THE HIGH COURT

[2021] IEHC 249

[Record No. 2014/4723 P]

BETWEEN

MICHAEL MCATEER, AENGUS BURNS, ULSTER BANK IRELAND LIMITED AND PROMONTORIA (ARAN) LIMITED

PLAINTIFFS

AND

LASZLO FRIED, LAZLO JEWELLERS LIMITED, JASZAI LIMITED AND CLADDAGH JEWELLERS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 6th day of April, 2021.

Introduction

1. In these proceedings, the first and second named plaintiffs, Michael McAteer and Aengus Burns, were appointed by the third named plaintiff as joint receivers by a deed of appointment of 19th April, 2013 in respect of certain charged properties at 25 Mainguard Street, Galway. By a further deed of appointment of that date, the third named plaintiff appointed the first named plaintiff, Mr. McAteer, as receiver over properties at 20 William Street, Galway. These appointments were made in respect of facilities – to which I will refer to in more detail below – which were transferred to the fourth named plaintiff by the third named plaintiff by a global deed of transfer and deed of conveyance and assignment of 12th March, 2015. The fourth named plaintiff was substituted in place of the third named plaintiff by way of "Receiver Novation Deeds" for the purposes of the continued appointment of the receivers.

2. By a plenary summons of 23rd May, 2015, the first and second named plaintiffs sought various reliefs against the defendants, including a series of injunctive reliefs to restrain the defendants from preventing or interfering with the receivers from carrying out their roles in relation to the properties, and in particular from trespassing on the properties and collecting rents in connection with them. The third named plaintiff also claimed judgment against the first named defendant in respect of a facility which had been offered to him as I will outline below. A separate defence and counterclaim was delivered by the first and third named defendants, and by the second and fourth named defendants, on 4th September, 2015. The plenary summons was subsequently amended so that the claim for judgment against the first named defendant is now pursued by the fourth named plaintiff, and an amended statement of claim was delivered on 21st June, 2018. An amended defence and counterclaim was delivered by the first and third named defendant on 8th January, 2019.

3. The application before me arises on foot of a notice of motion issued on 7th October, 2019 on behalf of the plaintiffs. The reliefs sought in the notice of motion are as follows: -

   "(1) Judgment as against the First Named Defendant in favour of the Fourth Named Plaintiff in the sum of CHF 6,117,076.80 Swiss Francs and USD $558.81 together with interest pursuant to contract.

(2) Interest pursuant to statute.

(3) An Order against the First and Third Named Defendants for an account of all rents and payments received by them from any party including but not limited to the Second and Fourth Named Defendants, their servants or agents since 19 April 2013 in respect of 20 William Street Galway and 25 Mainguard Street Galway and an Order directing the First and Second Named Defendants to pay same to the First Named Plaintiff forthwith in respect of the William Street property and the First and Second Named Plaintiffs forthwith in respect of the Mainguard property.

(4) In the alternative, judgment as against the First and Third Named Defendants in favour of the First and Second Named Plaintiffs in the sum of such rents or payment as they have received in respect of the properties identified at paragraph 3 *ante*.

(5) An order directing the tenants of 20 William Street Galway and 25 Mainguard Street Galway to make full payments of rents directly to the First and Second Named Plaintiffs until such time as the First and Second Named Plaintiffs take control of the properties.

(6) Insofar as it is necessary to do so an Order appointing the First and Second Plaintiffs as receivers over all future rents and payments paid by any occupants of the properties identified at paragraph 3 above.

(7) An Order restraining the Defendants, whether by their servants and/or agents from preventing, impeding and/or obstructing the First and Second Named Plaintiffs, their servants or agents from collecting the rents and payments associated with the William Street and Mainguard Street properties.

(8) Such further or other order as this Honourable Court shall deem fit.

(9) The costs of and incidental to these proceedings."

4. The matter was heard before me along with an application for judgment against the defendants in related proceedings entitled "The High Court, Record No. 2019 No. 341 S, between Promontoria (Aran) Limited, (Plaintiff) and Jaszai Limited and Laszlo Fried (Defendants)". I will refer to these proceedings as 'the summary proceedings', and that application will be the subject of a separate judgment which should be read in conjunction with the present judgment.

5. The issues between the parties in the present proceedings were set out extensively in an exchange of affidavits, and also in lengthy written submissions delivered by both sides. In order to understand the context of the issues, it is necessary to set out the background to the dispute in some detail. What follows therefore is a broad outline of the matters canvassed in the affidavits, which is not intended to be exhaustive, but rather to facilitate an understanding of the issues of law which the court has to decide.

The affidavits on behalf of the Plaintiffs

6. The application as regards the reliefs sought by the receivers is grounded upon the affidavit of the first named plaintiff of 4th October, 2019. The deponent refers firstly to a facility letter of 21st December, 2009 ('the Jaszai facility'), by which the third named plaintiff offered the third named defendant ('Jaszai') loan facilities in the following amounts:

> "(a) €290,000 by way of an overdraft facility for the purpose of providing working capital.
>
> (b) Continuation of an existing demand loan facility in the sum of Swiss Francs equivalent to €7,000,000 the balance on [sic] which was €7,558,537 as of the date of the facility letter. At all material times, the demand loan facility was held in Swiss Franc (CHF). The balance as of the date of the Facility Letter was CHF 11,294,500.
>
> (c) $25,000 by way of an overdraft facility for the purpose of providing working capital." [Paragraph 3 of affidavit]

7. The Jaszai facility is stated to be secured by a deed of charge between the third named plaintiff and Jaszai in respect of the property at 25 Mainguard Street, Galway ('the Mainguard property'). The deed provides for the appointment of receivers over the charged property, the assignment, transfer, sub-mortgage, sub-charge or otherwise grant of interests in the property, and also provides for a negative pledge by Jaszai that it would not without the bank's prior written consent "…grant or agree to any lease, tenancy, licence or right of occupation (whether shared or otherwise) affecting any part of the mortgaged property…".

8. It is averred that Jaszai "failed to comply with the repayment terms of this facility and thereby defaulted on the said facility" [paragraph 6].

9. The first named plaintiff avers that, by a facility letter of 29th March, 2010 ('the Laszlo Fried facility'), the third named plaintiff "…agreed to advance the First Named Defendant loan facilities in the amounts of (a) Swiss Franc (CHF) 7,318,850 (the then Euro equivalent of which was €5,141,808) and (b) €485,000". It is asserted that this facility was secured, *inter alia*, by a deed of mortgage between the third named plaintiff and the first named defendant of 15th April, 2003 under which the property at 20 William Street, Galway was charged. This deed of mortgage contained terms similar to those in respect of the charge over the Mainguard property, including the negative pledge clause.

10. The first named plaintiff avers that the Jaszai facility and the Laszlo Fried facility were transferred to the fourth named plaintiff by way of global deed of transfer and deed of conveyance and assignment of 12th March, 2015, and that by way of "Receiver Novation Deeds" dated 12th March, 2015, the fourth named plaintiff was substituted in place of the third named plaintiff for the purposes of the appointment of the receivers. The first named plaintiff avers that he and the second named plaintiff carried out their obligations

as receivers over the securities relating to the two facilities "as if the fourth named plaintiff was the original party to the said deeds of appointment".

11. The deponent avers that, on or around 23rd February, 2012, the third named plaintiff was provided with a copy of a purported lease entered into between the third and fourth named defendants of the Mainguard property, and that on or around 29th April, 2013, the third named plaintiff was provided with a purported lease entered into between the first and second named defendants in respect of the ground floor of the William Street property. It is further averred that, from the date of the appointment of the receivers in April 2013 "until in or around 12th August, 2013", the fourth named defendant discharged sums in respect of its occupancy of the Mainguard property, and that in the same period, the second named defendant discharged sums in respect of its occupancy of the William Street property.

12. However, by letter of 12th August, 2013, solicitors acting on behalf of the receivers and the third named plaintiff wrote to the fourth named defendant and advised it that the purported lease of the Mainguard property was invalid, and requested it to surrender vacant possession of the property within one month. By a further letter of the same date, solicitors acting on behalf of the first and third named plaintiffs wrote to the second named defendant advising it that the purported lease of the William Street property was invalid, and requesting it to surrender vacant possession of that property.

13. The first named plaintiff avers that, since that time, the third named defendant has refused to surrender possession of the Mainguard property, and that the first and second named defendants have refused to surrender possession of the William Street property. It is further averred that, since in or around 12th August, 2013, "…the defendants have not discharged any sums in respect of the occupancy of the Mainguard Street property or the William Street property" [Paragraph 21]. It is averred that the defendants "continue to assert the validity of the leases and have prevented the Second Named Plaintiff and I from dealing with the Mainguard Street property, and I from dealing with the William Street property, to market them for sale for the benefit of the receiverships…[f]urther, to my knowledge, the First and Third Defendants have been in receipt rents [sic] or other payments in respect of the properties since the appointments of the Second Named Plaintiff and I and have refused to pay over those rents on the basis that they were somehow not indebted to the Third Named Plaintiff or its successor in title the Fourth Named Plaintiff. There is no longer any dispute in relation to that issue". [Paragraphs 22 to 23].

