr. Morrissey as sought. The burden rested with Mr. Morrissey to prove otherwise and he failed to do so. Whilst at Grounds of Appeal 6 Mr. Morrissey contends that he is in fact a 95% owner of “*all the lands including the discrete portion on which the quarry is located*” it is DMIL, in receivership that is the owner of five of the six folios identified at Ground 1 in the appellant’s notice of motion filed on the 29th March, 2022. In the case of the sixth Folio – 7387F Co. Carlow, DML is the registered owner. Section 31 of the Registration of Title Act, 1964, as amended provides that the Folio is conclusive as to title. The quarry lands appear to be comprised in Folio 2075F and whereas Mr. Morrissey may well be the registered owner of the said Folio it is subject to the Sand and Gravel Lease which runs for the term of 99 years from the 1st August, 1985, the lessee’s interest is vested in DMIL the company which is in receivership.

102. No justification whatsoever has been identified by Mr. Morrissey for the joinder of AIB as a party to the within motion. It has ceased to be the secured charge holder as the appellant is well aware. All the estate, right, title and interest of AIB held pursuant to the loans, securities, judgments and orders relating to DMIL, the guarantee of Mr. Morrissey and, it would appear, the lessee’s interests under the Sand and Gravel Lease came to vest in Everyday. It would appear on the basis of the available information that the interest of Everyday has been recorded in each of the relevant folios in Land Registry save and except Folio 7387F of the Register of Freeholders, County Carlow. AIB should not have been a party to the within application having regard to the relevant facts. It is the receivers who are

in possession of the DMIL lands and the lands the subject matter of this application in pursuance of the discharge of their functions and powers as such receivers.

103. It follows accordingly, that this appeal is to be dismissed on all grounds.

Costs

104. My preliminary view is that in light of O. 99 of the Rules of the Superior Courts and s. 169 of the Legal Services Regulation Act, 2015 as amended the respondents, being entirely successful in the within proceedings, are entitled to an award of their costs against the appellant, Mr. Morrissey, who is a person who can fairly be described as not having been successful in any material respect in this appeal. The appellant pursued this appeal notwithstanding the clear decision of the High Court advanced on a reasoned basis.

105. No stateable basis was ever identified which would support the contentions agitated by Mr. Morrissey that he was entitled to an order from the High Court pursuant to s. 438 of the Companies Act, 2014 compelling the receivers to grant him a lease of 110 acres at a rent of €200 per acre for the term of 10 years in accordance with the Draft Agricultural Lease he exhibited. If either party contends for an alternative order then a written submission no longer than 1,500 words should be furnished within 21 days of the publication of this judgment in unapproved form. The court will thereupon consider the said submissions and make its determination on the issue of costs thereafter if necessary.

106. Noonan and Haughton JJ. having considered the within judgment agree with same.