**Neutral Citation No. [2012] NICh 25** | **MCCL8583**

*Judgment: approved by the Court for handing down* | *Delivered:* **13/09/12**

*(subject to editorial corrections)**

**[No 1]**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISON**

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**BETWEEN:**

**IRISH BANK RESOLUTION CORPORATION LIMITED (AND OTHERS)**

**Plaintiffs:**

**and**

**LYNDHURST DEVELOPMENTS TRADING SA (AND OTHERS)**

**Defendants:**

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**McCLOSKEY J**

**Preface**

(i) The further developments in these proceedings considered in the substantive part of this judgment have unfolded subsequent to the two earlier judgments of this court promulgated on 3rd May 2012 and in the wake of a significant hearing conducted on 22nd June 2012, which has now emerged as something of a landmark date. I shall revisit this topic *infra*.

(ii) At the outset, it is convenient to record that two material new players have now entered the scene evidentially. These are, respectively, ***Zenith***, a Ukrainian limited liability financial company and ***Elegant Invest***, a Ukrainian limited liability factoring company. Of these new members of the cast more later.

(iii) The first of the four extant Defendants, Lyndhurst Development Trading SA ("*Lyndhurst*"), remains the protagonist in the further events and developments documented in the additional evidence now before the court and, hence, in these proceedings. The first of the two judgments of this court handed down on 3rd May 2012 refused a recusal application brought by Lyndhurst and two other persons in contempt proceedings pursued by the Plaintiffs against them. Those discrete proceedings stand adjourned and have been allocated a further hearing date of 5th November 2012.

(iv) In the substantive proceedings, which are brought by originating summons, the Plaintiffs seek a series of forms of relief against the Defendants. In its main judgment given on 3rd May 2012, the court determined the Plaintiffs' case that certain impugned transactions were unlawful. The transactions in question involved the successive assignments of a loan of some US $45,000,000 (described for convenience as "*the Univermag debt*"). The Plaintiff sought to impugn two separate purported assignments of the Univermag debt, the first involving two of the other Defendants, by Demesne to Inishmore (the second and third-named Defendants respectively) and the second by Inishmore to Lyndhurst. The court found in the Plaintiffs' favour. The outcome was an order condemning the impugned transactions null and void and declaring that Demesne was solely entitled to the benefit of all rights purportedly transferred thereunder. By this stage, Demesne was no longer a Defendant but had become the fourth-named Plaintiff.

(v) As this résumé demonstrates, the aforementioned order of the court did not determine all of the Plaintiffs' claims against the Defendant. Rather, it was confined to the Plaintiffs' quest for relief under Article 367 of the Insolvency (Northern Ireland) Order 1989. The balance of the proceedings was adjourned.

(vi) The next significant development was an application by Lyndhurst to this court for permission to appeal to the Court of Appeal, giving rise to an *inter-partes* hearing on 22nd June 2012. This is addressed in greater detail in paragraphs [2] – [4] of the ensuing substantive judgment.

(vii) Finally, by way of introduction, I record that substantial and significant new evidence came to light following the hearing in this court on 22nd June 2012. This now forms part of the evidence before the court and provides the foundation for this further judgment.

**[1]** This is the latest chapter in the litigation saga the main features whereof to date I have outlined in very brief compass in the Preface above. While there are four Plaintiffs, the dominant moving party continues to be Irish Bank Resolution Corporation Limited ("*the Bank*"). Of the three extant Defendants, the spotlight remains firmly on Lyndhurst. This further chapter unfolds in the following way.

**[2]** I have outlined in the Preface the substantive judgment of this court delivered on 3rd May 2012 and the consequential order dated 10th May 2012. Lyndhurst subsequently applied to this court for permission to appeal to the Court of Appeal. In moving such application, Lyndhurst were represented by senior and junior counsel instructed by Messrs. Cunningham & Dickey solicitors who, in turn, were instructed by London principals. Cunningham & Dickey remain the solicitors on record for Lyndhurst and continue to receive instructions from London based solicitors, albeit (apparently) a different firm. Ultimately, the court was informed by Mr. Marshall of Cunningham & Dickey that the person providing instructions at present to their London principals is Mr. Orlov (one of the deponents in this litigation), in his capacity of beneficial owner of Lyndhurst. No further particulars or evidence of this were provided. While the application for permission to appeal was made *ex parte*, it proceeded on an inter-partes basis by order of the court.

