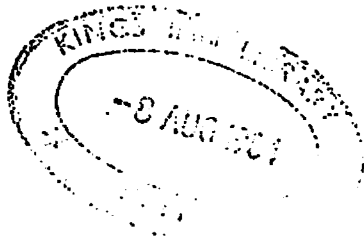

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THE HIGH COURT

1984

No. 2086P

BETWEEN:-

THE IRISH OIL AND CAKE MILLS LTD. AND
IRISH OIL AND CAKE MILLS (MANUFACTURING) LTD.

Plaintiffs

and

JOHN DONNELLY

Defendant

JUDGMENT OF MR. JUSTICE COSTELLO
Delivered the 27th March 1985.

Receiver and manager appointed by debenture holder. Carrying on Company's business. Interlocutory application by Company for mandatory injunction to furnish accounts and information to the Company. Duty of Receiver/manager to account. Whether breach of duty of care owed by Receiver/manager established. Effect of breach by directors of duty to furnish Statement of Affairs under sections 319 and 320 of Companies Act, 1963. Application refused.

INTRODUCTION

The Plaintiffs Companies owed the Northern Bank Ltd. a sum in excess of £1.9m and on the 28th October 1983 the Defendant was appointed by the Bank Receiver and Manager over the assets the Plaintiffs had charged under two separate Indentures of Floating Charge. The Defendant decided to carry on the business of the second named Plaintiff (that of manufacturing and distributing vegetable and other oils) with a view to selling it as a going concern and began the task of realising the assets by advertising them for sale on the 11th November 1983. One of the Company's assets was its interest in a subsidiary Company, Crest Foods Ltd. On the 25th January 1984 the Defendant agreed to sell this asset, but the second named Plaintiff herein claimed that the sale was at an under value and instituted proceedings against him. An application for Interlocutory Injunctive relief was adjourned by consent to the trial of the action. After this had happened the Plaintiffs Solicitor wrote to the Defendant on the 29th February 1984

requesting detailed accounts and information of the receivership. Before his Solicitors could reply otherwise than by means of a formal acknowledgment an article appeared in a Dublin daily paper stating that an offer had been made for the Plaintiffs business. The Plaintiffs Directors met on 8th March and authorised the institution of these present proceedings. They then applied to the Court for Interlocutory relief. Their first claim is for a Mandatory Injunction directing the Defendant to furnish the information requested in the letter of the 29th February but in addition they asked for an Order that such information as they might request in the future in relation to the affairs of or the disposal by the Defendant of the assets of the Plaintiffs be given to them. Mr. Fitzsimons on their behalf has however indicated that the claim is now limited to a request for a Mandatory Order directing the furnishing of the information in the February letter only. They also claimed an Order restraining the Defendant from selling the Plaintiffs assets at an under value "or until such time as the information sought by the Plaintiffs... is furnished by the

Defendant in relation to such sale or proposed sale."

There has, however, been no evidence filed to suggest that the Defendant is proposing to sell any asset at an undervalue and the relief claimed in paragraph 3 of the Plaintiffs Notice of Motion has not been pressed at the hearing. In effect what I now have to decide is whether the Plaintiffs are entitled to an Order directing the Defendant to furnish them with the information sought in the letter of the 29th February.

A great deal of evidence was filed on behalf of the Plaintiffs and replied to by the Defendant concerning the conduct of the receivership by the Defendant and the financial strength of the Plaintiff Companies. Mr. Fitzsimon says that it is unnecessary for me on this motion to decide the many issues of fact that arise on the Affidavits or otherwise to reach conclusions on them, and he submits that his case is in essence a simple one - as a matter of principle the Defendant he says is under a duty to furnish the information sought and the Court should order him to fulfil his duty. The duty he says arises because under the terms of the floating charges the Defendant as Receiver and Manager

is agent for the Plaintiffs and so a contractual duty as such agent exists to supply the information. Alternatively and independent of contract there is a duty of care owed by the Defendant to the Plaintiffs which obliges him to furnish the information sought. In the further alternative there is an equitable duty to account which on the authority of a recent case in England (Smith Ltd. v Middleton 1979 3 AER 843) oblige him to account as requested.

Before examining these submissions I should refer in greater detail to the information which the Plaintiffs say the Defendant is obliged to give them. The letter of the 29th February 1984 requests that the following information:-

"1. Financial Management Account for all periods from the 1st October 1983 to date.

2. Latest Balance Sheet analysed as to:

(a) All debtors and stocks

(b) All creditors - showing separately pre and post receivership preferential creditors.

3. Details of all tonnages and costs of raw materials purchased since 29th October 1983.

4. Details of refinery programmes since the 29th October 1983.

5. Details of sales made, by tonnage price and commodity since the 29th October, 1983.

6. The present manufacturing/sales programme.

7. Staff levels by job description to include management, administration and refinery indicating present and proposed (if different) and salary/wages levels.