14. An affidavit is sworn by Stephen McKeever on 7th October, 2019 in support of the plaintiffs' application. Mr. McKeever is described in his affidavit as "Head of Asset Management (Ireland) employed by Link ASI Limited (formerly known as Capita Asset Services (Ireland) Limited (the 'servicer') …". He avers that he is authorised to make the affidavit for and on behalf of the fourth named plaintiff to the proceedings, and does so "for the purposes of grounding an application on behalf of the fourth named plaintiff for judgment as against the First Named Defendant in the sum of CHF 6,117,076.80 Swiss

Francs and USD $558.81, together with interest thereon and other reliefs sought by the first and second named plaintiffs".

15. Mr. McKeever refers to the Laszlo Fried facility letter of 29th March, 2010, and sets out the material terms of the loan as provided for in the facility letter. These are expressed as follows: -

"(a) The purpose of the loan was to assist with the restructure of all outstanding debt in the name of the First Named Defendant, initially sanctioned in respect of the purchase of 20 William Street, Galway, and subsequently increased to provide for €1,500,00 [sic] re mortgage of 65 Kingsley Way, London, €600,000 re Bond investment, €200,000 re investment into trading companies, €800,000 re additional debt re 65 [Kingsley] Way/UK investment;

(b) The loan was repayable on demand;

(c) The repayment terms of the CHF loan, were originally agreed on an interest only basis for the first two years to March 2008 and this period was extended by the facility letter to 31 August 2010. In the event that the interest only period is not extended further at that stage, the borrower shall repay the loan over 20.5 years by way of 246 monthly repayments. On this basis of interest rate detailed, the interest only payment would be CHF 12,722 per month and capital and interest repayments of CHF 36,587 per month would be payable thereafter.

The repayment terms of the euro loan were originally agreed on an interest only basis for the first two years to March 2008 and this was subsequently extended to December 2009. Capital and interest payments to commence on this loan in January 2010, the borrower shall repay the loan over 21 years by way of 252 monthly repayments. Based on the interest rate detailed, Capital and interest repayments of €2,415.75 per month will commence in January 2010;

(d) the interest rate applicable to the CHF loan was the Third Named Plaintiffs' relevant Cost of Funds rate plus a margin of 2.0%. Based on the interest rate at the time of the facility letter the applicable rate was 2.0858%. The interest rate applicable to the euro loan was the Third Named Plaintiff's Cost of Funds plus a margin of 1.6%. Based on the interest rate at the time of the facility letter the applicable rate was 2.25%;

(e) the security for the loan, as expressly provided for in the facility letter, comprised (i) First legal charge over property at 20 William Street, Galway, known as Lazlo Jewellers. In this regard the Third Named Plaintiff holds a solicitor's undertaking dated 7 April, 2003 from Doyle Hanlon Solicitors, (ii) Legal charge over residential property situated at 65 Kingsley Way, London and (iii) Letter of Lien over Cash Deposits in the amount of £615,906.09." [Paragraph 6]

16. Mr. McKeever then exhibits the global deed of transfer of 12th March, 2015 by which the third named plaintiff and certain other entities purported to transfer a portfolio of facilities including the Laszlo Fried facility and related security to the fourth named plaintiff. A deed of conveyance and assignment executed by the third named plaintiff and the fourth named plaintiff on 12th March, 2015 to give effect to the transfer is also exhibited. Mr. McKeever also exhibits the notification of the agreement to assign the Laszlo Fried facility and related security to the first named defendant.

17. Lastly, the deponent exhibits copy statements of account in respect of the Laszlo Fried facility, and a letter of demand which was sent by the third named plaintiff to the first named defendant on 12th April, 2013 demanding repayment of the sums of CHF 5,557,258.91 and US $105.36. The deponent avers that, despite the said letter of demand, the first named defendant has failed, refused and/or neglected to pay the sums due and owing.

The affidavit on behalf of the Defendants

18. In his affidavit of 13th January, 2020, the first named defendant sets out his position in relation to the averments of Mr. McAteer and Mr. McKeever. In relation to the plaintiffs' application for summary judgment, the first named defendant avers that he is advised that this application is "procedurally irregular" in the context of plenary proceedings. He also comments that there is "no explanation in Mr. McKeever's Affidavit for the Plaintiffs' delay or as to why the within Motion is only now sought to be brought, some five and a half years after the plenary summons was issued".

19. The first named defendant avers that the facilities to which the plaintiffs refer makes no reference to US Dollar denominated facilities, and that therefore there is no contractual basis for the sum claimed of US $558.81. It is also pointed out that the standard terms and conditions governing business lending exhibited by Mr. McKeever relate to companies, rather than individuals, as is suggested by the facility letter exhibited in Mr. McKeever's affidavit.

20. The first named defendant is particularly critical of the alleged assignment of the facility from the third to the fourth named defendant. He says that Mr. McKeever offers no explanation or justification for the redactions in the transfer deed and deed of assignment on which Mr. McKeever relies to substantiate the assignment. He makes various criticisms of the documentation, and avers at para. 18 that "…it is a matter for the fourth Plaintiff to exhibit all relevant documentation and to properly and fairly explain why it has sought to redact and withhold key information and documentation from his application".

21. Criticism is also made of the alleged default and demand upon which the plaintiffs rely. The first named defendant avers that the motion papers "only describe one facility, being a CHF loan. No explanation is given for the basis on which that or any other facility came to be contained in three loan accounts" [paragraph 21]. Various criticisms are made of the figures provided by the certificates of balance exhibited by the plaintiffs, and the first named defendant avers that "…without a fulsome explanation or even full statements of account, I am unable to understand the figures offered by the fourth plaintiff…"

[paragraph 22]. Complaint is also made about Mr. McKeever's authority and means of knowledge from or concerning the third plaintiff, and in particular in relation to his averment that the third named plaintiff sent a letter of demand to the first named defendant of 12th April, 2013. It is averred that this notice of demand was in any event sent in a manner not contemplated by the general conditions exhibited to Mr. McKeever's affidavit.

22. The first named defendant then refers to two "*bona fide*" defences in particular. He avers firstly that "…the First and Third Defendants are entitled to rely on a limitation type Defence in respect of any portion of the Fourth Defendant's claim that pre-dates the 20th June 2012. I say that in the absence of statements of account, it is impossible to quantify or to further articulate the grounds of this defence".

23. Secondly, the first named defendant articulates a defence which he contends arises from the circumstances of his dealings with the representatives of the third named plaintiff ('Ulster Bank' or 'the bank').

24. The first named defendant refers to a meeting held on 2nd December, 2011 between Mr. Kevin McSharry, Director of Circle Consulting Limited, which company was acting on behalf of the first and third defendants, with Mr. Mervyn Duggan, a Senior Manager with Ulster Bank, to discuss a draft repayment proposal. There was then a subsequent meeting on 12th December, 2011, in which Mr. McSharry and the first named defendant met with Mr. Duggan and Ms. Barbara Seoige, a manager with Ulster Bank, to discuss a further draft repayment proposal. In relation to this meeting, the first named defendant avers as follows: -

> "29 …At that meeting, the bank was provided with two independent valuations for the properties at 20 William Street (€550,000.00) and 25 Mainguard Street (€620,000.00). The proposal submitted was significantly in excess of these values and amounted to the payment of €19,000.00 per month for 12 years (or €2,736,000.00). It was represented on behalf of Ulster Bank that this second proposal was "something that they could work with…and…was a long way there". Thereafter, by email dated 13th December, 2011, Kevin McSharry wrote to Ms. Seoige seeking feedback. Due to a decline in trading conditions, I wrote by letter dated 10th February, 2012 to Ulster Bank revising the proposal to the figure of €17,000.00 per month over 15 years as being sustainable".

25. Following an exchange of correspondence, there was a further meeting on 17th February 2012, during the course of which the first named defendant alleges that it was agreed that the monthly amount to be paid to Ulster Bank by or on behalf of him and the third named defendant ('Jaszai') would require to be maintained for a period of between four to six months in order to demonstrate that the payments could be sustainably made. The first named defendant avers that he clarified at that meeting that the amount in question was the sum of €17,000 per month over a period of fifteen years, and this was "agreed by all concerned".

26. The first defendant refers then to a meeting of 9th May, 2012 between himself and Mr. McSharry on the one hand, and Ms. Seoige and Mr. Duggan on the other. The first named defendant alleges that "…at this meeting the permanent restructure and rescheduling of my loan obligations and those of Jaszai to Ulster Bank was agreed. It was agreed that the payments to Ulster Bank were to be €17,000 per month comprising capital and interest and made up as follows: €10,000 from 20 William Street to me, and €7,000 from 25 Mainguard Street paid by Jaszai. The bank would write-off the balance of the debt over the term of the agreement which would be subject to a confidentiality provision" [paragraph 32].