**[3]** Pursuant to the above, this court conducted an inter-partes hearing on 22nd June 2012, receiving oral and written submissions from senior and junior counsel representing the Bank and Lyndhurst. Having considered the parties' arguments, I made an *ex parte* ruling, which has been transcribed. Referring to the transcript, I expressed my satisfaction that the comparatively modest threshold for securing permission to appeal had been overcome. I then addressed the question of whether permission to appeal should be conditional or unconditional and the further issue of a stay of execution of this court's substantive order. Both parties then addressed further argument to the court. Following exchanges with the court, I stated:

> "*It is quite clear that I cannot finalise the order this morning because there are three matters outstanding …*
>
> *One is security for costs. I could not impose a security for costs condition without finality of that condition. That is not feasible this morning …* [and is] *something to be finalised. The second is the question of any condition related to paragraph 3.2 of the securities agreement. Rather than rule on that issue now … I would have to await a draft of the proposed condition and I will afford* [Lyndhurst] *an opportunity to respond by letter … within several days … . The third matter is … the formulation of* [an undertaking which] *would appropriately be conveyed in writing to the court …*

> *I will allow seven days for the action to be taken on the Plaintiffs' side* [and] *seven days for* [Lyndhurst's] *response …*".

I further determined that I would adjudicate on the outstanding issues upon receipt of the necessary further drafts and written submissions. The ruling concluded:

> "*… I can go no further today than to conclude in principle that leave to appeal is granted. It is subject to conditions to be finalised …* ".

**[4]** As directed and contemplated, the court's ruling of 22nd June 2012 became the impetus for an exchange of correspondence between the solicitors representing the Bank and Lyndhurst. The parties were then informed of the court's view that a further hearing must be convened to enable the order granting permission to appeal to be finalised and perfected. Representations were then received that counsel were unavailable (unsurprisingly, given that events were unfolding during the vacation period). The court then relisted the matter on a continuing *inter-partes* basis at the beginning of the Michaelmas term. During this phase of the proceedings the court received written and oral submissions from Mr. Dunlop (of counsel) on behalf of the Bank and Mr. Marshall of Messrs. Cunningham & Dickey. At this stage of the proceedings, no formal order of the court consequential upon my *extempore* ruling of 22nd June 2012 has been made. Furthermore, while counsel have drafted a Notice of Appeal on behalf of Lyndhurst, this has been neither served nor filed. [In passing, the court has received a draft of this].

**[5]** I distil the essence of the Bank's contention at this stage of the proceedings as twofold:

(a) This court has not made a final order granting Lyndhurst permission to appeal.

(b) In light of the further evidence now presented to the court, Lyndhurst should be refused permission to appeal.

As regards the first of these contentions, Order 42, Rule 2 of the Rules of the Court of Judicature provides:

> "*(1) Every judgment shall –*
>
> *(a) subject to rules 3 and 7(1), be drawn up and signed by an officer of the appropriate office; and*
>
> *(b) be sealed and filed by an officer of that office and such officer shall at the time of filing enter such judgment in the*

*record kept for the purpose and the date of filing shall be deemed to be the date of such entry*".

By Order 42, Rule 1 **judgment** "*includes order, decision or direction*". Applying elementary principles, I consider that an order of the court does not come into existence until all of its provisions are finalised, unless the court purports to order otherwise. This is plainly the operative general rule. Furthermore, by the plain and unambiguous terms of this court's *ex tempore* ruling on 22nd June 2012, a final order was neither made nor intended. Rather, the proceedings in this court and the outcome thereof on that date represented a step – a significant and substantial one, of course – in the process of making a final and binding order. This process was then incomplete and the steps necessary to achieve completion were defined with precision in the court's ruling. Subsequent to the ruling, these steps were attempted by the parties' respective solicitors but were not completed for the reasons appearing in the further evidence now before the court, including the *inter-partes* correspondence. In short, the parties' solicitors found themselves unable to agree the terms of certain important provisions of the proposed order. This conclusion is fortified by the well established principle that the High Court is empowered to reconsider any order which has not been perfected: see ***Re Suffield*** [1880] 20 QBD 693 (per Fry LJ, p697) and The White Book, Volume 1, paragraph 35/10/8.

