THE HIGH COURT
COMMERCIAL

[2021] IEHC 114
[2019 No. 753 S]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

EMERALD PROPERTIES (IRL) LIMITED, JOHN MCCARTHY AND WENDY MCCARTHY

DEFENDANTS

Judgment of Mr. Justice Quinn delivered on the 19th day of February, 2021

1. The plaintiffs have applied for summary judgment pursuant to O.37 of the Rules of the Superior Courts in an amount of €12,369,550.12. The amount claimed in the notice of motion before the court is a lower sum of €12,364,400.

2. The defendants oppose the application and have applied for leave to defend the claim at a plenary hearing.

3. The intended grounds of defence may be summarised under three headings:

   (1) The defendants make a number of objections to the manner in which the plaintiff's proofs are presented. This includes issues concerning the particulars and calculation of the balance claimed to be due and objections to the inclusion of certain interest and default charges. Related submissions are made concerning asset realisations by and the conduct of receivers appointed by the plaintiff's predecessor in title, KBC Bank, and the impact of those matters on the balance claimed.

   (2) The defendants assert the existence of a collateral agreement made on 12 November, 2008, pursuant to which they say that the plaintiff's predecessor agreed to extend the relevant facilities beyond their stated maturity date and would refrain from placing the first defendant in receivership provided the second defendant funded the continuance of interest payments. They assert that the plaintiff and its predecessors have acted in breach of that agreement.

   (3) The defendants submit that the transaction whereby the plaintiff acquired the loans the subject of these proceedings and the right to pursue these proceedings amounts to a champertous assignment.

The Facilities

4. On 7 October, 2004, IIB Bank, which later became KBC Bank (and is referred to in this judgment as "KBC" or "the Bank"), granted to the first named defendant a facility of up to €10,750,000.

5. The purpose of the facility was to refinance existing borrowings of the first defendant with the then Anglo Irish Bank Corporation of €9.5 million, and to fund property renovations, interest on facilities and working capital requirements.

6. The facility was expressed to be repayable on demand at any time, and in any event on or before 1 November, 2006.

7. The facility was to be secured by a first legal mortgage over nine properties, comprising four houses at Lansdowne Road, Dublin 4 (Nos. 18, 20, 22 and 24), two houses at Lansdowne Park (Nos. 96 and 99, being properties at the rear of two of the houses on Lansdowne Road, and three apartments at The Plantations, Herbert Street, Dublin 2 (apartments 7, 8 and 9).

8. The facility provided also for the grant of guarantees by the second and third named defendants, who were directors of the first defendant.

9. The guarantee was executed by the second and third named defendants on 1 December, 2004.

10. The mortgage of the nine properties was executed in favour of KBC on 1 December, 2004. No point is taken in the case as to the validity of the mortgage or of the guarantees. In August 2014, receivers were appointed pursuant to the mortgage. Separate proceedings are pending between the receivers and the second and third named defendants in relation to one of the properties, No. 22 Lansdowne Road, which are the subject of a judgment delivered also today.

11. The terms of the facility were amended from time to time by amending facility letters dated 25 November, 2004, 13 November, 2004, 20 October, 2009, and 11 June, 2010. The meeting at which the defendants say the collateral agreement was made occurred on 12 November, 2008.

12. The amount of the facility was increased by these amendments and the maturity date extended from time to time. The letter of 20 October, 2009, provided for the grant of additional security comprising a charge over a certain Account, and over shares in a company referred to as Mainstream Renewable Power Limited, held by the second named defendant.

13. By the final amendment of 11 June, 2010, the amount advanced was increased to €13,271,820 and the final maturity date was extended to 1 June, 2011.

14. That letter also provided for a number of refinements to the provisions concerning the charges over the shares in Mainstream and for the execution of a Deed of Confirmation from the guarantors that the guarantee remained in full force and effect, which Deed was duly executed.

Events after the maturity of facilities

15. On 7 August, 2014, KBC served demands on the first defendant and on 11 August, 2014, KBC appointed Shane McCarthy and Kieran Wallace of KPMG as joint receivers over the assets charged by the mortgage.