27. The first named defendant avers that "…it was expressly agreed that the repayments would be amended and rescheduled such that monthly payments of €17,000.00 would be made to Ulster Bank initially for a period of four to six months to demonstrate that they could be sustained without difficulty as this was 'the platform on which the restructure would be done' and thereafter the parties would meet and the restructuring agreement would be completed and formalised on a long term basis". [Paragraph 33].

28. It is contended by the first named defendant that "at a meeting with representatives of Ulster Bank on 24th October 2012, "…in breach of the terms of the agreement previously reached and contrary to the representations previously made on its behalf, it was communicated on behalf of Ulster Bank that it wanted to continue the monthly payments as previously agreed for a further four to six month period before finalising the debt restructuring. This was completely contrary to what had actually been agreed…" [paragraph 35]. The first named defendant maintains that the agreement which he contends was reached in May 2012 was binding. He admits "…that both Jaszai and I are indebted to Ulster Bank and its lawful successors or assigns on foot of the agreement reached in May 2012 namely to repay the sum of €17,000 over a period of 15 years (i.e. €3,060,000.00) subject to all just credits…" [paragraph 37]. He contends that "…Ulster Bank enjoyed the benefit of the May 2012 agreement and ought not to be allowed to later ignore its commitments to my and Jaszai's detriment".

29. The first named defendant also makes complaint in relation to the conduct and progress of the receivership. He refers to correspondence of 17th and 27th September, 2013 sent by solicitors for the second and fourth named defendants by way of reply to correspondence from the receivers. He points out that those solicitors stated that "…our client has set aside any monies which may be due under the now disputed lease as of 27th August, 2013 so that this money will be available if and when this dispute is resolved". He avers accordingly that: -

> "…there is therefore no basis for Mr. McAteer's belief that either I or the Third Defendant have been in receipt of rental payments from either the second or fourth defendants since 27th August, 2013. For the avoidance of doubt, I confirm that neither I nor the Third Defendant has received any payment by way of rent from either the Second or Fourth Defendant since August 2013".

30. The first named defendant goes on to refer to the landlord and tenant relationships created between Jaszai and the fourth defendant in respect of the Mainguard Street property, and between the second defendant and himself in respect of the William Street property. He then avers as follows: -

> "50. At all material times Ulster Bank was aware of and consented to the creation and maintenance of each tenancy in favour of the Fourth Defendant and Second Defendant respectively. The rent levels, together with monthly licence payments of €1,500.00 for the telecommunications masts, were such that the bank was guaranteed to receive sums due on foot of the May 2012 agreement. Moreover, I say that Ulster Bank actively participated in the arrangement concerning the establishment of bank accounts into which rent due under the leases was paid. Those payments were made into accounts created for that purpose by and with Ulster Bank. Moreover, Ulster Bank enjoyed the benefits of those payments. I say and believe that the Plaintiffs are therefore estopped from denying the validity of the leases or the Fourth Defendant's tenancy and related rights in respect of the Mainguard Street property or from denying the validity of the second defendant's tenancy and related rights in respect of the William Street property".

Mr. McKeever's second affidavit

31. Mr. McKeever replied to the averments in the affidavit of the first named defendant by his affidavit of 29th January, 2020 on behalf of the plaintiffs. He exhibited redacted copies of the mortgage sale deed and deed of novation, and responded to criticisms by the first named defendant arising from the fact that these documents had not been exhibited in his first affidavit. He also exhibited "full statements of account" in relation to the loan accounts, contending that there was no double counting in the figures. He averred that "…Mr. Fried does not deny receiving the monies the subject matter of the within application or that those monies are repayable and have been repayable for a number of years". [Paragraph 15].

32. In relation to the "*bona fide*" defences of the first named defendant and Jaszai, Mr. McKeever avers that he is advised that the matters deposed to by the first named defendant "do not give rise to any defence to PAL's application". He avers that: -

> "…Mr. Fried's own affidavit refers to a process that was to take place before the purported debt restructuring was 'finalised' and he concedes that no 'final' agreement was reached. I am advised by the Plaintiffs' Solicitors that even if there was such an agreement it would not provide a defence to the within proceedings. No repayments have been made by Mr. Fried or Jaszai for several years and there is no suggestion that either party is in a position to make any such repayments. Even if Mr. Fried and Jaszai had made any such repayments it would not provide a defence to PAL's claim. Mr. Fried and Jaszai in no way acted to their detriment in making such payments as they did make in relation to facilities that were by that time due and owing to the bank". [Paragraph 16]

33. Mr. McKeever exhibits an indexed and paginated book of CRO filings, and avers as follows: -

> *"17 …Arising out of the said filings and the manner in which the Defendants have conducted the defence of the within proceedings, I have been advised by the Plaintiffs' solicitors that the Defendants and their respective officers have been engaged in a wholly unlawful course of action designed to frustrate their creditors by the diversion of assets. I have further been advised by the Plaintiff's solicitors that it is unclear on what basis Mr. Fried in his capacity as a director of the Third Named Defendant can continue to seek to avoid liabilities that were – up to the point when the Third Named Defendant filed accounts – recognised in those accounts. Once Jaszai ceased to be able to pay its debts then Mr. Fried's responsibility was to the creditors of the Company. The basis upon which Jaszai has purported to defend these proceedings and the related summary judgment proceedings remains entirely unexplained."*

Submissions of the plaintiffs

34. Detailed and extensive written submissions were made in advance of the hearing before the court, and these were supplemented by the oral submissions of Mr. Marcus Dowling BL (as he then was). The submissions, both written and oral, dealt with both the plenary and summary proceedings, although only those arguments relating to the plenary proceedings will be dealt with here.

35. It was submitted firstly that the plaintiffs were entitled to seek summary judgment against the first and third named defendants in the context of plenary proceedings, notwithstanding that the pleadings were closed, and that the entitlement of the court to entertain such a claim had been established by the judgment of Kelly J (as he then was) in *Abbey International Finance Limited v. Point Ireland Helicopters Limited* [2012] 2 IR 694.

36. In relation to the monies sought by the plaintiffs from the first named defendant pursuant to the facility letter of 29th March, 2010, the plaintiffs set out their position in paragraphs 17 to 24 of the written submissions. The plaintiffs submit that, as a matter of law, it is not open to the first named defendant to plead that he does not admit the plaintiffs' assertions in the statement of claim in relation to the Laszlo Fried facility, or in relation to the notice of default and demand made on foot of it; as the plaintiffs say at para. 18 of the submissions, "…the device of a non-admission cannot be used to sidestep the explicit rules that govern pleading where the claim is for a liquidated sum due on a loan contract". It is also submitted that *prima facie* evidence of the first named defendant's indebtedness is demonstrated by admissions by him both in his defence and on affidavit that he was unable to meet obligations in respect of the debt.

37. As regards the first named defendant's assertions that the plaintiffs do not provide sufficient information to be able to understand the claim for judgment against him, it is suggested that "…the averments made by him in response to the affidavit in the Summary Proceedings show that he does understand – with precision – the basis upon

which the interest rates are calculated, i.e. with reference to cost of funds plus a margin" [Paragraph 24].

38. In relation to the contention that the bank is estopped from enforcing the terms of the facilities against the first and third named defendants by reason of the alleged agreement for the restructure and rescheduling of those loans, it is argued that it is apparent, even on the first named defendant's own case, that no such agreement existed, and that the minutes of the alleged meeting of 9th May, 2012 on which the first named defendant relies make this clear. The plaintiffs rely on the dicta of Clarke J (as he then was) in *Kavanagh v. McLaughlin* [2015] IESC 27 as regards identifying a legal basis for a contention that certain loans do not have to be repaid: -

> "5.8 …While it is, of course, the case that a court may, on the evidence, conclude that there was some agreement or understanding of sufficient certainty and clarity so as to vary the written terms entered into between the parties, it would be necessary, in order to establish that such a situation existed, that a very clear evidential and legal basis be put forward for suggesting that the written terms which had been signed up to by both parties did not apply.
>
> 5.9 …[E]ach of the legal bases on which it might be argued that the Court should depart from the written terms of a contract require that very specific facts be clearly established on the evidence."

39. The plaintiffs contend that the first named defendant does not meet this test, but that in any event there would have to be consideration for any write-off of debt in order to create an enforceable promise pursuant to the rule in *Pinnel's* case. It is submitted, in para. 40 of the written submissions in particular, that the averments of the first named defendant fall far short of what would be required to establish meaningful acts of reliance on the alleged agreement, any acts of detriment on his part, or any consideration or benefit conferred on the bank.

40. It is argued that, in any event, even if acts of reliance by the first named defendant were established, they "would long since have expired". The plaintiffs submit that "a representation of forbearance giving rise to an estoppel will normally be temporary in nature…", and if not, the promisor "…will usually be entitled to withdraw the promise on giving reasonable notice and the promise will only become final and irrevocable if [the promisee] cannot resume his or her former position". [Laffoy J in *Barge Inn Limited v. Quinn Hospitality Ireland Operations Three Limited* [2013] IEHC 387, para. 72].

