THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 34

Record Number: 2017/594

Whelan J.
Noonan J.
Collins J.

IN THE MATTER OF SECTION 19(1) OF THE REGISTRATION OF TITLE ACT, 1964
IN THE MATTER OF AN APPLICATION PURSUANT TO THE PROVISIONS OF ORDER 96 OF THE RULES OF THE SUPERIOR COURTS
AND
IN THE MATTER OF FOLIO CK98228F

BETWEEN/

KATHERINE ROSS

APPELLANT

- AND –

BANK OF SCOTLAND PLC. AND START MORTGAGES LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 25th day of February 2020

Introduction

1. This is an appeal against the orders made by O'Regan J. in the High Court on the 15th November, 2017 refusing an application for a declaration pursuant to s. 19(1) of the Registration of Title Act, 1964 ("the 1964 Act") for the annulment of the burdens registered at entries number 4, 5 and 6 on Part 3 of Folio 98228F, Co. Cork together with relevant consequential orders.

2. The appellant also sought "summary compensation in lieu of costs."

Background

3. Section 19(1) of 1964 Act, as amended by s. 4 of the Registration of Deeds and Title Act, 2006, provides: -

> "Any person aggrieved by an order or decision of the Authority may appeal to the Court and the Court may annul or confirm, with or without modification, the order or decision."

4. The lands comprised in Folio 98228F, County Cork are described in Part 1(a) of the said Folio as follows: -

> "A plot of ground being part of the townland of Moydilliga and Barony of Condons and Clangibbon…"

5. Part 2 of the Folio records ownership and notes that on the 28th September, 2005 the appellant came to be registered as full owner. The appellant as registered owner of the lands in Folio 98228F, Co. Cork invoked the provisions of s. 19(1) of the 1964 Act aforesaid.

Part 3 of the Folio

6. Part 3 of the Folio records burdens and notices of burdens affecting the land. On the 28th September, 2005 Bank of Scotland (Ireland) Limited ("BOSI") was registered as owner of a charge at entry number 4 in Part Three of the Folio. Subsequently on the 9th April, 2015 Bank of Scotland Plc ("BOS"), on the basis that it had previously acquired ownership of the said charge on foot of a cross-border merger effected on the 31st December, 2010 more fully considered below, was registered in turn as owner/transferee of the charge and same is particularised at entry number 5 in Part Three of the Folio. Thereafter, on the 10th April, 2015 Start Mortgages Limited (hereinafter "Start") which was a private company limited by shares (and which subsequently converted to a Designated Activity Company pursuant to the provisions of the Companies Act, 2014; on the 21st October, 2016) came in turn to be registered as owner of the charge at entry number 4.

Events giving rise to entries 5 and 6 in Part 3 of the Folio

7. With effect from 23.59 on the 31st December 2010, BOSI merged with BOS in a cross-border merger by absorption pursuant to EU Directive 2005/56 ("the 2005 Directive"). Under the terms of the merger and by virtue of an order of the Scottish Court of Session made pursuant to the 2005 Directive and pursuant to implementing regulations in Ireland and the UK, including the European Communities (Cross-Border Mergers) Regulations 2008 S.I. 157/2008 and the Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom approved by Mr. Justice Kelly (as he then was) in the High Court on the 22nd October 2010 and thereafter approved by the Scottish Court of Session on the 10th December, 2010, all assets and liabilities of BOSI transferred to BOS. Thereby all the estate, right and title of BOSI in, *inter alia*, the charge registered at entry number 5 in Part 3 of the Folio became vested in BOS with effect from the 31st December, 2010 at 23:59 pursuant to and by virtue of Regulation 19 of S.I. 157/2008 aforesaid.

8. On the 20th February, 2015 BOS executed a transfer of its interest in, *inter alia*, the said charge to Start for good and valuable consideration. Same was effected in accordance with Form 56 of the Land Registry Rules governing the transfer of interests in registered lands. The registration of the charge at entry number 6 in Part 3 arose from the said transfer.