16. The joint receivers have brought plenary proceedings against the second and third named defendants for possession of property at No. 22 Lansdowne Road. In those proceedings an injunction was sought which is the subject of a separate judgment delivered today.

17. On 30 November, 2018, the facilities the securities and the guarantees were all transferred by KBC to Beltany Property Finance DAC ("Beltany").

18. The first defendant was duly notified of the assignment by KBC by letters dated 30 November, 2018, and 5 December, 2018, and by the plaintiff on behalf of Beltany by letter dated 11 December, 2018.

19. On 4 April, 2019, Beltany served a demand on the first defendant for a balance then claimed in an amount of €12,262,768.55.

20. On 15 April, 2019, Beltany served a demand on the second and third named defendants pursuant to the terms of the guarantee for a balance of €12,272,132.04.

21. On 28 May, 2019, further letters of demand were issued by Beltany to the second and third defendants in respect of a balance said to be due at that date of €12,308,785.50.

22. These proceedings were commenced by a summary summons issued by Beltany on 7 August, 2019.

23. On 10 September, 2019, an order was made by this court (Haughton J.) entering the proceedings in the Commercial List and listing for hearing provisionally on 12 November, 2019, the plaintiff's application for summary judgment.

24. Following exchanges of affidavits and further adjournments, the application for summary judgment was heard on 12 and 13 January, 2021.

25. On 7 August, 2020, Beltany transferred its legal interest in the facility, the security, and the guarantee to the plaintiff pursuant to a Mortgage Sale and Purchase Deed and a Global Deed of Assignment. This is the assignment which the defendants submit is champertous.

26. Notice of the assignment was given to the defendants by Beltany on 14 August, 2020, and by the plaintiff on 31 August, 2020.

27. On 15 October, 2020, Barniville J. made an order pursuant to O.17 r.4 of the Rules of the Superior Courts amending the title of these proceedings to the current title from the previous title in which the named plaintiff was Beltany Property Finance DAC.

28. By the same order Barniville J. granted liberty pursuant to O.28 r.1 to the plaintiff to amend the Summary Summons and an amended summons was issued on 23 October, 2020.

This application

29. The application for summary judgment is grounded on an affidavit sworn on 28 August, 2019, by Mr. Donal O'Sullivan. Mr. O'Sullivan states that he is a director of Beltany Property Finance DAC, which was then the plaintiff.

30. Mr. O'Sullivan said that he made the affidavit on Beltany's behalf following a review of the relevant books and records of Beltany and the relevant books and records maintained on Beltany's behalf by its servicing firm, the plaintiff.

31. Mr. O'Sullivan exhibited to his affidavit the facility letters, the guarantee, the Deed of Transfer by KBC to Beltany dated 30 November, 2018, the letters giving notice of the transfer to the defendants, and the demand letters.

32. He says that the total sum advanced to Emerald under the facility was €13,271,820, and that interest was payable on that sum at the rates specified in the facility as amended. He said that as at the 27 August, 2019, the total sum of €12,364,400.13 remained due and owing, together with continuing interest.

33. Mr. O'Sullivan exhibited what he described as a Statement of Account in respect of the facility, dated 27 August, 2019. He said:

> *"A Statement of Account in respect of the facility, prepared at my request by Pepper on Beltany's behalf, appears at Tab 14 of the booklet".*

34. Mr. O'Sullivan referred to the fact of the appointment of the joint receivers and to the injunction proceedings relating to No. 22 Lansdowne Road. He then stated as follows:

> *"The sale of the security (including 22 Lansdowne Road) will not be sufficient to discharge Emerald's indebtedness to Beltany. It is anticipated that there will be a shortfall of approximately €2.5 million following the sale of the security. That shortfall will be in the order of €4.5 million if the joint receivers are unable to sell 22 Lansdowne Road."*

35. Mr. O'Sullivan then continued by stating:

> *"the current redemption figure gives credit for the fact that the joint receivers have sold three of the secured properties and will be further reduced in the event the balance of the security is sold."*

36. The Statement of Account dated 27 August, 2019, is a statement running to one page (although it contains a second page with standard notes attached). It refers to an "*opening arrears balance*" of €12,209,936.80 and a "*closing arrears balance*" of €12,364,400.13.