41. As regards the reliefs sought by the receivers in relation to rent, the plaintiffs assert that there is no challenge by the defendants to the efficacy of the security instruments. In fact, at para. 42 of his affidavit, the first named defendant alleges that there is "no default on the underlying facilities", a proposition which the plaintiffs consider "unsustainable". The issue therefore, according to the plaintiffs, is whether there is any basis upon which the defendants are not required to remit the rent to the receivers "at least pending the trial of these proceedings".

42. The plaintiffs refer to the letters of 17th and 27th September, 2013 from the solicitors for the second and fourth named defendants, referred to at para. 45 of the first named defendant's affidavit, in which it is asserted that those defendants have "set aside any monies which may be due under the now disputed Lease as of 27th August, 2013 so that this money will be available if and when this dispute is resolved". The plaintiffs note that no affidavits have been filed by the second and fourth named defendants "demonstrating that the rents have been duly set aside and are available as suggested above".

43. The plaintiffs make reference to certain matters which they say indicate that "the overwhelming inference to be drawn from the material before the Court is that the rents have not been paid and are not in a segregated account available to be paid pending the conclusion of the case…" [written submissions para. 47]. The plaintiffs submit that, on any analysis, any rents payable in relation to the secured properties are the property of the receivers, and that a payment to the receivers would not give rise to an acceptance of or acquiescence to the leases by the receivers, and cite the decision in *Fennell v. N17 Electrics Limited* [2012] IEHC 228 in that regard.

44. In addition to relying on its proofs of the assignment of the facilities as set out in Mr. McKeever's affidavits, the plaintiffs point out that para. 51 of the defence and counterclaim of the first and third named defendants – and paragraph 39 of the amended defence and counterclaim – rely on the fact that the facilities and loan assets have been transferred by Ulster Bank to a "third party" as a means of objecting to any claims made by Ulster Bank in the proceedings. Those defendants cannot now – it is said – "approbate and reprobate" the same instrument, and must be deemed to have accepted the transfer to the fourth named defendant.

45. Lastly, the criticism made at para. 20 of the first named defendant's affidavit – that "[t]he documentation relied upon does not disclose any evidence that any stamp duty has been paid nor is there a certificate from Revenue confirming that one of narrow exemptions applies" – is rejected. The plaintiffs refer to the decision of Barrett J in *Healy v. Ulster Bank Ireland DAC* [2018] IEHC 12, in which the court held that stamp duty is not chargeable on a "debt factoring agreement" as defined in the Stamp Duties Consolidation Act 1999 as amended, which includes "an agreement for the sale, or a transfer on sale of a debt or part of a debt where such sale occurs in the ordinary course of the business of the vendor or the purchaser".

Submissions of the first and third defendants

46. Very extensive submissions were delivered by the first and third named defendants in reply to those of the plaintiff. These were supplemented by Mr. Martin Hayden SC at the hearing. The submissions address the issues of how the court should assess the evidence in the action; whether it is appropriate to seek summary relief in a plenary action; whether Promontoria has presented sufficient evidence to establish a *prima facie* debt; and if so, whether the defendants have put forward a credible defence in accordance with the test in *Aer Rianta cpt v. Ryanair* [2001] 4 IR 607.

47. The first and third named defendants took exception to the plaintiffs seeking to introduce evidence outside that of the affidavits filed in respect of their motion. In particular, they objected to reliance on affidavits filed in an action pursuant to s.212 of the Companies Act 2014 involving the fourth named defendant and two sons of the first named defendant. I gave judgment in relation to certain aspects of this matter, reported at [2020] IEHC 325. The first and third named defendants also objected to the reliance by Mr. McKeever on certain Companies Registration Office filings in relation to the affairs of the second, third and fourth named defendants, which they alleged were not certified and had not been served on those defendants.

48. Particularly strong objection was made to the averments at para. 17 of Mr. McKeever's second affidavit, set out at para. 33 above, that "[a]rising out of the said filings and the manner in which the Defendants have conducted the defence of the within proceedings", he had been advised that "the Defendants and their respective officers have been engaged in a wholly unlawful course of action designed to frustrate their creditors by the diversion of assets". It was said that this was an expression of opinion by Mr. McKeever, which was "expressly based on hearsay". To the extent that it was offered as an expert opinion, it was not admissible as to a fact in issue.

49. It was submitted that, in any event, the plaintiffs sought to "fill in the gaping holes in their proofs with 'admissions' which are sought to be attributed to the first and third named defendants. Those admissions are sought to be extracted from statutory filings and the replying affidavits delivered. In short, it is submitted that the claimed 'admissions' relied upon by the plaintiffs simply do not support the application that is made" [Paragraph 21].

50. As regards whether the plaintiffs were entitled to seek summary relief in a plenary action, it was submitted that such a course of action should not be permitted, and reference was made to the decision of Peart J in *Judkins v. McCoy* [2013] IEHC 82, in which Peart J held that, where proceedings were correctly initiated by plenary summons due to the inclusion on the summons of reliefs other than the seeking of judgment, "…the procedures for plenary summons proceedings must be followed and adhered to…" [paragraph 33]. There is no indication in the report of that case that the decision in *Abbey International Finance*, delivered some months earlier, in which Kelly J came to a contrary conclusion, had been drawn to the attention of Peart J in *Judkins*.

51. Complaint is made by the first and third named defendants as to Mr. McKeever's means of knowledge. In particular, the point is made that Mr. McKeever avers that his means of knowledge is derived from the books and records of the fourth named plaintiff ('Promontoria'), and his immediate employer Link ASI Limited, which provides administration and other services to Promontoria in respect of the loans in question. It is submitted that Mr. McKeever at no point suggests that he has access to the books and records of the third named plaintiff ('Ulster Bank'), nor is he an officer of either Ulster Bank or Promontoria, and that as such, Promontoria is not entitled to rely on his evidence to prove the debt claimed.

52. The first and third named defendants submit, in relation to the application for judgment against the first named defendant, that the facility letter of 29th March, 2010, exhibited at SMK1 to Mr. McKeever's first affidavit, while referring to each of the loans referred to therein as "demand loan facility", does not in its terms refer to the loans as being repayable on demand, notwithstanding detailed provisions as to repayment. It is suggested that "…by any fair measure of contractual interpretation [the facilities] are at least arguably term facilities requiring, at a minimum, that Promontoria point to some event of default warranting an accelerated repayment" [paragraph 35]. It is noted that the "contractual maturity date" for the loans in the transfer documentation from Ulster Bank to Promontoria is given as 28th February, 2031.

53. It is asserted that both the loan agreements and the documentation relating to the assignment of these loans from Ulster Bank to Promontoria suggest that the loans are term facilities and not in fact demand loans. It is therefore submitted that "…there is a stateable defence that the Laszlo Fried facility is not repayable on demand and that otherwise no identifiable event of default has occurred". Various complaints are also made about the level of redaction in the assignment documentation, for which it is said "no basis or explanation is offered".

54. There are numerous criticisms of the plaintiffs' attempts to establish the amounts alleged to be due and owing by the first named defendant. Mr. McKeever initially exhibited three certificates of balance in relation to the alleged indebtedness. As Mr. McKeever is not an officer of Ulster Bank, such certificates would not be binding on the first named defendant under the terms and conditions for which the plaintiffs contend. Mr. McKeever sought to rectify this by exhibiting, in his second affidavit, "…full statements of account from the date of migration". The first and third named defendants argue that, as it would appear from these documents that Mr. McKeever is not the account manager responsible for these accounts, he is unable to establish a "course of dealing" such as was suggested by Baker J in *Promontoria (Aran) Limited v. Burns* [2020] IECA 87 at para. 86 would be necessary where the plaintiff is not a bank and cannot rely on the Bankers Books Evidence Act 1879 as amended ("the 1879 Act").

55. Adverse comment was also made on the fact that these statements commence on 25th April, 2015, with no detail as to how the figures up to that point are calculated. It is said that Mr. McKeever is not in a position to aver as to whether the facility extended to the first named defendant was repayable on demand or whether a letter of demand was sent on 12th April, 2013, or even whether it was sent to the correct address.

56. It is submitted that there is sufficient evidence of a restructure arrangement, as contended for by the first and third named defendants and as summarised at paras. 23-28 above, such that there is "either a promissory estoppel or alternatively an estoppel by convention such as to take the present situation outside of the ordinary rule in Pinnel's case" [para. 59 written submissions], or that it is at least "not very clear" that the first and third named defendants have no defence, and that they have in fact "demonstrated a credible basis for the defences raised".