**[6]** In these circumstances, I am satisfied that the court has not made a final order granting permission to appeal to the Court of Appeal. While I make this conclusion without hesitation, I shall consider an alternative approach, for completeness. Insofar as this conclusion is incorrect, I am satisfied, in the alternative, that the principles contained in ***Paulin –v- Paulin*** [2009] EWCA. Civ 221 are engaged. In that case the English Court of Appeal held (*inter alia*) that a judge has an untrammelled power to reverse his decision, to be exercised only for "*strong reasons*" or where there are "*exceptional circumstances*". Insofar as the correct analysis is that this court has already made an order granting permission to appeal to the Court of Appeal (which I do not accept), I consider that both strong reasons and exceptional circumstances exist. This assessment is rooted in the new evidence now before the court (*infra*), the impact which such evidence *prima facie* has on the cornerstone of Lyndhurst's case, the shadow which is now classed over a piece of potentially critical evidence laid before this court by Lyndhurst for the purpose of the permission to appeal hearing on 22nd June 2012 and the abject failure by Lyndhurst to disclose any of the new evidence previously. It follows that, by one route or another, the issue of granting Lyndhurst permission to appeal to the Court of Appeal remains at large and the parties are at liberty to present further evidence and argument bearing thereon. To this I shall now turn.

**[7]** While the additional evidence now assembled before the court is (as ever) of impressive bulk, its key elements are relatively few. Furthermore, this additional evidence overlaps with certain new evidence placed before the court by Lyndhurst in support of its application for permission to appeal. This evidence included an affidavit worn by Ms Acorda, a member of the London firm of solicitors then

instructing Cunningham & Dickey. This affidavit, in *seriatim* form, spoke to the seven grounds of appeal being pursued by Lyndhurst. It included the following pithy averment:

> "*So far as the seventh ground of appeal is concerned, I refer to exhibit* ***IA2*** *from which it is, in my submission, clear that value was going to be provided*".

The seventh ground of appeal recites:

> "*The learned judge was wrong in law and/or fact to find that the first Defendant had not made out its defence under Article 369(2) of the Insolvency (Northern Ireland) Order 1989 when –*
>
> *(1) There was no evidence that the first Defendant did not acquire the debt in good faith and without notice of the relevant circumstances.*
>
> *(2) There was evidence that value was to be provided albeit that it was not provided within ninety days*".

The next element in this jigsaw is a draft Defence on behalf of Lyndhurst, which also formed part of the materials on which they relied at the permission to appeal hearing, which pleads, in paragraph 39:

> "*The first Defendants deny that the consideration for the second assignment was valueless. The first Defendants are in the process of drawing up a document which they promised to provide*".

This draft pleading is dated May 2012.

**[8]** The document exhibited as **IA2** to Ms Acorda's affidavit, sworn on behalf of Lyndhurst, was a new piece of evidence. For convenience, I shall describe it as "*the securities agreement*". This document has, **on its face**, the following features:

(a) It is described as **Agreement No. D11/061205** of sale and purchase of securities.

(b) The seller is Zenith (in shorthand) and the buyer is Lyndhurst.

(c) It is dated 6th December 2012 (clearly an error – most likely intended to be 2011, by reference particularly to the year recorded in the Ukrainian language copy).

(d) It lists ten identified "*securities*" all of them particularised, having a total value of US $45,000,000.

(e) By paragraph 3.2 of the document:

> "*To guarantee the payment under the Agreement the Buyer agrees to sign with the Seller the Assignment Agreement for the assignment of right of claim of its debtor's residence of Ukraine for the corresponding amount, which comes into effect if the Seller fails to perform Clause 2.2.2 of this Agreement*".

(f) By Clause 9.1:

> "*This Agreement shall enter into force on the date of its signing by the parties and shall be in force until the due payments connected with this Agreement are made*".