37. This "*Statement of Account*" is simply a statement of an amount of €12,209,936.80 being the "*opening balance*" at the time when Beltany acquired the loan from KBC, and an amount of €12,364,400.13 on 27 August, 2019, apparently being the balance after applying interest charges and payments between 3 December, 2018, and 1 August, 2019.

38. There are a number of difficulties with this statement. Firstly, Mr. O'Sullivan himself says that this is a statement prepared "*at his request by Pepper on Beltany's behalf*". It is clearly therefore not a statement in the ordinary course as would be issued to the borrower. Secondly, it contains no information which would enable a reader to ascertain how the opening balance was calculated and is simply a statement of entries from 3 December, 2018, to 1 August, 2019. Thirdly, it does not coincide with the amount claimed in the summons, although that difference is very small. If this statement were the only evidence before the court as to the balance claimed it would clearly be inadequate.

Collateral agreement

39. The second defendant swore a replying affidavit on 25 October, 2019, on behalf of all three defendants.

40. Mr. McCarthy does not dispute that the facility agreements, security and guarantees were entered into and that the loans were drawn down, save for a point made concerning the drawdown of two elements of the final facility letter namely an amount of €321,000 in respect of interest capitalisation and an amount of €120,000 for ongoing working capital expenditure.

41. Mr. McCarthy says that in late 2008, the first defendant's properties were performing well but the economic climate had deteriorated. He says that the banking crisis was causing a downturn in the economy.

42. Mr. McCarthy says that he was contacted by KBC and requested to attend a meeting. The meeting took place on 12 November, 2008, at the office of the first defendant on Lansdowne Road.

43. The meeting was attended by Mr. McCarthy and his associate Fiona O'Philbin on behalf of Emerald. KBC was represented by Mr. Michael Gilmartin, Mr. Charles Bradley and Mr. Paul Kilroy.

44. Mr. McCarthy's account of the meeting is that Mr. Gilmartin informed him that the bank was unhappy with its "*exposure*" to Emerald under the facility and that the bank had formed the view that Emerald's position was no longer sustainable. The bank anticipated that Emerald was "*on course to run up interest arrears*" and therefore that the bank could call in the facility and place Emerald into receivership immediately. Mr. McCarthy says that Mr. Gilmartin proposed to him an agreement which he described as follows in para. 17 of his affidavit: -

> *"Mr. Gilmartin explained to me that what the bank wanted to agree was a 'strategy' going forward. He said that what the bank wanted to agree with me would be a 'quid pro quo' deal: as long as I undertook to apply personal funds (derived from my own personal resources) to paying any interest shortfall Emerald faced on the facility, the bank would continue the facility and would refrain from placing Emerald into receivership".*

45. Mr. McCarthy states that he wished to do everything possible to avert a receivership and that he agreed to personally support any interest shortfall. He said that he gave to Mr. Gilmartin the undertaking which was sought namely *"that I would continue to make further injections of personal funds in reliance on the agreement he proposed at the meeting".*

46. Mr. McCarthy states that when Mr. Gilmartin proposed this agreement he, Mr. McCarthy, believed that he was acting in good faith and that he was suitably qualified and had the bank's authority to make such an agreement.

47. Mr. McCarthy says that in reliance on this agreement he set about selling part of his interest in a sister company of Emerald in London and that as part of this process he sold STG £12 million worth of properties in London, which he refers to as "*the London money*".

48. Mr. McCarthy claims that were it not for the assurances given by him to the bank, he would never have taken the action he took in disposing of the London properties, as he believes that if he had held on to those properties, that portfolio would have been worth in excess of STG £20 million.

49. Reference is made by Mr. McCarthy to ongoing engagement between him and the bank thereafter in which the bank took a proactive interest in the progress of the realisation of London assets. He says that he would never have embarked on this course of action if he had known that the bank would withdraw the facility in 2011 and place Emerald in receivership in 2014. He also says that the bank continued to press him thereafter to use the London money not only for interest accruing on the Emerald facilities but also for capital repayments.

50. No minute or other note of the meeting of 12 November, 2008, was put into evidence, although Mr. McCarthy has exhibited notes of one other meeting between himself and representatives of the bank and correspondence, to which I shall refer later.