57. In relation to the various reliefs sought in respect of rent, the point is made that the receivers are seeking mandatory orders, and that they must accordingly satisfy the test in *Maha Lingam v. HSE* [2005] IESC 89 that they have a "strong case likely to succeed at the hearing of the action". The first and third named defendants say there is no evidence of default in payment of rent, and no express contractual basis for the claimed entitlement to payment of rent. It is said that Ulster Bank has delivered no evidence in relation to the matter, "…nor was it joined in on the receiver's application for rents" [para. 75 written submissions].

58. The first and third named defendants emphasise that no application has been made by the receivers for possession, and that the application "…is limited to the rents only. Accordingly, on the basis of the decision in *Turner v. Walsh* [[1909] 2 KB 484] and the provisions of the charges relied upon, the Receivers do not have any basis to claim an entitlement to the rents or income of the properties at least not *in vacuo* and absent taking or obtaining an order for possession".

59. It was submitted that the receivers were not appointed as receivers of the income or rent of the mortgaged property, and that no demand was made by them of the defendants to pay over the rent or income generated by the property.

60. The first and third named defendants rely particularly on what they contend is the "unexplained and prejudicial delay" of "almost six (going by the commencement of this action) or seven years (going by their appointment) in seeking to make their application…" [para. 89 written submissions]. It is suggested that the application has been timed by the receivers "…to seek to take maximum advantage of difficulties in the wider Fried family and principally the subject of the s.212 oppression action…" [para. 89 written submissions].

61. The first and third named defendants summarised their position in relation to the rent claims as follows: -

> "95. The Receivers are, in reality, asking this Honourable Court to disregard the clear terms of the security contracts; to gloss over real factual issues; to side step the detailed statutory regime in place to facilitate the enforcement of valid security; and to take a selective (and it is respectfully submitted myopic) view of the caselaw in the area and instead, and on the basis of inference, to grant final orders in a plenary action some seven years after appointment and at a time when the wider Fried family is in the midst of separate litigation. It is submitted that in light of the foregoing, the Receivers' application ought to be refused".

Submissions of the fourth named defendant

62. Although it did not proffer evidence, the fourth named defendant, Claddagh Jewellers Limited, was separately represented, delivered written submissions and was represented ably at the hearing by Mr. Patrick Fitzgerald BL. These submissions were directed towards the orders sought requiring the second and fourth named defendants to make payments of rent to the receivers. It was pointed out that the second named defendant,

Lazlo Jewellers Limited, had been dissolved, and no application had been made by the receivers to restore it to the register.

63. The fourth named defendant submitted that the receiver's application was premature as there was a "serious question to be tried as to the validity of the Lease which cannot be resolved on a summary basis…[t]he need for these issues to be determined at plenary hearing is further compounded by the fact that the validity of the Receivers' appointment is in issue between the parties…" [para. 12 written submissions]. It was suggested that the receivers are "attempting to have their cake and eat it: they wish *Claddagh Jewellers Ltd* to pay rents directly to the Receivers but seek to deny the existence of the Lease…" [para. 13 written submissions].

64. The point is made that the receivers in the present case are not dealing with an unknown lease or tenant. They are seeking payment of the rent in full knowledge of the lease of the Mainguard Street property and its terms, having received a copy of it on 23rd February, 2012. The issue of the validity of the lease, and the fourth named defendant's right to rely on it, cannot be resolved at interlocutory stage, and "…the issue of the rent cannot be divorced from the issue of the validity of the lease… [para. 25 written submissions]".

Discussion

65. While I have attempted, in the foregoing sections of this judgment, to summarise the breadth of the submissions made by both parties, I propose in this section to focus only on the matters which have primarily influenced my decision.

66. In relation to both the application for judgment against the first named defendant and the reliefs sought by the receivers in respect of the rents relating to the properties, the defendants have raised various procedural objections to the applications. It is logical and appropriate to deal with these matters first before considering the substance of the applications.

Summary judgment in plenary proceedings

67. The first objection of the first and second named defendants relates to whether it is appropriate or possible to obtain summary judgment for liquidated sums in a plenary action. In this regard, the plaintiffs rely on the decision of Kelly J (as he then was) in *Abbey International Finance Limited v. Point Ireland Helicopters Limited* [2012] 2 IR 694 as authority for the proposition that the High Court has an inherent jurisdiction to grant summary judgment in a plenary action. The first named defendant however relies on the later judgment of Peart J in *Judkins v. McCoy* [2013] IEHC 82. It is necessary to look at these cases in some detail.

68. In *Abbey International Finance*, the plaintiff company leased three aircraft and a medical kit to the first named defendant. The plaintiff claimed that there was default in the rental obligations under the various leases and subleases. Counsel for the defendants accepted at the initial directors hearing that this was the case, and that arrears of €3,195,000 were owing. Having examined the terms of the lease in relation to payment of rent, Kelly J commented that "…it is difficult to conceive more watertight obligations to pay rent in

accordance with the terms of the lease. Yet it is a fact that almost from the very beginning there has been default on the part of the first defendant in respect of the discharge of those obligations". [Paragraph 9].

69. The plaintiff terminated the leases and subleases on 11th June, 2012, and on 14th June, 2012, commenced proceedings against the defendants. As the plaintiff sought liquidated amounts in relation to rent, but also orders seeking delivery up of the aircraft and the medical kit, the plaintiff opted to proceed by way of plenary summons. However, the plaintiff contended that there was no defence to the proceedings, and sought summary judgment for the monies due and delivery up of the aircraft.

70. Kelly J, in a decision given on 27th July, 2012, held that the plaintiff was entitled to seek summary judgment in respect of its unliquidated claims by reference to the inherent jurisdiction of the court, and the rules which apply to cases transferred to the commercial list:

> "17. I can see no reason in either law or logic why a defendant who has no defence to a liquidated claim may be subject to an application for summary judgment, but, not be so in the case of an action seeking unliquidated damages or other substantive reliefs.
>
> 18. In proceedings seeking liquidated sums, a defendant has to put his defence on affidavit within a short period of time and have it judicially tested by reference to the – admittedly low – standard of proof which has to be achieved in order to avoid summary judgment. In the absence of an ability to seek summary judgment in an unliquidated claim an unmeritorious defendant can procrastinate for months or perhaps years. That would be an obvious injustice to a plaintiff in such a case.
>
> 19. I believe there to be an inherent jurisdiction in the court to enable a plaintiff to seek summary judgment in such circumstances. It is true that there is no specific provision in the Rules of the Superior Courts 1986 to enable such an application to be brought, save in respect of cases in the commercial list to which I will turn in due course. But the absence of a specific rule should not deny a meritorious plaintiff from speedy relief against an unmeritorious defendant in an appropriate case."

71. The court also based its decision on the discretion accorded to the court under O.63A, r.5 to make directions and orders as part of the case management of proceedings in the Commercial List: -

> "A judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings".

72. The court also referred to the powers given to the court by O.63A, r.6(1) to give directions in relation to a wide range of matters, and gave a number of examples of cases in which these powers had been utilised. Kelly J then commented as follows:

> "29. Given these wide powers, I am of opinion that it is open to a plaintiff in plenary proceedings being heard in the commercial list to seek a summary disposal of them in circumstances where a defendant is alleged to be unable to demonstrate a real or *bona fide* defence. The ability to bring such an application promotes the objectives for which the commercial list was established."

73. The situation in *Judkins* was somewhat different. In that case, the original plaintiff in the case, who was succeeded after her death as plaintiff by the executors of her estate, issued a plenary summons in which she claimed a sum of €371,000 against the first named defendant, and also sought declaratory and injunctive relief. While the matter had a somewhat tortuous procedural history, the court was ultimately required to decide whether the order of the Master of the High Court granting summary judgment should be set aside "…and the process allowed to continue as plenary proceedings following the delivery of the plaintiffs' Statement of Claim".

74. Peart J allowed the defendant's appeal, stating as follows: -

> "32. In relation to the jurisdiction point, I believe that is unanswerable. The Rules of the Superior Courts provide in O.1, r.6 that 'in all proceedings (other than to take a minor into wardship) commenced by originating summons, procedure by plenary summons shall be obligatory except where procedure by summary summons or by special summons is required or authorised by these rules'. Order 2, RSC provided that procedure by way of summary summons 'may be adopted' in a number of different types of claim, including where the plaintiff seeks 'only to recover a debt or liquidated demand in money'.
>
> 33. In the present case even if the plaintiff was seeking to recover only a liquidated sum and was not seeking in addition some injunctive relief, she could have commenced her proceedings by way of plenary summons, given the use of the phrase 'may be adopted' in O.2, r.1 RSC. However, given the inclusion of reliefs other than the seeking of judgment for the amount claimed, these proceedings could not have been commenced by way of Summary Summons. It was appropriate to commence by way of Plenary Summons therefore. Having done so, however, the procedures for plenary summons proceedings must be followed and adhered to. Once the defendants entered an appearance in which they called for delivery of a Statement of Claim, a plaintiff before proceeding in any way further was required by Order 20, r.3 RSC to deliver a statement of claim within 21 days of the date of receipt of that appearance. There is nothing in the Rules which makes any provision, even by consent, for the plaintiff to issue and serve a Notice of Motion for liberty to enter final judgment returnable before the Master of the High Court either before delivery of a Statement of Claim or thereafter. It is simply not permissible, and it is surprising indeed that this was not picked up in the Central

Office when the plaintiffs' solicitor was issuing the Notice of Motion…" [Emphasis in original]

75. While the respective courts in *Abbey International Finance* and *Judkins* came to different conclusions, it will be apparent that the circumstances in which each court came to its conclusion were markedly different. In *Abbey*, when the matter came before the court on its entry into the commercial list for the initial directions hearing, in which the court would usually exercise its power to make directions in respect of case management, counsel for the defendants acknowledged that there was no defence to the liquidated claim. The court formed the view in such circumstances that it should grant judgment in respect of that claim for arrears of rent, and did so, but also admitted of the possibility that summary judgment could be granted in respect of an unliquidated claim.