Contentions of the appellant in s. 19 application to the High Court

9. The order of the Property Registration Authority appealed against was made on the 8th April, 2015. It was signed by Fergus Hayden, Deputy Registrar, an officer duly authorised pursuant to s. 22(7) of the Registration of Deeds and Title Act, 2006. The order recites as follows: -

> "ON READING the Order of the High Court (2010 No. 250 COM) made on the 22nd day of October, 2010 certifying pursuant to Regulation 13 of the Regulations that BOSI had properly completed each of the pre-merger requirements in respect of a cross-border merger with BOS AND the Approval Order made on the 10th day of December, 2010 in the Court of Session of Scotland approving the aforementioned cross-border merger for the purpose of Article 11 of the Directive AND the obiter dictum of Miss Justice Laffoy in the Supreme Court in *re. Thomas Kavanagh and*

Bank of Scotland Plc. (Plaintiffs/Respondents) v. Patrick McLaughlin and Roseann McLaughlin (Defendants/Appellants) [2015] IESC 27 delivered on the 19th March, 2015 and the correspondence filed on Instrument No. D2010LR15555AK.

ORDER

IN PURSUANCE OF giving full force and effect to the purpose and intent of Article 14 of the Directive as transposed into Irish law by Regulation 19 of the Regulations and into the laws of the United Kingdom by Regulation 17 of the UK Regulations AND in order to give full force and effect to the intentions of parties to deeds of transfer of charges in Form 56 of the Rules from BOS to other parties lodged in the Land Registry before BOS made application to be registered as owner of charges previously forming part of the assets of BOSI.

IT IS HEREBY ORDERED THAT any such transfer lodged prior to an application of BOS for its registration as owner of any subject charge or charges constitutes a particular case referred to in Rule 182 of the rules AND THAT the regulation set down in Rule 58(1) of the Rules governing the date of registration and the priority of dealings received for registration be and is hereby relaxed AND THAT the date of registration of any such the transfer in Form 56 is accordingly postponed until registration of BOS as owner of the relevant charge or charges."

10. The relevant Land Registry Rules came into operation on the 1st November, 2013.

Rule 182 provides: -

> "The Authority may, in any particular case, extend the time limited or relax the regulations made by these Rules and may, at any time, adjourn any proceedings. Where at any time it is of the opinion that the production of further documents or evidence or the giving of any notice is necessary or desirable, it may refuse to proceed until the documents, evidence or notice have been supplied or given."

11. Rule 58 governs priority of dealings received for registration. Its provisions are not pertinent to any issue arising in the appeal.

The application

12. In her application the appellant sought declaratory orders from the High Court pursuant to s. 19(1) of the 1964 Act annulling the registrations in Part 3 of the Folio of the burdens at entries number 4, 5 and 6 and further an order directing the Property Registration Authority to modify the Register in respect of the Folio "reinstating it to its previous recitals immediately prior to the Registration entry no. 5…"

The High Court application

13. The hearing proceeded before the High Court on the 15th November, 2017. As with this appeal, the appellant conducted her case as a litigant in person. In addition to written legal submissions, the appellant made oral submissions to the Court. The key issues advanced by her at the hearing included, *inter alia*, the following: -

(1) That Regulation 19(2) required BOS to register as a foreign company

14. The appellant contended that the requirements of the Companies Act, 1963 obliged BOS as a foreign company doing business in Ireland to register pursuant to the Companies Act, 1963 and that its failure to do so renders anything thereafter undertaken null and void. In particular, the appellant contends that BOS failed to register the organisation with the Companies Office and with the Registrar of Companies pursuant to Regulation 19(2) of S.I. 157/2008.

Regulation 19(2)

15. S.I. 157/2008 transposed the 2005 Directive into Irish law. Regulation 19 of the Statutory Instrument identifies the consequences of a cross-border merger.

9(1)(a) provides: -

> "All the assets and liabilities of the transferor companies are transferred to the successor company,"

Regulation 19(2) provides: -

> "The successor company shall comply with filing requirements and any other special formalities required by law (including the law of another EEA State) for the transfer of the assets and liabilities of the transferor companies to be effective in relation to other persons."

The latter provision closely mirrors Article 14(2) of the 2005 Directive.

(2) No Certificate from Registrar of Companies submitted by BOS

16. The appellant contended before the High Court that BOS needed to submit a certificate from the Registrar of the Companies Office to the Registrar of the Property Registration Authority to establish that it is the party entitled to the charge notwithstanding that it did not register itself as a company within the State.

(3) Failure to comply with s. 352 of the Companies Act, 1963

17. The appellant asserted that BOS was obliged to comply with the provisions of s. 352 of the Companies Act, 1963 and had failed to do so having failed to deliver the particulars of the charge to the Companies Office.