51. The last two facility letters were signed on 20 October, 2009, and 11 June, 2010, respectively. Mr. McCarthy asserts that when he signed those he did so against the background of ongoing engagement in *"reliance upon the agreement whereby I would continue to apply personal funds to assist in meeting the company's liabilities on condition that it continued the facility and refrained from placing it into receivership".*

52. Mr. McCarthy says that he believed that when he signed the final facility letter on 25 June, 2010, "*all issues between the parties had been resolved*". He says that although the final facility letter contained a maturity date of 1 June, 2011, he expected the Bank to honour its side of the agreement by extending the facility beyond that maturity date. He does not identify the duration of the extension.

53. Mr. McCarthy says that the bank did not assert that there was a default on the facility *"in any respect other than that the bank had demanded repayment on the ground that it had matured".*

54. Finally, Mr. McCarthy says that by allowing the facility to expire and not extending it, the bank in effect "*reneged on the collateral agreement entered into with me and Emerald on 12 November 2008".* He says that he had acted to his detriment by advancing personal funds to Emerald to service interest and that the bank then failed to continue the facility. He submits that the bank is estopped from relying on the maturity clause in the facility.

Further affidavits

55. On 28 October, 2020, a supplemental affidavit was sworn on behalf of the plaintiff by Mr. Michael Quealy. Mr. Quealy says that he is a senior portfolio manager at the plaintiff. He says that he makes his affidavit on the plaintiff's behalf following a review of the relevant books and records of the plaintiff *"including computerised records containing details of the defendant's accounts".*

56. Mr. Quealy exhibited a Statement of Account dated 25 April, 2018, which he says was issued by KBC *"for the purpose of the transfer of the Facility to Beltany*". He continued by stating "*it is clear from Mr. McCarthy's affidavit that statements were periodically issued by the Bank to Emerald during the lifetime of the Facility*." Whilst Mr. Quealy observes that this statement was issued by KBC "*for the purpose of the transfer of the Facility to Beltany*", it emerges from Mr. McCarthy's own replying affidavit that he was in possession of that statement before the commencement of the proceedings, and availed of it for the purpose of his first replying affidavit. It is a document of importance to this application and I shall return to it later (see paragraphs 137 – 139).

57. Neither Mr. Quealy or Mr. O'Sullivan have any direct personal knowledge of the meeting of 12 November, 2008. Mr. Quealy addressed the contents of Mr. McCarthy's affidavit regarding that meeting by way of commentary but as he was not at the meeting, cannot therefore give any direct evidence on this subject.

58. No other persons who attended the meeting on 12 November, 2008, swore affidavits either on behalf of the plaintiff or on behalf of the defendant.

59. No contemporaneous note or record of the meeting is exhibited.

60. In the absence of any affidavit sworn by any person on behalf of the plaintiff or its predecessors who has direct knowledge of the meeting of 12 November, 2008, I must consider the evidence of Mr. McCarthy of that meeting, and the evidence of subsequent communications between the parties relied on by the defendants, to examine whether taking this evidence at its height it discloses an arguable defence such as would justify granting leave to defend on the ground of the alleged collateral agreement.

Summary judgment

61. In making this assessment, I apply the established tests for an application for summary judgment considered in such cases as *Aer Rianta cpt v Ryanair Ltd (No 1)* [2001] 4 IR 607*, IBRC v McCaughey* [2014] IESC 44, [2014] 1 IR 749, *Allied Irish Bank v O'Callaghan* [2020] IECA 318, and *Danske Bank v Shortt* [2020] IECA 137, to name only a few of the more recent relevant judgments.

62. In *Harrisrange Ltd v Duncan* [2002] IEHC 14, [2003] 4 IR 1, McKechnie J. considered the tests extensively and it is unnecessary to repeat his analysis.