8. Receiver's estimate of break-even point and how calculated.

9. Details of all sales and purchase contracts.

10. Present status of amounts due to and by foreign traders arising out of 100M raw material purchase and sale contracts prior to the 29th October 1983."

The net question which now arises is this;
Is this information which, as a matter of law, a Receiver and Manager is, after 4 months of his receivership, obliged to give the Company?

The Plaintiffs first submission is that the Receiver is under a contractual duty to provide the requested information.

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The Receiver derives his appointment and his authority from the contract entered into between the parties. In this case, as is usual, the parties agreed that he is to be treated as the agent of the mortgagors, the Plaintiffs herein. This provision protects the debenture holders from liability as mortgagees in possession and establishes the relationship between the Receiver and the Company. But the contract is silent as to the nature of his duties and the Plaintiffs here submit that there is to be implied an obligation to account as claimed in the February letter. The agency here is of course very different from the ordinary agency arising every day in commercial transactions. Here the Receiver has been appointed by the owner in equity of the Companies' assets with the object of realising their security and for this purpose to carry on the Companies business. The exceptional nature of his status is to be seen from the fact that notwithstanding his appointment as agent he is to be personally liable under contracts entered into by him (with a right of indemnity out of the assets) unless the contract otherwise provides (s. 316 (2) Companies Act 1963).

I can find no basis for implying a term into the contract in this case which would oblige the Receiver to furnish the information now sought.

I think that the Company has a right to an account from a Reciever, as I will point out later, but I think it is an equitable right and that the Plaintiffs herein have not a right arising from an implied term in the debenture for the information claimed in their February letter.

McGowan v Gannon (1983 ILRM 516) does not help their case on this point. That was a case dealing with the proposed sale by a Receiver of a Company's premises. The Receiver had given information about the sale to the Company's Directors, but not to a Guarantor of the Company's debts who was challenging the sale. Whilst in that case the Receiver had vouchsafed information about a sale to the Directors there is nothing to suggest that he gave them details of his trading accounts and the Court was in no way concerned with the point raised in this case, namely, the existence of a Receiver's duty to account to the Board of Directors whilst managing the Company's business.

The second basis on which the claim is put forward is that the Defendant threatens to breach a duty of care which he owes to the Plaintiffs. The argument proceeds as follows. It is said

(a) that a duty of care lies on the Receiver to take reasonable steps to get the best possible price for the Company's assets and that this is a duty which he owes to the Company (see Standard Bank Ltd. v Walker 1982 3AER 939 and Lambert v Donnelly, (unreported) O'Hanlon J. 5th November 198?)

(b) in failing to give the information sought the Receiver is in breach of this duty in that (i) with its assistance the Company could prepare a scheme of re-construction or arrangement which would mean that the price for the assets would be greater than that recoverable on a sale in the open market and (ii) alternatively two of the Directors of the Company, Mr. Rabbitte and Mr. Senezio, are interested in purchasing the Companies' assets and that if the Company gets the information sought it will be available to these Directors and enable them to formulate a bid for the Company which would be higher than would otherwise be obtained.

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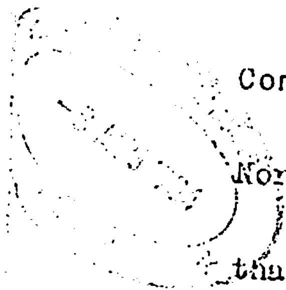
The Receiver does not deny that he owes a duty to the Company as alleged, but he urges that he has not been nor is he in breach of it. As to the sale which has already taken place of part of the Company's assets Mr. Fitzsimons accepts that the issues of fact surrounding it will be determined in other proceedings and I am not required to express any view on them on this motion. As to the Receiver's present intentions, Mr. Fitzsimons agreed that I do not have to decide now whether as is stated in the Affidavits grounding this motion the Receiver is acting mala-fide. The Plaintiffs claim to the information is based on the general legal principles which they claim are applicable and not on any allegation of wrong-doing on the Receiver's behalf.