(4) Failure of BOS to comply with s. 52(1) of the Companies Act, 1963

18. The appellant contended that it was incumbent on BOS which, she argued, was a foreign company which had an established place of business in the State, to register as an external company pursuant to s. 52(1) of the 1963 Companies Act. She asserted that BOS was obliged to deliver particulars of the charge over her property to the CRO in a similar fashion to a company registered pursuant to s. 352 of the Companies Act, 1963 would have done so. In this regard she relied on the decision of N.*V. Slavenburg's Bank v. Intercontinental Natural Resources Limited* [1980] 1 All ER 955.

(5) Ambiguity

19. The appellant argued that Part 3 of the Folio was ambiguous "because it's saying that the owner of the charge over at No. 4…is Bank of Scotland Ireland so the Bank of Scotland Ireland is a dissolved limited liability company, so how is it holding the charge?"

(6) Registration should have been effected shortly after 31st December, 2010

20. The appellant contended that in order to avail of the provisions of s. 16 of the 1964 Act, BOS should have been registered as owner of the charge upon their acquisition of same on the 31st December, 2010. Instead their solicitors in this jurisdiction, Arthur Cox, instructed the Land Registry by way of a letter to note BOS as the owner of the said charge, "but that was not a registration and that's what I'm saying, they are noted as owner, not registered as owner of the charge."

21. The appellant submitted to the High Court that: -

> "… my argument just goes back to the beginning…it goes back to the day when the Bank of Scotland Plc was being registered on… the folio in 2015."

Decision of the High Court

22. The judgment was delivered on by O'Regan J. on 15th November, 2017. The key conclusions are set out as follows. At p.12, regarding the place of business of BOS the High Court judge noted that: -

> "…the evidence in her affidavit is because Bank of Scotland instructed Arthur Cox to register then *ergo* that instruction meant that Bank of Scotland had a place of business presumably within the offices of Arthur Cox. That's the evidence she gives on affidavit. It's in the submissions, her supplementary submissions, that she raises the taking over of the building and service that had been involved in it."

The judgment notes at p. 13 –

> "The non-evidence [*sic*]…in her submissions, is that the building previously occupied by Bank of Scotland Ireland and subsequently occupied by Certis [*sic*] was the place of business…It is not something that I have to entertain one way or the other. I hear the merits of what Ms Ross is saying, but nevertheless I am satisfied that, even if Ms Ross was correct and they carried on a business from the old premises occupied by Bank of Scotland Ireland, nevertheless the consequences of non-registration within the Companies Act and in fact under the Revenue legislation is not impacted on the Registration of Title legislation. Under the Companies Act there is the liability to a fine and that is the extent of it."

The judgment continues: -

> "…I am quite satisfied that Arthur Cox's was not a place of business of Bank of Scotland… nevertheless the penalty for failure to comply with the Companies Act is contained within that 1963 Act and it is not a follow-on that anything that's done in respect of the charge is null and void. Again I rely on the decision of Laffoy J in *Kavanagh* in that regard because Laffoy J made it absolutely clear, when the cross-border merger occurred, what was then required to rely on section 62 of the 1964 Act was the registration of that effective assignment within the Land Registry."

23. At p. 14 the trial judge observed: -

> "…I believe that Ms Ross misunderstands *Kavanagh* as far as she suggests that the

> Supreme Court has suggested that the foreign company must be registered under the Companies Act in advance of relying on section 62 or section 64 of the Registration of Title Act, 1964. So I am satisfied that the non-registration within the Companies Act has no application here."

The judgment continued: -

> "So for all those reasons it is in fact confined to within the 1964 Act as to when a charge can become registered and operable and when the holder of that charge can rely on the provisions of the Registration of Title Act."

The judge then observed: -

> "The Slavenburg file… has absolutely no application. The charge was created by Ms Ross in 2005 and not thereafter and not by anyone else. That charge, within the confines of the four walls of the agreement Ms Ross entered into with Bank of Scotland Ireland, was to the effect that, if Bank of Scotland Ireland wished to assign the charge that they held, they could do so, as they did do so by virtue of the cross-border merger."

She concluded at p. 14 that "Section 31 does apply for the benefit of Start Mortgages". She further noted that: -

> "Insofar as jurisdiction is concerned… within the four walls of the contract, which was created between Bank of Scotland Ireland and Ms Ross, it was Irish law which would be determinative of the outcome of any issue and…what happened thereafter was an assignment of that charge, not an alteration of it, save for the ownership of the charge, and therefore that agreement with Ms Ross that Irish law will be applicable continues to apply…"

24. The judgment noted at p.15 that the appellant had not sought a declaration to condemn the BOSI charge. She further concluded: -

> "I am satisfied that, as matters currently stand, Start Mortgages are the current owners of the charge registered at No. 4 of part 3 being the charge registered on the 28th September, 2005 and I am satisfied that there was no error on the part of the Registrar of Titles in the succession of registrations."