63. In *Aer Rianta cpt v Ryanair Ltd*, Hardiman J. referred to the description of the test as a question of examining "*the fair and reasonable probability of the defendants having a real or bona fide defence".*

64. In the same case, McGuinness J. said the following: -

> *"…it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence. Since there had been no oral hearing and neither deponent has been cross-examined on his affidavit, it was not for the learned High Court Judge to weigh the affidavit evidence of Mr. O'Leary and Mr. Byrne or to attempt to resolve the factual contradictions contained in it. Still less is it for this court to attempt any such task".*

She continued: -

> *"The question is rather whether the proposed defence is so far-fetched or so self-contradictory as not to be credible"*

65. The case law on this subject was reviewed extensively by Ni Raifeartaigh J. in *Danske Bank v Shortt* [2020] IECA 137, at paragraph 34, where she said the following: -

> *"a) The usual evidential threshold applies in summary judgment cases in respect of a defendant who seeks to have an issue in, and/or the entire case, remitted for plenary hearing. Accordingly, the evidence does not have to reach the threshold that would be required at a trial. This is as true in respect of the issue of a collateral contract as it is for any other issue. (IBRC v. McCaughey is an example of the evidence concerning an alleged collateral contract being measured against the evidential standard in a summary judgment case).*
>
> *b) Nonetheless, and although the evidential foundation for establishing an arguable case is lower than the evidence required to establish a collateral contract at trial, a court may legitimately reach the conclusion, even on an application for summary judgment, that the evidence put forward by a defendant seeking plenary trial is so implausible, lacking credibility or otherwise thin that even that lesser standard has not been met in a particular case (examples of this are Deane, Mallon and Kennedy)".*

66. Mindful of the lower threshold identified by the Court of Appeal in *Shortt* and in other cases, I shall now examine the evidence put forward by Mr. McCarthy, firstly in his own affidavit and secondly in the documents exhibited and relied on by him.

67. The essence of Mr. McCarthy's description of the agreement is that in consideration of his agreement to advance funding to Emerald to pay any interest shortfall going forward, the Bank would "*continue the facility and would refrain from placing Emerald into receivership"*. This proposition in itself is vague. No particulars of the intended duration of such an agreement were given. The court is being invited to infer that this arrangement would continue for as long as the second defendant would personally fund the interest payments, however indefinite that might be.

68. Similarly vague is the duration of the suggested obligation to refrain from placing Emerald into receivership.

69. As matters transpired it was not until 11 August, 2014, that the bank appointed receivers. At no point have any of the defendants claimed that such an appointment was invalid or in breach of contract, save for the suggested collateral contract of 12 November, 2008.

70. On his own account of the matter, Mr. McCarthy was already advancing funds to the company and he says at paragraph 19 of his affidavit that by that time he had already advanced personal funds of €490,000 to support interest payments being made to the bank.

71. The undisputed evidence is that the Bank forbore in terms of enforcing its rights against the first defendant until 11 August, 2014, when it appointed the joint receivers and against the second and third defendant as guarantors when it commenced these proceedings five years later on 7 August, 2019.

Renewals and extensions of the facility: final facility letter 21 June, 2010

72. A central part of the defendant's submission is that when signing the final facility letter, which contained the maturity date relied on by the plaintiffs of 1 June, 2011, Mr. McCarthy did so in reliance on the agreement of November 2008. He also refers to correspondence during 2010. It is informative to consider the correspondence relied on.

73. Mr McCarthy exhibited a letter dated 9 February, 2010, from KBC apparently in reply to a letter which he wrote on 28 January, 2010. The defendant did not exhibit that letter.

74. In this letter, the author, Mr. David O'Mahony, "Senior Manager" at KBC Bank Ireland Ltd., refers to ongoing discussions and endeavours being made *"for some time to reach agreement with you to provide an extension to your facility and to address the substantial arrears position on your account".* Mr. O'Mahony continues: -

> *"Following our discussions in early 2009, KBC Credit Committee approved a restructuring of your account in May 2009.*
>
> *Once the vacancy at no. 22 was resolved in September 2009 credit approval was received to restructure your account as follows: -*
>
> - *Extend the term of the loan to June 2011, a full rental sweep with all rent going forward to be lodged into a deposit account with KBC;*

- *Capitalise €313,000 of arrears subject to additional security being provided via a pledge over your Mainstream shares;*

- *Provide a €120,000 working capital facility to fund management expenses on the properties over the term;*

- *A pledge over the Mainstream shares to be provided but solely limited to Tranches E and F.*

As is clear from the approved facilities KBC has worked with you in providing a facility to address the current position. Given the evolution of the facility during 2009 with the vacancy of no. 18 and subsequently no. 22 and the substantial arrears on the account KBC has at all times endeavoured to provide an agreed solution and it has in no way "prevaricated" or "rolled back" this regard. The terms of the facility letter dated 20 October 2009, to which you confirmed your agreement, sets out the details above".