Both the Ukrainian version of this Agreement and an English translation thereof were included in the new evidence placed by Lyndhurst before this court in support of its application for permission to appeal. The former version appears to be stamped and signed and, moreover, the year is stated to be **2011**.

**[9]** As the transcript demonstrates, at the permission to appeal hearing on 22nd June 2012, the arguments of Mr. Ullstein QC (appearing with Mr Babington, of counsel) focussed on, *inter alia*, certain elements of the new evidence laid before the court by Lyndhurst. These included the opinion of a Ukrainian lawyer about the legal impact in the Ukraine of the registration of the instruments in question and, in particular, the lawyer's contention that such registration was conclusive evidence that the instruments were valid, a contention duly upheld in various court proceedings in the Ukraine. In consequence, and/or by virtue of the Rome Convention, it was argued that this court had erred in failing to recognise the conclusive validity of the instruments. Mr. Ullstein's submissions also alluded to evidence establishing that (contrary to this court's finding) Lyndhurst is not an off the shelf company which had no realistic prospect of raising the necessary finances. The issue of consideration and the time limit for making consideration was also raised. In reply on behalf of the Plaintiffs, Mr. Moss QC emphasized that at the substantive hearing Lyndhurst had failed to make any evidential response to the Plaintiffs' case that no price for the salient assignment had ever been agreed and no value was provided therefor. Mr. Moss's submissions also addressed the newly exhibited securities agreement (to which I have referred above). It was submitted that this is plainly not a genuine document - in blunt terms, a forgery. This is encapsulated in the following excerpt from the transcript [pp. 32-33]:

> "*… It is quite clear that this is a forgery designed for the purposes of this case. There is no other reasonable explanation why Lyndhurst having been a party and having had four months to put in evidence of the bona fide purchase for value without notice of defence failed to put in what they now say is a key document in relation to that.*"

In the alternative, it was argued that the newly produced securities agreement did not advance Lyndhurst's case in any event.

**[10]** It is convenient to recall that in the substantive Ukranian proceedings, Lyndhurst was claiming US $43,000,000 against Univermag and succeeded at three successive tiers of the Ukrainian court system, ultimately by judgment of the High Commercial Court of the Ukraine on 17th May 2012. A highly significant subsequent order of the Kiev City Commercial Court, dated 22 June 2012, was, on its face, made pursuant to an application by a limited liability company entitled "Elegant Invest". The relief sought by this application was "*substitution of a party with its legal successor*". The application (again on its face) was determined by the court on paper. My interpretation of a somewhat elaborate court order is that Elegant Invest contended, and the court accepted, that it was the legal successor of Lyndhurst, giving rise to an order substituting Elegant Invest for Lyndhurst in the previously determined proceedings against Univermag. I interpose the observation that, at this juncture, a full comprehension of the following events and the sequence thereof is not possible:

(i) The final court order in favour of Lyndhurst against Univermag is dated 17th May 2012.

(ii) On 5th June 2012, Lyndhurst filed an application in the Kiev City Commercial Court (the first instance tribunal) seeking "*review of the judgment in Case No. 35/465 on the basis of new facts*".

(iii) On 12th June 2012, Elegant Invest applied to the same court for an order that it be substituted for Lyndhurst in the same proceedings.

(iv) On 22nd June 2012, the court acceded to the application of Elegant Invest.

(v) On 2nd July 2012, the court rejected Lyndhurst's application for review, primarily on the ground that Lyndhurst was no longer a party and therefore had no *locus standi*.

These events are the latest developments in a progressively intriguing and complex web. I shall elaborate on the most recent orders of the Kiev City Commercial Court *infra*. For present purposes, it is sufficient to record that all of the evidence about the

various orders rehearsed in (ii) – (iv) postdates the hearing in this court on 22nd June 2012.