As to (i), (the argument based on the possibility of a scheme of re-construction) it is not, in my judgment, sufficien on a motion of this sort for a Company merely to assert the possibility that such a scheme would be forthcoming with the assistance of the information sought and that a Receiver is under a duty to await the formulation of such a scheme before selling the assets. The uncontradicted evidence in this case is that before the Receiver was appointed the Directors

had approached the debenture holders, informed them of the Company's financial difficulties following speculation on the commodity market (which had resulted in debts of nearl £4 m.) and the Directors had negotiated with creditors of the Company and Foir Teoranta to see if a rescue plan coul be implemented. Foir Teoranta stated that it was not prepared to support a plan because it believed that funding necessary to finance it was not forthcoming. The uncontradicted evidence also establishes that on the 2nd December Mr. Rabbitte, the Managing Director of the Plaintiffs, Company wrote stating that "he had proposals to pay off the Northern Bank in full together with the Receiver's fees" and that Mr. Hooper of the Investment Bank of Ireland would contact the Receiver about them. But no proposals were forthcoming, either at that time or since. Nearly five months have elapsed since the Receiver was appointed and in the absence of a satisfactory explanation for (a) the failure to put forward a realistic scheme, and (b) as to how the information sought could assist in ensuring that the financial backing necessary would be available, and (c) in the absence of



satisfactory evidence to show that purchase of the assets under the proposed scheme could avoid a sale of the assets or produce a better price than their sale in the ordinary way, the Plaintiffs have not satisfied me that the Receiver is acting in any way in breach of his duty to the Company on the ground I am now considering.

The second ground is a different one. It is said that if the Company got this information two of its Directors would been be in a position to make a bid for the Company's assets. But the Companies' assets have been advertised for sale since 11th November, 1983 and whilst an offer was made for part of the assets of the group none has ever been made for the Companies principal assets.

Again to justify the Court making the entirely novel and wholly exceptional Order, which is now claimed, it is not sufficient for the Company to assert that the information sought would produce the result suggested. To justify the Court in holding that the Receiver is in breach of a duty of care to the Company it should be shown that evidence in support of the assertion is available. This has not been done to my satisfaction in this case. The Receiver is of course

prepared to give to the Directors the same information whish is available to other prospective purchasers. He is entitled to make a commercial judgment in the matter and decide that it would not be conducive to procuring an enhanced price to give these Directors any more information. The evidence fal short in showing that by so concluding he is in breach of duty.

The Plaintiffs advanced a second argument to support the contention that the Receiver is in breach of the duty of care he owes to the Company. It is said that apart from the special facts of this case the general duty on Receiver and Manager to take reasonable steps to secure the best possible price for the Companies' assets includes a duty "to keep the Company appraised of how the business of the Company is going". This is a very far-rearching proposition, unsupported by any authority and I must reject it. There may well be special circumstances in which, to ensure that the best price possible is obtained for the assets, trading information since the appointment of a Receiver should be give to the Company's Directors. But in the absence of special circumstances which might favourably affect the price, a

a Receiver/Manager is not under any duty of care which involves him in reporting as suggested to the Directors on his management of the business.

It cannot be said that a Receiver/Manager is under no duty to account to the Company whose affairs he is managing nor did the Defendant so urge in this case. The extent and nature of the duty and the extent and nature of the accounts he must furnish will depend on the facts of each individual case. Smiths Ltd. v Middleton (1979) 3 All ER 942 illustrat this point. That was a case in which an account was ordered after a receivership had come to an end, the Court holding that as agent an equitable obligation to account existed whic had not been obviated by statute. But the Plaintiffs (havin perhaps been misled by the head-note to the report) are not correct in finding in that case a general legal proposition to support their contentions in this case. I am not required now to lay down any general principles, and I gladly refrain from doing so. I am merely adjudicating on the claim to the detailed information sought in the letter of the 29th February. As I have said a claim to such

information is wholly exceptional, and I can find nothing in the evidence to justify me acceding to it on this motion. As pointed out by the Chief Justice in Campus Oil Ltd. v Minister for Industry & Energy (17th May 1983) Mandatory Injunctions at the interlocutory stage are only granted in exceptional cases and I agree with McGarry J. in Sheppar Homes Ltd. v Sandham (1971) 1 Ch. 351 that on such applications the Court must feel a high degree of assurance that at the trial it will appear that the Injunction was rightly granted. I feel no such assurance in this case and so must refuse the relief claimed.

There is one final observation to be made. The Directors of these Companies are under a statutory duty under Sections 319 and 320 of the Companies Act 1963 to furnish a Statement of Affairs to the Receiver. This requirement has not been complied with and certainly cannot be regarded in this case as a mere formality whose breach the Court should readily excuse. A statutory Statement of Affairs verified by Affidavit is specially required here for a number of reasons; including the fact that the Companies' Managing Director is

associated with Companies who owe the Plaintiff Companies sums in excess of £9m. and may be associated with other Companies indebted to the Plaintiffs, and because of the need to explain adequately the status of the debts amounting to £4m. incurred on speculating on the commodity market to which no reference is made in a recent Statement of Affairs prepared by the Directors. The information was not sought in the February letter for the purpose of preparing the statutory Statement of Affairs and as it relates almost exclusively to the receivership the failure to respond to the letter does not excuse Breach of Statutory duty by the Directors. As the relief claimed now is a discretionary one the failure to the Companies through their Directors to comply with this improtant statutory requirement would in my judgment in any event have disentitled them to relief.