76. In *Judkins*, Peart J. readily accepted that a liquidated claim could be made by way of plenary summons. However, he commented as follows: -

> "…where a plaintiff opts to proceed by way of Plenary Summons, the procedures provided by the Superior Courts must be adopted also, and the plaintiff cannot simply proceed as if the proceedings had been commenced by way of Summary Summons. One very practical reason why that is so is presumably that a General Indorsement of Claim on a Plenary Summons will not contain any detailed particulars of the claim. It will simply set forth a list of the reliefs being claimed, as in this case. It will not be until the delivery of a Statement Of Claim that the defendant will become aware of any details in relation to the claim being made. By contrast, the Special Indorsement of Claim on a Summary Summons must set forth detailed particulars of the sum being claimed, and how the sum claimed has become due and owing." [Paragraph 9]

77. In the present case, the plaintiffs followed the full plenary procedure from the institution of their proceedings up to the close of pleadings, the course of which was as follows: -

(1) Plenary summons dated 23rd May, 2014.

(2) Concurrent Plenary Summons dated 23rd May, 2014.

(3) Statement of Claim dated 8th October, 2014.

(4) Notice for Particulars dated 3rd December, 2014 [raised by the second to fourth named defendants].

(5) Replies to Notice for Particulars dated 18th February, 2015.

(6) Defence and Counterclaim of the First Defendant and Third Defendant dated 4th September, 2015.

(7) Defence and Counterclaim of the Second and Fourth Defendant dated 4th September, 2015.

(8) Notice for Particulars and Notice to Produce delivered on behalf of the First and Third Defendants dated 7th September, 2015.

(9) Replies to Notice for Particulars of the First and Third Defendants dated 19th July, 2016.

(10) Notice of Intention to Proceed dated 7th March, 2017.

(11) Amended Statement of Claim dated 21st June, 2018.

(12) Amended Plenary Summons served 21st June, 2018.

(13) Notice for Particulars and Notice to Produce on Amended Statement of Claim delivered on behalf of the First and Third Defendants dated 16th July, 2018.

(14) Replies to Notice for Particulars and Notice to Produce on Amended Statement of Claim dated 26th October, 2018.

(15) Amended Defence and Counterclaim of the First Defendant and Third Defendant dated 8th January, 2019.

(16) Reply to Defence and Counterclaim dated 26th April, 2019.

78. It should be said that, in addition to the normal course of pleadings, the plaintiffs brought a motion to strike out certain paragraphs of the defence and counterclaim which related to the past involvement of the parent bank of the third named plaintiff in criminal wrongdoing consisting of the manipulation of certain LIBOR rates. The High Court on 2nd May, 2018 acceded to the plaintiffs' application [Ní Raifeartaigh J, [2018] IEHC 386], and the appeal from this decision was subsequently dismissed by the Court of Appeal on 17th July, 2019, [2019] IECA 216.

79. It was on 7th October, 2019, nine months after receipt of the amended defence and counterclaim of the first and third named defendants, at a time when those defendants might have expected either a request for discovery or notification that the matter had been set down for trial, that the plaintiffs issued the present motion, seeking summary judgment against the first named defendant in addition to the various reliefs regarding payment of the rent in relation to the properties. It should be said that the amended defence was largely consistent with the matters set out in the affidavit and submissions of the defendants in the present application, but also contained a "preliminary objection" "… that the Fourth Plaintiff's claim against each of them is statute-barred and is bound to fail by reason of the provisions of the Statute of Limitations 1957 (as amended) …".

80. It seems to me that the decision of Peart J in *Judkins* as expressed at para. 74 above adheres closely to the provisions of the Rules of the Superior Courts, and as an indication of the way in which matters can and should usually proceed under those rules, is logical and unexceptionable. The judgment of Kelly J in *Abbey International Finance* differs only in holding that there is an inherent jurisdiction – rather than an explicit jurisdiction in the

rules – in the court to accede to a liquidated or unliquidated claim which has been advanced by plenary summons, and that the court's power to do so in a commercial list case is fortified by the court's explicit powers to give directions for the management of cases.

81. Although Kelly J may have been somewhat influenced by the ready acknowledgement of counsel for the defendants at the earliest stage of the proceedings that there was no defence to the claim in respect of the liquidated sum, it does not appear from his judgment that he was of the view that the inherent jurisdiction of the court should be limited to just such a situation. As he comments at para. 24 of his judgment: -

> "…[i]f there is an inherent jurisdiction to strike out proceedings which have no reasonable prospect of success then, in the interests of justice, why should there not, in an appropriate case, be a jurisdiction to adjudicate summarily upon a purported defence? If the defence offered is alleged to be lacking any reasonable prospect of success, then the plaintiff should have the ability to seek to recover judgment regardless of the type of proceedings. I believe that there is no good reason why such an application cannot be brought and considered by the court."

82. The present case does not come under the aegis of O.63A. It therefore falls to be decided whether, if there is an inherent jurisdiction to grant summary relief on a claim commenced by plenary summons, that jurisdiction should be exercised in the present case.

83. It seems to me that such an inherent jurisdiction must exist for the reasons set out in the judgment in *Abbey International Finance.* There will be situations where it would be unjust to deny a plaintiff who has commenced his or her action by plenary summons a right to summary judgment, and subject them to the long delays to which plenary proceedings can be prone, rather than to grant judgment where it is clearly appropriate to do so. The facts in *Abbey International Finance* present a compelling example of such a situation.

84. In the present case, the proceedings were initiated on 23rd May, 2014. The first and third named defendants delivered a defence and counterclaim on 4th September, 2015. The response of the first and third named defendants to the claims in respect of the "Laszlo Fried facility" was to make "no admission" to those claims, and to put the plaintiff on "full proof" of them. At this stage, Promontoria had – according to the plaintiffs – acceded to ownership of the facilities and securities at issue. However, no claim was initiated by motion in relation to the "Laszlo Fried facility" until the present application in October 2019. There does not appear to be any reason why a free-standing application for judgment in respect of this facility could not have been made from September 2015 onwards, assuming a court would accept that it had the jurisdiction to entertain it.

85. As we have seen, the first named defendant has now met the criticism of his defence – that it did not in fact disclose a defence in simply declining to admit the plaintiffs' claims – with a substantial affidavit and lengthy legal submissions which set out his position. It is

said that the loan agreements and assignment documentation provide that the loans are term facilities and not demand loans, and that the facility is not therefore repayable on demand, and that "otherwise no identifiable event of default has occurred". He draws attention to what he contends are serious difficulties with the proofs in the affidavits of Mr. McKeever, and indeed to Mr. McKeever's capacity to advance any such proofs.

86. As I am of the view that Kelly J (as he then was) was correct in holding that the court has an inherent jurisdiction to consider a claim for summary judgment, I am not disposed to dismiss the claim on the basis that the court is precluded from considering it, as the judgment in *Judkins* might suggest. However, the circumstances of the present case are very different to those in the *Abbey International Finance* case, in which the factual circumstances were overwhelmingly in support of granting judgment. I consider that the court should take into account the circumstances of each case in deciding whether it would be just to accede to the application for summary judgment, and I will address the question of whether or not it would be appropriate to do so in the present case in conjunction with the matters set out below.

The evidence for summary judgment

87. I have referred at paras. 51 to 55 above to the submissions made on behalf of the first named defendant in relation to the affidavits of Mr. McKeever, and in particular as to his means of knowledge as to the matters he addresses.

88. Mr. McKeever is not an employee or officer of either Ulster Bank or Promontoria, and it is not suggested that he has ever had access to the books and records of Ulster Bank for the purpose of giving evidence as to the debt. The statements of account in his second affidavit only relate to the period after Promontoria took over the loan, with no indication as to how the balance up to that point was made up. If the facility is indeed a demand facility – and there is a significant dispute in this regard – it does not appear that Mr. McKeever is in a position to give evidence in relation to the alleged letter of demand of 12th April, 2013, or for that matter, the facility letter of 29th March, 2010.