75. Notably, Mr. McCarthy does not exhibit the letter of 28 January, 2010, to which this was a reply, or his reply to this letter. There is nothing contained in this letter which is consistent with the collateral contract alleged by Mr. McCarthy. If anything, this letter is reflective of ongoing discussions about an extension to the facility which at that stage was due to mature on 1 June, 2011, a maturity date which was restated in the facility letter ultimately negotiated and concluded on 21 June, 2010.

76. Reliance is placed by the defendants on a letter of 25 June, 2010, from KBC to Emerald. This letter refers to the final amending facility letter dated 21 June, 2010, and states that subject to the terms and conditions contained in that letter, KBC are agreeable to certain matters in relation to the operation of the facility. These relate to such matters as the application of surpluses in any rental deposit account to discharge insurance and management fees, a requirement that at maturity any funds held in the rental deposit account will be used to discharge outstanding interest charges, costs and expenses and thereafter any capital amounts due under particular tranches, first and thereafter the outstanding principle, and a particular agreement regarding the availability of the working capital facility referred to in the final facility letter.

77. These were all operational matters relating to the operation of the facility and the letter contains no reference to extending the maturity date. Mr. McCarthy states in relation to this as follows: -

"I thought that the renewed facility in conjunction with this letter signalled that we had reached agreement in every respect and I never imagined or even thought for a moment that the whole scenario might be a trap designed to capture our Mainstream shares".

78. If anything, this letter and Mr McCarthy's own evidence illustrates that the facility letters stood confirmed in their terms. No suggestion is made by the defendant that any of the

facility letters were not signed or fully understood by him and I can find nothing in this correspondence which supports the contention that the bank extended or waived the maturity date.

79. On 20 June, 2011, KBC wrote to Emerald in the following terms: -

> *"As outlined in our letter to you dated 17 June 2011 your loan facility which is documented under the facility letter has matured and as such is due for immediate repayment.*
>
> *If you wish to have your loan facility extended, can you please provide a detailed proposal to us, clearly setting out how you intend to meet both interest and capital repayments. I attach also a formal application form that you might complete if it is indeed your intention to seek an extension of your loan facility".*

80. On the same day, Mr. McCarthy replied in the following terms: -

> *"I would be grateful if the bank would extend me a little patience in the short term".*

81. He then inquired if the Bank was still refusing to release any funds from the working capital facility.

82. The Bank replied on the same day, confirming that the facility had matured and had not been repaid and stated: -

> *"As advised the facility has now matured and has not been repaid. As such an event of default has occurred and so no drawdown is permitted"*

83. Mr. McCarthy exhibits a letter of 14 September, 2011, which he wrote to the Bank by way of an update on the status of charged assets, an insurance claim relating to No. 22 Lansdowne Road, valuation matters, sale of London assets, and concludes as follows: -

> *"Otherwise, as mentioned in my letter of 16 August [not exhibited] I need a reasonable degree of tolerance on the bank's part in order to allow me to progress the above schedule and get back on an even keel as quickly as possible. I will keep the bank posted as to progress as it happens and if I am needed for anything else in the meantime please do not hesitate to let me know".*

84. This correspondence is typical of the exchanges between a bank and customer when a loan has become overdue for repayment and of itself is unobjectionable. However, in as much as these are the letters selected by the first defendant to evidence the collateral agreement of 12 November, 2008, their contents do not advance his submission. If anything, they evidence the absence of any agreement deviating from the repayment terms stipulated in the facility letters.