The court dismissed the application.

The notice of appeal

25. The notice of appeal lodged identifies a number of grounds which will be considered in turn.

Ground 1

26. The appellant contends that where a foreign company incorporated outside the State: -

> "…has not made itself amenable to the jurisdiction of the High Court…the High Court ought not to make any judgment either in its favour or against it as to do so would amount to interference on the part of the High Court in its internal affairs."

It was further contended that BOS was obliged to have itself listed on the Slavenburg file or the organisational list in the Companies Office in order to comply with Regulation 19(2) upon which Regulation19(1) relies for legal effect. It was argued that BOS "had purposefully and carefully ensured it had no established place of business within the State."

Ground 2

27. The appellant claimed that: -

    (a) The trial judge erred in departing from the normal and proper procedures for hearing the motion.

    (b) The appellant contends she should have had at least an hour to present her case in a largely unimpeded manner.

    (c) The trial judge did not permit the appellant to read out her motion and affidavits in full in court. She further contended that the judge had hindered her in the presentation of her motion.

Ground 3

28. The trial judge erred in law in breaching the normal and proper procedures for hearing the motion. Ground 3(2) reiterated ground 2.2 (*ante*) that the appellant was entitled to an hour to present her application and that the appellant was rushed by the trial judge and experienced excessive interference in her presentation of her arguments.

Ground 4

29. The appellant alleges: -

    (a) That the trial judge breached her right to a fair hearing;

    (b) That the motion ought to have been considered carefully on its merits by an impartial and independent judge; and

    (c) By asking her questions bearing on her understanding of the motion before the appellant had been given an opportunity to present the motion and outline her understanding of it –

        "…the trial judge made certain statements and certain interventions which showed she was biased against me… I was deprived of my chance to have a fair and impartial hearing of my motion."

Ground 5

30. This ground raises again Regulation19(1) and (2) of S.I. 157/2008 which are already raised in ground 1 of the notice of appeal and also in ground 2 thereof.

31. There are no grounds 6 or 7 apparent in the notice of appeal.

Ground 8

32. The appellant asserts that the trial judge erred in law and misdirected herself in holding that the provisions of s. 31 of the 1964 Act meant that even if it was found that BOS had

no interest in the charge that Start could rely on the conclusiveness of the register to maintain the said charge in their own favour. Further that: -

> "This principle was breached here as the trial judge by stating pursuant to the said s. 31 that even if BOS Plc were not the registered owner of the charge and did not have an interest in the charge that would clearly constitute an error on the face of my folio and the register could not therefore be conclusive and could not be relied on by Start Mortgages."

Ground Nine

33. The appellant contends that the trial judge erred in stating that the provisions of s. 352 of the Companies Act, 1963 did not apply to BOS and that "it was a choice to register with the Companies Office". The appellant contended that her rights are "protected by law by ensuring BOS is registered with the Companies Office as it is a registered company incorporated outside the State and purports to acquire my charge".

34. It is further argued that pursuant to sections 111 and 352 of the Companies Act, 1963 BOS was obliged to register its particulars with the Registrar of Companies and did not do so.

35. The appellant seeks to set aside the orders of the High Court judge or in the alternative to have the motion heard before "an independent and impartial judge of the High Court".

Discussion

36. S. 62 of the 1964 Act, as amended, provides: -

> "(1) A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, and either by way of annuity or otherwise, and the owner of the charge shall be registered as such.
>
> (2) There shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form … but, until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land."

37. S. 62(6) provides: -

> "On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a legal mortgage under Part 10 of the Land and Conveyancing Law Reform Act, 2009, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under such a mortgage, including the power to sell the estate or interest which is subject to the charge."

The cross-border merger

38. In an effort to streamline the issues, in circumstances where the various grounds overlap to a significant extent or are otherwise repetitive, perhaps a useful starting point is the cross-border merger effected on the 31st December, 2010 pursuant to the 2005 Directive. It is by now well settled that a valid cross-border merger of Bank of Scotland

Ireland with Bank of Scotland took effect at 23:59 on the said date following the order of the Scottish Court of Session made on the 10th December, 2010 by Lord Glennie approving the completion of the said merger. Thereupon a cross-border merger by absorption took effect but BOSI was never formally liquidated.