89. In *Promontoria (Aran) Limited v. Burns* [2020] IECA 87, the Court of Appeal considered the situation in which the plaintiff, which could not avail of the provisions of the 1879 Act, sought to prove facilities and debts which it had taken over from Ulster Bank Ireland Limited. The deponent who swore the grounding affidavit was, like Mr. McKeever, employed by Link ASI Limited, the servicing agent which administers debt collection on behalf of the fourth-named plaintiff in the present proceedings.

90. As Collins J stated at para. 7 of his judgment in that matter: -

> "… [n]either Promontoria nor the Servicer had any involvement in the transactions between Ulster Bank Ireland Limited and Mr. & Mrs. Burns which led to the [sic] Mr. & Mrs. Burns apparently entering into the guarantees referred to by Baker J. Equally, neither Promontoria nor the servicer had any involvement in the decision to demand payment of the guarantee debts or to issue these proceedings when such demand remained unsatisfied because (on the facts here) those events pre-

dated the assignment from Ulster Bank Ireland Limited to Promontoria. It would appear to follow that neither Promontoria nor the Servicer is in a position to '*swear positively'* to those matters insofar as that may be a requirement to obtain summary judgment…" [Emphasis in original]

91. Excerpts from the judgment of Baker J in that case show the difficulties that the court had with the documentation proffered by the plaintiff to substantiate the debt: -

> "…I do not consider that the letters of demand or the facility letters prove their contents. What is required to be proved by Promontoria is that monies were advanced on foot of certain agreements for repayment and subject to certain conditions, including a condition providing for the payment of interest, and that the monies fall due for payment. The content of the letters is relevant to show that demand was made but not whether the debt was due, or by whom and in what amount…" [paragraph 95].
>
> "…Mr. Harris [i.e. the deponent] does not say that he has possession of the books and records of Ulster Bank or that he has had an opportunity to examine these and give evidence from them… he does not say that when the assets were transferred to Promontoria following the sale from Ulster Bank that Promontoria took possession of the books and records of Ulster Bank, where these are maintained, and that he himself inspected and drew conclusions from them. He does not say how he obtained possession of the copies of the documents he exhibits nor can be [sic] confirm that the copies are true copies of the original" [paragraphs 98 to 99].
>
> "…I cannot therefore ignore the omission of a simple averment in the numerous affidavits sworn on behalf of the plaintiffs that the originals of the various documents are held by or on behalf of Promontoria and that the documents exhibited are true copies, or that the deponents have examined the books and business records of Ulster Bank relating to the loans…" [para. 103].
>
> "…It is with regard to the proof of the quantum of the claim that I have most difficulty. There are no bank statements of the type sent on a regular basis from a bank to a customer which carry indications of reliability and can be seen as part of a course of dealings, or evidence of a contractual nexus from which a court could draw an inference from a failure to respond…It is noteworthy in that context that there are no statements from Ulster Bank exhibited in any of the plaintiff's affidavits…" [paras. 104 to 105].
>
> "…Mr. Harris again exhibits a second bundle of statements of account bearing the date 20 February 2019. These statements also seem from their dates to have been prepared for the purpose of updating the figures for the hearing. They are not statements updating the figures due on a loan account of the type said to warrant a reply or evidence of a course of dealings suggestive of acceptance of liability…
>
> …There is no averment that the statements were sent to the defendants.

> …It must be assumed therefore that Mr. Harris did not examine the books and accounts of Ulster Bank or which of the historic records were handed over to Promontoria when the loans were sold, and notwithstanding that he swore three affidavits, the evidence commences with the figure calculated at 25 April 2016, after the Global Deed and after Ulster Bank assured its interest in the loan facilities and guarantees to the plaintiff. At best the evidence of Mr. Harris is evidence of the amount Promontoria was told was due by the respondents on foot of the debt at the date the sale of the debt closed. It is classic hearsay, a statement of what the deponent was told by someone else." [Paras. 107 to 109]

92. It seems to me that these criticisms apply equally to the evidence of Mr. McKeever in the present case. Neither is there a "course of dealing" which might establish a claim. In her judgment in *Burns*, Baker J stated as follows: -

> "…I conclude that the present state of the law is that in order to rely on evidence which does not come within the Act of 1879 because the plaintiff is not a bank, a claim in debt can be established by credible evidence emanating from a course of dealing, from the nature of business records that show that dealing and which carry indications of reliability, especially if those records are in the form of statements of account sent from time to time in the course of a lending transaction, which, taken together with evidence from an authorised person of an analysis and inspection of books and records, whether documentary or electronic, can in the absence of a denial or challenge which is more than a mere bald assertion, be sufficient to establish a claim." [Para. 86]

93. There is no suggestion in the affidavits of Mr. McKeever that any "course of dealing" was established between Promontoria and the first named defendant, or indeed that there was any contact between those parties outside of the context of the litigation between the notification of the first named defendant by Ulster Bank – not Promontoria – of the assignment in March 2015, and the issue of the present application in October 2019.

94. The first named defendant, at paras. 21 to 23 of his affidavit, specifically complained that he was unable to understand the figures offered by the fourth named plaintiff in the certificates of balance advanced to substantiate the debt in Mr. McKeever's first affidavit without a "full, complete and comprehensive statement of account". The second affidavit of Mr. McKeever did not address these concerns, nor did it address the expressed concerns as to Mr. McKeever's means of knowledge at para. 24 of the first named defendant's affidavit. In my view, the evidence presented by the fourth named plaintiff as to the quantum of the debt is both inadequate and inadmissible.

95. However, the fourth named plaintiff seeks to circumvent the difficulties regarding the admissibility of the evidence regarding the quantum of the debt in the following way. It is submitted that "…the true position is that Mr. Fried has admitted, through his pleadings and other material before the court, all of the matters that he now seeks to put in issue" [para. 6 written submissions].

96. In this regard, the fourth named plaintiff relies on the judgments of the Supreme Court in *Ulster Bank Ireland Limited v. O'Brien* [2015] 2 IR 656. In that case the plaintiff bank issued a motion for liberty to enter final judgment, grounded on an affidavit of a senior employee who personally had managed the defendant's loan facilities. The affidavit set out the terms of the agreements and exhibited extracts from the plaintiff's computer records, together with the letter of demand signed by the deponent. The plaintiff did not avail of the provisions of the 1879 Act. The defendants did not deny the debt, or adduce any evidence in defence of the claim, their sole submission being that, as the plaintiff had not complied with the provisions of the 1879 Act, the affidavit comprised hearsay evidence and was not admissible.

97. The Supreme Court held that the affidavit evidence was admissible, and entered judgment for the plaintiff bank. There were judgments from all three judges of the court – Laffoy, McMenamin and Charleton JJ. The fourth named plaintiff in the present case relies heavily on the judgment of Charleton J, who examined the circumstances in which a failure to respond to an accusation or assertion could be deemed to be an admission, and cites the following excerpt from his judgment: -

> "61 …analysing whether a failure to respond in the face of an accusation can amount to a declaration against interest must depend upon a myriad of factors. What follows cannot be definitive but merely indicative: an analysis of the nature of the relationship between the parties is essential; the circumstances under which an allegation is made must be taken into account, what is solemn, being different from what is social and from what is jocular or mischievous; the nature of what is claimed may amount, on the one hand, to a bare allegation or, on the other, to an apparently definitive statement backed-up by documentary proof; but finally, the test must be that a failure to respond, in circumstances when a denial would clearly be required, would amount in terms of the conduct of reasonable people to an admission".

98. The various approaches of the judges of the Supreme Court in *O'Brien* are the subject of analysis by Baker J in *Burns*: see paras. 58 to 72. In particular, Baker J had this to say about the judgment of Laffoy J: -

> "62. A number of material observations can be made regarding her judgment. The deponent of the affidavit was a 'senior relationship manager' with the restructured Ulster Bank Group and averred that she had responsibility for the daily management of the loan facilities of the defendants and went on to say that she made her affidavit from a perusal of the bank's books and records which she believed to be true and accurate. Laffoy J took the view that the combined averments were sufficient to comply with O.37, r.1 and that the deponent had 'sworn positively' to the relevant facts to establish the claim. She noted that the deponent had specific responsibility for managing loan facilities and was a senior official of the bank.

63. It is also of significance for the present appeal that the documents exhibited supported or corroborated the averment in the affidavit. The deponent was a co-signatory of the demand letters and Laffoy J noted that the content of the letter of demand was 'wholly consistent' with the bank's claim as set out in the pleadings and consistent with the facts in the affidavit. The deponent also swore that there remained due and owing by the defendant to the bank the sum identified in the pleadings.

64. Also of relevance for the present appeal is that the deponent had exhibited a statement of account in the form of a print off of an electronically maintained statement of account and that Laffoy J said it was possible to draw proper inferences from those statements and relate the statements to the specific accounts referable to the facility letter."