Meeting of 30 April, 2012

85. Mr. McCarthy places reliance on a minute of a meeting attended by him and representatives of the Bank on 30 April, 2012. A copy of the minute was obtained by him pursuant to a data access request and is heavily redacted as regards the names of bank personnel. He refers to this as evidence of the Bank taking a close and keen interest in his efforts to realise London properties and advances the proposition that this constitutes evidence supporting the existence of the agreement of November 2008.

86. This minute shows that the Bank have noted that the facility had matured in 2011 and that the Bank had given Mr. McCarthy a period of forbearance to sell his UK properties and provide a capital repayment plan.

87. Representatives of the Bank were quoted as having stated the following: -

- *"Facility has matured in June 2011;*
- *KBC have given JMcC a period of forbearance to sell his UK properties and provide a capital repayment plan;*
- *KBC have been reasonable to date with our approach;*
- *KBC need a commitment that there will be capital paid down on the facility;*
- *A repayment plan over a three-year period would be useful;*
- *Queried whether JMcC would consider reducing the debt by property sales possibly the apartments?"*

88. This minute runs to four pages and takes the form of a series of exchanges regarding the status of realisations, exchanges regarding the willingness of the Bank to allow continued forbearance, culminating in a conclusion that the matter would be reviewed following the meeting. It does not say who had committed to revert thereafter.

89. There are two striking features of the minutes of this meeting: -

(i) Nowhere in all of the exchanges is any assertion made of the existence of the November 2008 agreement;

(ii) It is the only minute exhibited or relied on by Mr. McCarthy in support of his submissions.

90. No other minute, whether contemporaneous or otherwise, has been produced either as a minute of the November 2008 meeting or referring thereto. Nor is any note of any other meeting from November 2008 onwards, before and after the calling of the loan, exhibited. The first defendant selected this minute, which is inconsistent with his submission.

Letter of 30 August, 2013, Conlan Crotty Murray & Co. to KBC

91. Mr. McCarthy places reliance on a letter written by his accountants, Conlan Crotty Murray & Co. on 13 August, 2013. Again, this letter has been selected and correspondence

exchanged before and after it has not been exhibited by Mr. McCarthy. In his second affidavit, he characterises this letter as a rejection of a request by the Bank to agree a new arrangement "*contrary to the November 2008 agreement*". In fact, a close reading of this letter contains no assertion of the November 2008 agreement.

92. In this letter, Messrs. Conlan Crotty Murray & Co. firstly reject the contents of a letter from the Bank dated 31 July, 2013, (not exhibited) and state that the bank's position is not acceptable. They continue: -

> *"Moreover, the proposals set down by the bank in this letter is entirely contrary to its former position; it gave our client an assurance it would not pressurise him and allow him continue his business, providing he settled all interest arrears and allow him to continue his business, providing he settled all interest arrears and maintained the company's interest payments in compliance. Our client's decision to sell his interest in Emerald London was solely made on this basis. He exited London in order to release personal funds, so as to meet the bank's requirements, in order to permit him to continue his Dublin operation. If the bank does not honour this undertaking now, it will have very significant consequences for our client in terms of consequential loss and damage.*
>
> *Our client is still anxious to come to a workable agreement with the bank".*

93. The letter then contains a recital of a number of offers which the defendants have made and commitments made in respect of payments. It continues: -

> *"On any reasonable evaluation of the position, our client has clearly demonstrated that he is capable and willing to continue his business, in a sustainable manner, while maintaining his facility with the bank in compliance with existing terms, for a period of at least a further three years.*
>
> *In an attempt to try and secure its continuing existence, our client has instructed us to confirm that he is willing to consider injecting even further personal funds into the company, to provide a guarantee to the bank ensuring that its interest payments will be met for a period in excess of a further three years and possibly a further four or five years. This would be in addition to clearing all outstanding interest arrears. The bank is aware that this undertaking is capable of being satisfied from the distributions he will receive from the London funds.*
>
> *We would be obliged if the bank would reply letting our client know whether or not it would be acceptable to continue the existing facility on that basis".*

94. The letter concludes by stating the defendant's willingness to attend a further meeting to progress the matter "*on a mutually positive basis (including consideration of any alternative proposals the bank may wish to put to my client)".*

95. The reference to an existing "*undertaking*" is vague and there is no suggestion by Messrs. Conlan Crotty Murray that they are relying on a particular collateral agreement made on

12 November, 2008, almost five years earlier. On the contrary, the letter is an appeal to KBC to "*come to a workable agreement*" and a recital of a series of offers.