**[11]** The securities agreement looms large in the *inter-partes* correspondence and further evidence assembled post dating the hearing in this court on 22nd June 2012. This evidence includes the aforementioned Order of Kiev City Commercial Court, also dated 22nd June 2012. This order of the Kiev Court, which has been translated, contains extensive recitals. These rehearse, *inter alia*, the securities agreement of 6th December 2011; an instrument whereby, on the same date, Zenith transferred to Lyndhurst ten promissory notes of a specified value; an assignment on the same date whereby Lyndhurst assigned to Zenith and the latter acquired in its entirety Lyndhurst's claim against Univermag for the debt of some US $45,000,000; a notification by Lyndhurst to Univermag, by letter, on **9th December 2011**, of said assignment; a formal acknowledgement by Lyndhurst to Zenith, on **11th February 2012**, of its inability to pay for the securities, coupled with an admission of debt; a notification from Zenith to Univermag on **13th February 2012**, by letter, of this last-mentioned development; a supplementary loan agreement executed on 4th April 2012 by Univermag and Zenith, confirming the transfer of the Univermag debt to Zenith; a further assignment of the same debt by Zenith to Elegant Invest, on **22nd May 2012;** and a notification thereof to Univermag by letter, on **23rd May 2012**.

**[12]** In Lyndhurst's application for permission to appeal in June 2012 there was substantial emphasis on the newly adduced securities agreement. This was clearly designed to demonstrate that Lyndhurst would have been capable of providing value for the purported assignment to it by Inishmore of the Univermag debt. The new evidence includes an affidavit sworn by Mr. Marchukov, a Ukrainian lawyer retained by the Bank subsequent to the hearing in this court on 22nd June 2012. In essence, this affidavit evidences and exhibits a series of transactions which, it is contended, disclose the steps taken by the Defendants in an effort to put beyond reach the asset claimed by the Plaintiffs viz. the Univermag debt. Mr. Marchukov deposes to and exhibits the various further transactions recited in the order of the Kiev Commercial Court dated 22nd June 2012 and rehearsed above. The period under scrutiny is, broadly, December 2011 to June 2012. The evidence establishes that, during this period, a series of material documents was generated, in the aforementioned context. The Plaintiffs highlight that none of these was included in the evidence presented to this court on behalf of Lyndhurst **and** there was a failure by Lyndhurst to disclose to the court any of the transactions to which they relate. A further affidavit asserts that this is mirrored in the proceedings in the British Virgin Islands and the subsequent activities of the court appointed receiver. This affidavit is sworn by a BVI attorney acting on behalf of the Plaintiffs. The thrust of the case made by the Plaintiffs at this stage of the proceedings is encapsulated in the following averments:

> "*It is clear, therefore, that steps have already been taken to place the asset further beyond the Claimants. The Claimants believe that the Zenith assignment agreement and the*

*Securities Agreement were backdated as no mention has been made of this in any proceedings in any jurisdiction to date. If, however, the assignment from Lyndhurst to Zenith did take place on 6th December 2011 then the BVI and Northern Ireland courts appear to have been seriously misled as all of the proceedings have taken place on the assumption that Lyndhurst still held the asset.*"

**[13]** As the above résumé of the newly adduced evidence demonstrates, the chain of transactions, sequentially, has, fundamentally, involved purported assignments of the Univermag debt by Lyndhurst to Zenith and, subsequently, by Zenith to Elegant Invest. In consequence, Elegant Invest purportedly became the beneficiary of the Univermag debt. The culmination of these steps was the aforementioned Order dated 22nd June 2012 of the Kiev City Commercial Court, whereby Elegant acquired Lyndhurst's judgment for US $45,000,000 against Univermag. The contrasting outcomes of the litigation in the Ukraine and in Northern Ireland are stark:

(i) In The Ukraine, Elegant Invest has now acquired Lyndhurst's judgment for US $45,000,000 against Univermag.

(ii) This court held that the Univermag debt vests in Demesne (the fourth-named Plaintiff) as a result of the successive assignments from Demesne to Inishmore and Inishmore to Lyndhurst, contravening the provisions of the Insolvency (Northern Ireland) Order 1989.