99. It will be clear from the judgments of Baker J and Collins J to which I have referred at paras. 90 and 91 above that the Court of Appeal in *Burns* considered the circumstances surrounding the affidavit evidence in that case to be materially different to those which the Supreme Court encountered in *O'Brien*. As Charleton J acknowledged at para. 59 of his judgment "…whether a failure to answer an allegation would make what otherwise might be hearsay into an admission is entirely dependent upon the factual circumstances".

100. Counsel for the fourth named plaintiff submits that the evidence given by the first named defendant in relation to the negotiations in 2012 regarding a restructure of the liabilities, which I have summarised at paras. 23 to 28 above, necessarily acknowledges personal indebtedness on the part of the first named defendant which triggers what counsel contends is an obligation, pursuant to the decision in *O'Brien*, to engage with the fourth named plaintiff's allegation of indebtedness, and that failure to advance a stateable defence should be regarded as an admission of the debt.

101. In my view however, this presupposes that there is appropriate evidence to which the defendant must respond. In *O'Brien*, the deponent was an employee of the bank who had personal knowledge of the matters to which she deposed. The evidence proffered by the fourth named plaintiff in the present case, as in *Burns*, is inappropriate and inadmissible.

102. In any event, while it is true that the first named defendant acknowledged personal indebtedness to Ulster Bank in 2012, he says at para. 32 of his affidavit, referred to at para. 26 above, that "…at this meeting the permanent restructure and rescheduling of my loan obligations and those of Jaszai to Ulster Bank was agreed". He does not accept that he is indebted to Ulster Bank or Promontoria in the manner contended for by the fourth named plaintiff. In this respect also, his situation is very different to that of the defendants in *O'Brien,* who did not seek to contend that no debt was owed.

Summary Judgment in Plenary Proceedings - Conclusions

103. I do not in any event consider the present case – even if I were satisfied that there was admissible evidence of the debt – to be a suitable one in which to exercise the court's discretion to grant summary judgment in a case commenced by plenary summons.

104. The summary judgment procedure is set out at O.37 of the Rules of the Superior Courts. The order provides a mechanism whereby a plaintiff may seek judgment for a liquidated sum on foot of a motion for liberty to enter final judgment without invoking the plenary procedure. The deponent in the affidavit grounding the motion must swear that, in his belief, there is no defence to the motion [O.37, r.1]. The affidavit from the defendant must state whether "the defence alleged goes to the whole or part only, and (if so) to what part, of the plaintiff's claim" [r.3]. Judgment may be given "…for the relief to which the plaintiff may appear to be entitled…" [r.7].

105. The main purpose of the summary procedure for a liquidated sum is to identify that part of the plaintiffs' claim in respect of which there is no defence, and to allow the plaintiff to obtain judgment in respect of it. Any part of the plaintiffs' claim in respect of which the defendant has a *bona fide* defence may be adjourned to plenary hearing. A procedure is thus provided whereby it can – in theory at least – be relatively quickly determined whether or not any such defence exists.

106. As we have seen, the fourth named plaintiff has in fact initiated separate proceedings by way of summary summons against the third and fourth named defendants. Those proceedings were initiated on 10th April, 2019. By notice of motion in those proceedings issued on 8th October, 2019 – one day after the present application issued – the fourth named plaintiff sought liberty to enter final judgment for CHF 12,216,750.45 and $4,448.36 against the third named defendant, Jaszai Limited, and for €7,000,000 against Mr. Fried on foot of an alleged letter of guarantee in respect of the loans to Jaszai Limited. This motion was opposed by those defendants, and was heard by me in conjunction with the present application.

107. On receipt of the summary summons, to which the defendants in those proceedings entered an appearance on 18th April, 2019, the first named defendant might reasonably have expected that, while he would inevitably have to face a motion for liberty to enter final judgment in the summary proceedings, the plenary proceedings, the pleadings in which were by that stage almost closed, would duly proceed to a plenary hearing; in short, that the fourth named plaintiff had made a strategic decision to proceed by way of summary summons in respect of the guarantee claim against him, but would proceed to trial in respect of the claims in the plenary proceedings. However, as events turned out, he has faced two motions for summary judgment, each for very substantial sums.

108. One must bear in mind that the initial decision to claim judgment in plenary proceedings, rather than in separate summary proceedings, was that of Ulster Bank rather than Promontoria, which did not enter the picture until March 2015. Nonetheless, the usual manner of proceeding has been inverted, with the fourth named plaintiff asserting its claim for summary judgment only after the full roster of pleadings for the plenary proceedings has been completed.

109. Since the initiation of the motion, there has been the full course of affidavits, submissions and a hearing. The first named defendant does not admit the claim, and opposes the motion on stated grounds. What has happened in this case is in very marked distinction to the case of *Abbey International Finance*, in which Kelly J was prepared to grant judgment where the debt was admitted by counsel for the defendant at the earliest opportunity.

110. In all the circumstances, I consider that, even if there were admissible evidence of debt, the matter should continue the course it has been on since May 2014 and proceed to plenary hearing. I would have to be convinced, in order to give summary judgment after a full exchange of pleadings and particulars over a period of five years, that it was so clear from the pleadings that there was no answer to the plaintiffs' claim that it would be unjust to cause the plaintiff to incur further cost in pursuing an inevitable judgment. Such a conclusion would always be unlikely, given that a defendant in plenary proceedings is usually entitled to deny or decline to admit the plaintiffs' allegations without committing to a specific line of defence.

111. While not perhaps going so far as Peart J in *Judkins* as to suggest that summary judgment may not be awarded in plenary proceedings, I think that a plaintiff who chooses to ignore the O.37 procedure in a case clearly suited to it, but seeks summary judgment only after making very substantial engagement with the plenary process, should only be entitled under the inherent jurisdiction of the court to an order for judgment in the clearest of cases, and where it would be unjust to refuse summary relief. I do not consider that this is such a case.

112. As I have decided not to accede to the application for summary judgment for the reasons set out above, it is neither necessary nor desirable to express an opinion on whether the other grounds of defence advanced by the first named defendant amount to a stateable or credible defence, in accordance with the well-established jurisdiction in cases such as Aer *Rianta cpt v. Ryanair* [2001] 4 IR 607.

The rent application

113. At para. 48 of the written submissions, the plaintiffs contend that:

> "…[w]hat should be occurring is that the rents should be paid to Mr. Fried and Jaszai and then remitted to Receivers pending the determination of the issue as [sic] the validity of the leases or paid directly to the Receivers in their capacity as the agent of Mr. Fried and Jaszai in relation to the properties. That has not occurred. However, on any analysis any rents earned or paid in relation to the secured properties are the property of the Receivers as the parties clearly entitled to receive."

114. However, are the receivers "the parties clearly entitled to receive"? It seems to me that this is far from clear. The receivers do not identify any provision of the charges in relation to the properties which gives them the right to rent or income of the property, nor do they assert that there is any contractual basis for such a right. While the receivers

allege that the leases are not binding on them, and that payment of rent to them would not, according to the decision of the High Court in *Fennell v. N17 Electrics Limited* [2012] 4 IR 634, give rise to any acceptance on their part of the validity of the leases, it is notable that the receivers have not sought possession of the properties. The defendants cite the decision in *Turner v. Walsh* to which I referred at para. 58 above, in which Farwell LJ of the Court of Appeal stated as follows: -

> "The question then becomes simply one of fact. Who is entitled to the income of the mortgaged property? Where land is both demised and mortgaged, the answer depends on whether the mortgagee has taken possession or given notice of his intention to take possession of the mortgaged property or not: If he has done so, then he is entitled; if he has not, the mortgagor was always and is still so entitled, and he receives and retains such income for his own benefit, without any liability to account either at law or in equity… ."

115. I do not have to decide definitively in the present application the issue of whether the receivers are entitled to the rental income. I am asked to make orders in respect of that income pending the trial of the action. I do not consider it an appropriate case in which to do so. There seem to me to be substantial issues regarding the entitlement of the receivers in relation to the collection of rent, whatever about their entitlement to possession of the properties, a claim which they do not press in the current application. I do not consider that the receivers have satisfied the test required by the decision in *Maha Lingam* referred to at para. 57 above in order to persuade me that mandatory relief is warranted.

Delay

116. In any event, I consider that there has been considerable and culpable delay in making the present application. It is well established that "delay defeats equity". The proceedings were in existence for almost five and a half years before the present application was made, at a time when the pleadings had been closed for several months. No justification is put forward by the plaintiffs for their inactivity in this regard.

117. It may be that the receivers consider that they would be unlikely to obtain an order for possession after such a delay, and confine their application for interlocutory relief accordingly to orders designed to secure the rent pending the trial. However, in the absence of an application for an order for possession, I do not think an order in respect of the rent is appropriate, given the plethora of issues involved.

Conclusion

118. For the reasons set out above, I do not consider that I should grant any of the reliefs sought by the plaintiffs. There will be an order dismissing the plaintiffs' application. The matter should proceed to plenary hearing without further ado. I will give the parties fourteen days from delivery of this judgment to make written submissions in relation to any orders which may be appropriate with a view to helping the matter progress to trial, and as to the costs of the present application.