39. The legal impact of the cross-border merger was considered by Clarke J. (as he then was) in *Kavanagh v. McLaughlin* [2015] 3 IR 555. At para. 49 he observed: -

> "The cross-border merger was made under the European Communities (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008) ('the Irish Regulations') in Ireland and the Companies (Cross-Border Mergers) Regulations 2007 in the United Kingdom. The orders approving the merger in this case were made by the High Court (Kelly J.) on the 20th October, 2010, and, so far as Scotland is concerned, by the Court of Sessions on the 10th December, 2010. The effect of those orders was to ensure that all assets and liabilities of BOSI were transferred to BOS at 23:59 on the 31st December, 2010, and that BOSI then stood dissolved without liquidation and ceased to exist."

At para. 54 of the judgment Clarke J. observed: -

> "Article 14 deals with the consequences of cross-border mergers. It provides as follows: -
>
> '1. A cross-border merger carried out as laid down in points (a) and (c) of Article 2(2) shall, from the date referred to in Article 12, have the following consequences:
>
> (a) All the assets and liabilities of the company being acquired shall be transferred to the acquiring company;
> (b) the members of the company being acquired shall become members of the acquiring company;
> (c) the company being acquired shall ceased to exist…'"

At para. 55 Clarke J. noted that Regulation 19 of the Irish Regulations is in similar form.

S. 111 and s. 352 of Companies Act 1963 – "established place of business"

40. A further issue is whether BOS was a company subject to the provisions of s. 352 and/or s. 111 of the Companies Act, 1963. It will be recalled that the provisions of the said Act were operative until the coming into operation of the Companies Act, 2014 on the 1st June, 2015. S. 352 of the Companies Act, 1963 provided: -

> "Companies incorporated outside the State, which, after the operative date, establish a place of business within the State, shall, within one month of the establishment of the place of business, deliver to the registrar of companies for registration—
> (a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company…"

S. 111 of the Companies Act, 1963 provided: -

> "The provisions of this Part shall extend to charges on property in the State which are created on or after the operative date, and to charges on property in the State which is acquired on or after the operative date, by a company incorporated outside the State which has an established place of business in the State, …. and for the purposes of those provisions, the principal place of business of such a company in the State shall be deemed to be its registered office."

41. The appellant theorises in her notice of appeal, including at ground 9 and implicitly in ground 5(2)(c), that BOS had an established place of business within the State on the relevant date, namely the 31st December, 2010, 23:59.

42. It is noteworthy that by affidavit sworn on the 2nd March, 2017 Trevor Murphy, an in-house solicitor with Lloyds Banking Group, the ultimate parent company of BOS, deposes as follows: -

> "Up to 31st December, 2010, I was an in house solicitor employed by Bank of Scotland (Ireland) Limited ('BOSI'), a company registered in Ireland, which was a subsidiary of BOS…
>
> From 1 January, 2011 and up to mid 2016, I was an in house solicitor employed by a Certus, an unlimited company incorporated in Ireland, which provided a range of services to BOS in relation to the management of its Irish loan book. As set out above, I am now an in house solicitor with LBG the ultimate parent of BOS.
>
> At no material time did BOS establish or have a place of business within the State. Accordingly, I say and believe and I am advised that the entirety of Part XI of the Companies Act 1963 did not apply to the BOS so that BOS had no obligation to register with the Registrar of Companies."

Thus, we have compelling evidence which contradicts the appellant's surmise and to which she offers no cogent answer.

43. Throughout her submissions and arguments, affidavits and supplemental arguments the appellant has repeatedly contended that BOS ought to be deemed to have an established place of business within the State by virtue of having retained Messrs. Arthur Cox solicitors and having availed of the latter's address in litigation and legal correspondence. Likewise, she argued that the address of Certus, an entity which provided services to BOS in connection with the management of the Irish loan book it acquired from BOSI, ought to be deemed attributable to BOS.

44. The respondents rely on the English Court of Appeal decision in *Re Oriel Ltd* [1985] 3 All ER 216 which considered the meaning of the phrase "… established place of business…" pursuant to s. 106 of the Companies Act, (England and Wales) 1948. The Court held that to prove an overseas company had at the relevant date, i.e. the date when it created a charge on its property in England, "…an established place of business…" within s. 106, the person challenging the validity of the charge had to show that at the date the company

had a more or less permanent, specific location in England with which it was recognised to be associated and from which the business which it carried on was habitually conducted. However, it was unnecessary that the company should own or lease such premises.