As foreshadowed in the prologue above, Mr. Marchukov's affidavit deposes to and exhibits a series of instruments and transactions involving Lyndhurst, directly or indirectly, which now form part of the evidence before the court for the first time. A particular source of the further evidence which his investigations have yielded is the Kiev City Commercial Court file in Case No. 35/465 viz. Lyndhurst's claim against Univermag for some US $45,000,000. I have already addressed above the judgment in this amount recovered by Lyndhurst against Univermag and the two further post-judgment orders made by the Kiev Court in June and July 2012. Through the medium of this further evidence, the two new players who now make an entrance to a progressively complex and intriguing scene are:

(i) **Zenith**, a Ukrainian limited liability financial company.

(ii) **Elegant Invest**, a Ukrainian limited liability factoring company.

**[14]** I have also adverted above to what I have described in shorthand as the "*securities agreement*" between Lyndhurst and Zenith, dated 6th December 2011. Mr. Marchukov avers that this agreement first surfaced in the proceedings before the Eastern Caribbean Supreme Court, on **28th May 2012**. He suggests, plausibly, that Lyndhurst produced this agreement in such proceedings in an attempt to demonstrate that it was intending or able to provide value for the assignment to it

from Inishmore in the form of ten promissory notes purchased by Lyndhurst from Zenith. Notably, **apparently** none of the ten promissory notes emerged in the proceedings in any of the three jurisdictions concerned (the Ukraine, Northern Ireland and the British Virgin Islands) until **26th July 2012**, prior to the final hearing in the Eastern Caribbean Supreme Court. Mr. Marchukov further deposes to a **Zenith Transfer Certificate**, which purports to record a transfer by Zenith to Lyndhurst of the ten promissory notes on 6th December 2011. I record, but am not required to rehearse in detail in the present context, certain further averments in Mr. Marchukov's affidavit calling into question the legitimacy of the securities agreement and Zenith itself. Much of this consists of analysis and comment already ventilated in legal argument in this court at earlier stages of the proceedings.

**[15]** Mr. Marchukov's affidavit also describes and puts in evidence a document purporting to constitute a Supplementary Loan Agreement between Zenith and Univermag, dated 4th April 2012 (which I shall describe as "*the Zenith/Univermag transaction*"). The deponent avers that this agreement formalised the assignment of the claims against Univermag from Lyndhurst to Zenith. On its face, the only parties to this agreement are Zenith (the "new lender") and Univermag ("the borrower"). Next, the affidavit addresses a further instrument/transaction, purportedly constituting an Assignment Agreement dated 22nd May 2012, the parties whereto were Zenith and Elegant Invest. This instrument purported to assign Zenith's claims against Univermag to Elegant Invest for the same consideration viz. some US $45,000,000. Full provision was made for payment of the consideration. This instrument is to be considered in conjunction with a Transfer Certificate (dated 22nd May 2012) and a supplementary agreement between the same parties (dated 30th May 2012). I refer also to my résumé above of the recitals in the Kiev City Commercial Court order of 22nd June 2012.

**[16]** Mr. Marchukov's affidavit also contains averments calling into question the legitimacy and validity of the further orders purportedly made by the Kiev City Commercial Court on 22nd June 2012 and 2nd July 2012. He questions why his firm was not granted permission to examine the court file until two days later, on 4th July 2012 and suggests that the delay of around one month in acceding to this request is unconventional. He describes the processing of Lyndhurst's claim for some US $45,000,000 against Univermag at first instance, culminating in a judgment of this amount, as extraordinarily rapid and comments adversely on the sequence and speed of the two June/July 2012 Kiev court orders, whereby the court permitted the substitution of Zenith for Lyndhurst and, in quick succession, approved the assignment of the judgment to Elegant Invest.

**[17]** Pausing at this juncture, a series of material transactions, instruments, and Kiev court orders have come to light subsequent to the last hearing of note in this court, on 22nd June 2012. These developments were the subject of certain *inter-partes* correspondence. In the letters written by the Plaintiffs' solicitors, it was contented that Lyndhurst's London and Northern Ireland solicitors had apparently been "… *deceived by your clients* [and] *have unwittingly misled the* [Northern Ireland] *court and*

*put forward forged documents.*" In response, Messrs. Cunningham & Dickey stated, *inter alia*:

> "*We wish to assure you immediately that this firm has had no prior indication or knowledge whatsoever of any assignment by Lyndhurst such as that which is referred to in the documents furnished …*
>
> *All representations made to the court by us in writing or by counsel on our behalf in court were and have been made in good faith based upon our existing instructions…*
>
> *We accept, of course, that the court has been misled. That has not been through any wrongdoing on the part of the legal team on record for Lyndhurst.*"

The essence of the correspondence written by Lyndhurst's London solicitors was that they had no awareness of any of the documents in question. In their letter dated 11th July 2012, they stated:

> "*We have today advised our client that we can no longer act and have suggested that they instruct a new legal team as a matter of urgency*".