45. However, nowhere does the appellant meaningfully contradict the unequivocal statement of Trevor Murphy deposed to in his affidavit and hence there is no evidence before this Court nor was there before the High Court that would support a proposition that BOS had an established place of business within the State either on the 31st December, 2010 or at any material subsequent date.

46. I am satisfied that there was no probative evidence before the High Court from which the judge could properly draw the inference that BOS ever had an established place of business within this State on the relevant date.

47. Since the evidence of BOS demonstrated that it did not have an established place of business in the State on the relevant date, it was not obliged to register on the external Register of Companies pursuant to s. 352 of the Companies Act, 1963.

48. I am further satisfied that the provisions of Part XI of the Companies Act, 1963 did not apply to BOS. Further, since BOS did not have an established place of business in the State as prescribed in s. 111 of the Companies Act, 1963 compliance with the said provision did not arise, same being contingent on the company having such an established place of business in the State at the date of the assignment.

Slavenburg

49. In his text book *The Law of Private Companies*, (2nd Edn., 2002) Thomas B. Courtney at para. 21.079 states: -

> "A foreign company which *has* an established place of business in the State but which does *not register* as an external company as it is required to do under CA 1963, s 352(1) is obliged to deliver particulars of a charge over property in Ireland to the CRO in the same way (by using a Form 8E) as a company which has registered under CA 1963 s 352.

This was decided in the UK in *NV Slavenburg's Bank v Intercontinental Natural Resources Limited*. In that case a company, which was incorporated in Bermuda, had an established place of business in England and created charges over assets which subsequently came to be reposited in England. The company was not registered in England nor were the particulars of the charges *delivered* to the English Companies House…

It was held by Lloyd J that although there was no formal method for registering such charges because the foreign company did not have a company number which it would have had were it registered on the external register, particulars of such charges were nonetheless required to be *delivered* to the English Companies House. Where such were not delivered, those charges would be void as against a liquidator or any creditor. The mere fact that such charges could not formerly be registered was not a sufficient reason for failing to deliver particulars to the Registrar of Companies…" (emphasis included)

Further, the author states: -

> "It continues to be the law in Ireland that where a foreign company which has an established place of business in the State, but which has not registered as an external company under CA 1963, Part XI creates a charge over property, real or personal, situate in Ireland, the company, or the holder of that charge, must deliver particulars of that charge to the Irish Registrar of Companies. Failure to do so will render the charge invalid."

Up until about the month of July 2015 the CRO maintained the Slavenburg file.

50. Writing in the *Commercial Law Practitioner*, 2014 21(1), 3-10 ahead of the passing into law of the 2014 Act, Dr. Mary Donnelly in her article "*Company charges and the Companies Register: Implications of the Companies Bill 2012 for Secured Lending*" observes: -

> "In respect of companies which do not fit within the definition of 'relevant external company', s. 1292(5) attempts to remove any role for a Slavenburg file. This states that the registration procedures 'may not, with respect to a charge created by a relevant external company' be availed of unless the company has complied with the requirements to register as an external company. While this clearly prohibits the operation of a Slavenburg file, it does not directly address the underlying concerns to which the decision in *Slavenburg* gave rise, namely, the consequences of non-registration and the risk that the 'sanction of invalidity' could apply. While it could, of course, be argued that the statutory prohibition is sufficient to prevent an Irish equivalent of the decision in *Slavenburg*, there would be merit in a clear legislative statement regarding the non-applicability of the sanction of invalidity in this situation."

She observed that the UK removed entirely the requirement for registration in respect of overseas companies regardless of whether they have a registered place of business in the UK or not.

S. 1301(5) of the Companies Act, 2014

51. In fact, section 1301(5) of the Companies Act, 2014 provides: -

> "Without prejudice to the application generally of the provisions of Part 7 by subsection (4) and, in particular, the consequence of a charge being void under section 409 (1), the following provisions of that Part, namely, sections 409 (3) and (4) and 410 (2), may not, with respect to a charge created by a relevant external company, be availed of by the company or a person referred to in section 410 (2) unless the company has complied with, as the case may be—
>
> (a) section 1302 (1) and (2), or
>
> (b) section 1302 (1) and (2) as applied by section 1304."

The annotations to that subsection provide: -

> "Subsection 5 provides that subss. 409(3) and (4) and 411(2) in respect of the

registration of charges created by a relevant external company may not be availed of unless there is compliance with the requirement to register as an external company. The prior law in relation to the registration of charges apply to all external companies, even those that had not registered with the CRO. Due to the fact that unregistered foreign companies did not have a registration number, it was not possible for those charges to be registered in the normal way. Instead, a paper file, known as the 'Slavenburg file', was kept in the CRO for the registration of such charges. Under this section the CRO will no longer accept notices of charges from external companies until they have registered in accordance with Pt 21. This is in accordance with a recommendation of the CLRG: see para. 8.15.4 2nd report."