Messrs. McIldowies, who were Lyndhurst's solicitors on record during a substantial period of the Northern Ireland litigation, also asserted in writing that they too were unaware of any of the documents in question. I record that this court accepts the representations which have been made by the three firms of solicitors concerned.

**[18]** During the balance of the summer vacation period, matters lay in abeyance until the case was relisted by the court on the opening day of the Michaelmas Term, 5th September 2012. The hearings during this discrete phase of the proceedings were completed on 10th September 2012. During this period, Messrs. Cunningham & Dickey, who remain on record for Lyndhurst, made certain representations to the court. In this way the court was informed that they were in receipt of instructions from newly instructed London solicitors who were acting only for the beneficial owner of Lyndhurst, Mr. Orlov, and not the company itself. They highlighted the order of the Eastern Caribbean Supreme Court, dated 26th July 2012, appointing receivers over Lyndhurst's assets. Two short adjournments (of three working days' duration in total) gave Cunningham & Dickey the opportunity to take some further instructions from their London principals. The receipt of further instructions enabled Cunningham & Dickey to advance a reasonably detailed critique of the case now being made by the Plaintiffs, based on the new evidence, including an innocent explanation of and justification for Lyndhurst's conduct throughout the events under scrutiny. In these written representations, it was fully acknowledged that an explanation must be provided for Lyndhurst's failure to make disclosure to the court of obviously material evidence. This explanation is, understandably and

properly, qualified by the words "*as we understand it*". It spans three sentences, which recount that initially the focus of Lyndhurst's lawyers' instructions was the contempt proceedings in this court and then the application for permission to appeal. I find that the explanation proffered is uninformative, wholly implausible and, fundamentally, unacceptable.

**[19]** In this latest phase of the proceedings, it is contended by Mr. Dunlop (of counsel) on behalf of the Plaintiffs that the new evidence demonstrates that Lyndhurst's application to this court for permission to appeal was based on fraudulent evidence. It is submitted that the new evidence demonstrates that there were further assignments of the Univermag debt, firstly by Lyndhurst to Zenith and subsequently by Zenith to Elegant Invest. Fundamentally, it is argued, Lyndhurst at all material times has, demonstrably, had no interest in the asset in question. The secondary main argument advanced is that this court has been seriously misled by Lyndhurst.

**Permission to Appeal: the Court's Final Determination**

**[20]** Further to the conclusion which I have made in paragraph [6] hereof, I consider that the first issue to be addressed is whether a further adjournment of this court's final determination of Lyndhurst's application for permission to appeal to the Court of Appeal should be granted, to afford Lyndhurst an extended opportunity to respond to the series of developments post dating the hearing in this court on 22nd June 2012. This requires the court to balance a series of considerations. These include in particular the gravity of the allegations against Lyndhurst; the recent vintage of the new evidence and consequential allegations against Lyndhurst; the opportunity which Lyndhurst has had to respond to date, of some two months proportions; Lyndhurst's right to a fair hearing; the continued involvement of London and Belfast solicitors; **[**the court's alertness to any possible misuse of its process;**]** the Plaintiffs' allegations of material non-disclosure, seriously misleading the court and abusing its process in consequence; and the real possibility, taking into account the overall history of these proceedings, that the evidential matrix before the court remains incomplete. I must also take into account the objectively incontestable dilatoriness of Lyndhurst's conduct since the inception of the Northern Ireland litigation some eight months ago, the various changes in legal representation and the public interest generally. I also weigh the consideration that none of the further transactions emerging in the newly available evidence is disputed by Lyndhurst's representatives. Moreover, it is plain that Mr. Orlov has remained active and has been capable of providing at least basic instructions to his lawyers. Notwithstanding, nothing of substance has materialised in response to the new evidence and allegations. The court has a discretion as to how to proceed at this stage. Balancing all of these considerations, I consider that the fair and just exercise of this discretion impels to the conclusion that an adjournment is inappropriate. In my view, Lyndhurst has had a more than adequate opportunity to provide, as a minimum, an elementary response of substance to the new evidence and allegations.