52. In my view an obligation to register on the Slavenburg file did not arise in the instant case for whilst the assignee of the charge was an unregistered foreign company, BOS, it nevertheless did not at any material date have an established place of business within the State.

53. Since I am satisfied that it is established that BOS was an unregistered foreign company which did not have an established place of business in the State within the meaning of s. 352 or indeed s. 111 of the Companies Act, 1963, the question arises: what obligations were operative and imposed upon it for the purposes of meeting the obligations to be found in Regulation 19(2) of S.I. 157/2008?

54. In my view, the obligations in question are to be found in the 1964 Act, the Registration of Deeds and Title Act, 2006, the relevant statutory instruments and in particular in s. 106 of the 1964 Act as amended, where s. 106(1) provides: -

> "Every person whose name is entered on the register as owner of land or of a charge, or as cautioner, or as entitled to receive any notice, or in any other capacity, shall furnish to the Registrar a place of address in the State."

The place of address furnished on behalf of BOS was the address of their solicitors Messrs. Arthur Cox. That satisfied the requirements of the Statute as a "place of address in the State".

55. There is no legitimate basis for contending that the place of address so furnished amounts to an "established place of business within the State" within the meaning of the 1963 Companies Act. This is a mistaken argument conflating two distinct statutory schemes in a manner unsupported by any authority or by the language of either statutory provision.

Allegations of bias and the contention that the appellant was entitled to read all her pleadings and relevant documents including her affidavit into the record

56. A wide range of allegations are made particularly in grounds 2, 3 and 4 which include allegations of departing from the normal and proper procedures for hearing a motion, that the appellant should have been allocated at least an hour to present her case in a largely unimpeded manner, that she was entitled to read out her motion and affidavits and those of the respondents; that the judge by asking questions and seeking clarification seriously hindered and prejudiced the appellant in her attempt to present her understanding of her motion to the Court, that there was a breach of normal and proper procedures, that

inadequate time was afforded to the appellant, that there was a breach of the right to a fair hearing, that the judge had not behaved in an independent and impartial manner, that the judge showed she was biased against the appellant and in favour of the respondents, that the judge showed that she had pre-judged the motion and that as a result the appellant was deprived of her chance to have a fair and impartial hearing of the motion.

57. A careful examination of the transcript of the hearing does not support such a contention. Allegations of this nature, including allegations of bias against a sitting judge, are extremely serious and ought never to be made without some substantial basis. There is no basis for such allegations on the evidence here.

58. Whenever such an allegation is made it has to be carefully considered and evaluated making it necessary to reiterate some matters which are fundamental. This was addressed by the Supreme Court in *Tracey v. Burton* [2016] IESC 16 where MacMenamin J. said at para. 45:-

> "In all legal proceedings, whether a litigant is legally represented or not, a point may be reached where the conduct of such litigation is so dilatory or so vexatious, or proceeds in a manner which either breaks or ignores rules of procedure, or where there is such egregious misconduct either before court, or in court itself, as to raise questions as to whether the right of access to the court should be limited, or, in extreme cases, whether a case should actually be struck out…"

59. It is evident from the judgment that the judge had read and considered all the submissions and arguments in advance, including the relevant instruments governing the cross-border merger and the relevant parts of S.I. 157/2008, and it is clear that she was conversant with all of the contentions being advanced by the appellant. Nothing in the judge's interactions with the appellant could conceivably lead a reasonable minded person to conclude that the judge was motivated by personal *animus* or bias against the appellant. Her questions were testament to the conscientiousness with which she approached the issues in question. Neither did she behave during the course of the proceedings in a manner which evinced any lack of fairness or even-handedness.

60. The transcript shows that the judge was at pains to ensure that she fully and comprehensively understood the arguments and contentions being advanced by the appellant. There is no basis whatever for contending that she was other than wholly impartial as decision maker in the matter. She carried out her functions scrupulously but robustly in circumstances where at times the written submissions and arguments appear to lack either coherence or clarity.

61. It will be recalled that the test to be applied in considering an allegation of bias was laid down by Keane C.J. in *Orange Communication Ltd. v. Director of Telecoms (No. 2)* [2000] 4 IR 159 at p. 186 where he observed that there is: -

> "…no room for doubt as to the applicable test in this country: it is that the decision

will be set aside on the ground of objective bias where there is a reasonable apprehension of suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias."