Fairness does not dictate that this opportunity be extended. Accordingly, there will be no further adjournment of this phase of the proceedings.

**[21]** I turn to determine the application for permission to appeal to the Court of Appeal. I record once again that there is no challenge by the solicitors on record for Lyndhurst or the solicitors now receiving instructions from Mr. Orlov *qua* beneficial owner of Lyndhurst to the documents evidencing the series of previously undisclosed transactions involving Lyndhurst directly or indirectly. The evidence impels me to proceed on the basis that these transactions occurred. For present purposes and at this juncture, it is unnecessary – and would be inappropriate – for this court to make any further findings incidental thereto: for example, relating to the authenticity of dates or backdating. Having regard to the terms of the Kiev City Commercial Court orders, the one salient fact which is clear beyond peradventure is that all of these documents, whatever their true date or provenance, were in existence prior to **12th June 2012**, when the first of the two post-judgment applications was made to that court. I record further that this court has received no plausible explanation for Lyndhurst's failure to disclose these documents throughout the present proceedings and, in particular, at the hearing conducted on **22nd June 2012**. There is clear *prima facie* evidence that, at this juncture, Lyndhurst has no interest in the Univermag debt. Furthermore, the order which this court made on 10 May 2012 appears to have been rendered impotent and redundant.

**[22]** The judgment of this court delivered on 3rd May 2012 was based on two assignments of the Univermag debt. The substantial new evidence of other assignments was not available to the court. On the aforementioned basis, the court observed that the participants, one of whom was Lyndhurst, "… *were indulging in an orchestrated, elaborate and illicit charade*": see paragraph [42]. In the application for permission to appeal conducted on 22nd June 2012, this was characterised by Lyndhurst's counsel "*a swingeing finding*" against Lyndhurst. With each passing phase of this litigation, the correctness of this finding is vindicated and fortified. The test, well established, to be applied to this application is whether the putative appellant has a realistic, that is to say more than fanciful, prospect of success. I shall proceed on the basis that there is clear *prima facie* evidence that Lyndhurst has had no interest in the Univermag debt since December 2011. There is no evidential basis for proceeding otherwise. This renders the appeal moot. Secondly, the further evidence fortifies the correctness of this court's judgment on 3rd May 2012. Thirdly, the further evidence, as a minimum, undermines the cornerstone of Lyndhurst's application, namely the securities agreement. Fourthly, the conduct – more accurately, inertia – of Lyndhurst and its asserted beneficial owner, Mr. Orlov, during the post-judgment phase confounds the complaint that the substantive proceedings in this court were in some way unfair to Lyndhurst, an intrinsically fragile plea in any event. The conclusion that the appeal which Lyndhurst wishes to

pursue in the Court of Appeal has no realistic prospect of success follows inexorably.

**[23]** Independent of my primary conclusion, there is clear *prima facie* evidence that the process of this court has been seriously misused by Lyndhurst. The elements of this further conclusion are fully rehearsed above. The refusal of permission to appeal to the Court of Appeal would be fully justified on this ground alone.

**[24]** For the avoidance of any doubt, I reiterate that I have proceeded and have made my conclusions on the basis of clear *prima facie* evidence. In the context of an application of this kind and, particularly, in the absence of a further *inter-partes* hearing, which neither Lyndhurst nor Mr. Orlov requested, it will generally be inappropriate for the court to make concluded findings of fact, particularly in relation to fresh evidence. I have not made any such findings. I have, rather, made a fair and evaluative assessment of all the evidence, in particular the new evidence. Lyndhurst's application is refused and I shall determine the question of costs when the parties have had an opportunity to consider this ruling and have addressed the court further.