62. It is clear that beyond the bare assertions oft repeated and intersticed in the notice of appeal there is no evidence to support an allegation of bias or that the judge was otherwise than acting independently and impartially in considering the claim on its merits and endeavouring to ensure that she understood and fully comprehended the various strands and arguments being advanced by the appellant.

63. It is noteworthy that MacMenamin J. in *Tracey v. Burton*, a decision sought to be relied upon by the respondents to this appeal, did observe at para. 45: -

> "... The time has long past where it is either necessary, or desirable, to permit litigants, or their legal representatives, to read documents or submissions into the record of the court, or where court time, a scarce public resource, is unnecessarily wasted…Time allotted to the parties may be apportioned by a judge fairly, prior to, or during a hearing. But, such time must be predicated on a realistic appraisal of the time a case, or matter, should, ordinarily and properly, take."

Compliance with Regulation 19(1) and (2) of S.I. 157/2008

64. As a matter of fact and law, compliance with Regulation 19(2) in the case of BOS concerned a company which did not have established a place of business within the State, within the meaning of s. 111 and s. 352 of the Companies Act, 1963. That being so, the filing requirements must be construed in that context in light of the fact that the language of that Regulation mirrors Article 14(2) of the 2005 Directive. The special formalities required by law are those to be found in the 1964 Act. I am satisfied that the registration effected on Part Three of the Folio on the 9th April, 2015 whereby BOS was noted as owner of the charge in succession to BOSI satisfied the statutory requirements, in particular s. 106(1) of the 1964 Act insofar as it demonstrated evidence of ownership of the charge.

65. It is clear that registration of the transfer of title to the charge in Part 3 of the Folio was a mandatory prerequisite having regard to the strict language in s. 62 of the 1964 Act. As was noted by Laffoy J. in *Kavanagh* at para. 106: -

> "Section 62 deals with the creation and effect of a charge on registered land. Subsection (1) provided that the registered owner may, subject to the provisions of the Act of 1964, charge the land with payment of money and it further provides that 'the owner of the charge shall be registered as such'".

66. She further observed that: -

> "The important point to be noted in relation to subs. (6) is that the power to enforce the charge is conferred on 'the registered owner of the charge.'"

She continues at paras. 107-108: -

> "Section 64 deals with the transfer of a charge. Subsection (1) empowers the registered owner of a charge to transfer the charge to another person as the owner thereof, and provides that the transferee shall be registered as the owner of the charge. Subsection (2), which has been amended by the Act of 2009, stipulates the form of the transfer but also, consistent with s. 62(2) it provides, 'until the transferee is registered as owner of the charge, that instrument shall not confer on the transferee any interest in the charge.'

Section 90 of the Act of 1964, which was referred to in *Freeman v. Bank of Scotland Plc* [2014] IEHC 284, (Unreported, High Court, McGovern J., 29th May, 2014), confers powers on as person on whom the right to be registered as owner of the charge has devolved in prescribed circumstances, for instance, by reason of an instrument of transfer made in accordance with the provisions of the Act of 1964, to transfer or charge the charge before he himself is registered as the owner of the charge, subject to certain qualifications. I am satisfied that s. 90 has no application to the issue of the entitlement of BOS, as successor of BOSI, to enforce the security which was transferred to it by operation of law on the cross-broader merger against the McLaughlins."

She concluded at para. 119: -

> "As regards any further steps which require to be taken to enforce the 2006 Charge, for the reasons set out above, I have come to the conclusion that, notwithstanding the manner in which the 2006 Charge became vested in BOS, if BOS wishes to avail of the statutory rights conferred by s. 62 of the Act of 1964 to enforce the 2006 Charge, it must comply with the requirement that it be registered as owner of the charge. That conclusion, which is *obiter*, is based on the absence of any legislation relieving a transferee in the position of BOS of the obligations imposed by s. 62."

67. I am further satisfied that on the 9th April, 2015 BOS did comply with the statutory provisions and in particular s. 64 of the Act and hence, thereupon, the statutory rights conferred by s. 62 of the said Act were available to them and in turn BOS clearly passed title to the charge to their successor Start, who was registered on the following day as owner of the charge in succession.

68. The grounds of appeal are without foundation in law or on the evidence and are based on a misunderstanding of the operative legal principles and statutory provisions engaged. Accordingly, the appeal should be dismissed.