96. No assertion of the existence of a binding agreement was made, and the letter if anything is inconsistent with the proposition now advanced that a binding collateral agreement was made in November 2008.

97. Another noteworthy feature of this letter is that it contains acknowledgement in a number of places of the existence of interest arrears in August 2013, which would be a breach of the collateral agreement.

98. Throughout this correspondence there is no articulation of the terms of the collateral agreement, which is asserted for the first time in the second defendant's affidavit sworn on 25 October, 2019.

Conclusion as regards alleged collateral agreement

99. Six facility letters in total were executed. The first four (7 October, 2004, 25 November, 2004, 30 November, 2004, and 10 July, 2006) were executed before the alleged collateral agreement. The defendant claims that the collateral agreement was made on 12 November, 2008. An amending facility letter was executed on 20 October, 2009, and the final facility letter on 21 June, 2010.

100. No explanation has been proffered by the defendant as to how or why he signed the last two facility letters after the making of the alleged collateral agreement of 12 November, 2008, without seeking to have the stated maturity date amended or qualified to reflect that agreement.

101. Although the facility letters all follow a certain form which is clearly a standard bank form, it cannot be said that these were facility letters unilaterally issued or imposed on the defendant. Firstly, the correspondence of February 2010, being the only documentary material exhibited between the dates of the last two facility letters shows that the parties were in active negotiations as to the facility and extensions of the maturity date. Secondly, the last two letters contain particular non-standard provisions dealing with additions to the security arrangements, to extend to the "*Mainstream*" shares. Clearly, they reflected the outcome of very particular negotiations, and yet contain no provisions consistent with the alleged collateral contract.

102. I have come to the conclusion that the only correspondence and material which has been relied on by the defendant is inconsistent with the bare assertion which he makes regarding the vague and inchoate terms of the purported collateral agreement. The facility letters signed after the date of the alleged agreement were not standard terms imposed, but resulted from negotiations, and are also inconsistent with the asserted collateral agreement.

103. Mr. McCarthy may have formed a view, whether based on the meeting of 12 November 2008 or otherwise, that if he were to realise assets outside Emerald and utilise the proceeds to defray interest shortfalls accruing to Emerald, he would be in a position to

secure further extensions or persuade KBC to apply less pressure, to use his own words. It is not for the court to speculate on this belief, but the evidence put forward by the first defendant takes the court no further than such a proposition, and is inconsistent with the collateral contract asserted. That assertion is therefore, as Ní Raifeartaigh J. put it in *Shortt*, implausible and lacking in credibility.

Champerty

104. The assignment of the loans, security and guarantees was effected pursuant to two instruments executed on 7 August, 2020, being a Mortgage Sale and Purchase Deed and a Global Deed of Assignment, each made between Beltany and the plaintiff.

105. These instruments, with certain redactions to which no objection was taken, were exhibited to the affidavit of Mr. Quealy sworn 30 September, 2020, which grounded the application for the order made by Barniville J. on 15 October, 2020, amending the title of these proceedings and granting liberty to the plaintiff to amend the summary summons.

106. The defendants submit that this transaction amounts to a champertous assignment of the right to pursue these proceedings. It is submitted that in circumstances where this motion for judgment to recover the principle sum and interest was already pending before the court and had been adjourned from time to time, the effect of the assignment was that the plaintiff was acquiring a bare right to litigate the claim.

107. Counsel for the plaintiffs urged on the court that applications for the substitution of assignees of debts as plaintiffs in pending debt recovery proceedings are made in the High Court almost every week as a matter of course and that to now find that an assignment of this nature was champertous would have a hugely disruptive effect on the market practices associated with the assignment of debts and loans in the State. I am not persuaded that this argument rules out a closer examination of the points which have been made by the defendants and it is therefore necessary to consider the submissions made and the case law governing the point.

108. The only precedent invoked by the defendants for this proposition is the judgment of the Supreme Court in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2018] IESC 44, [2019] 1 IR 1. Extensive reference was made to the judgments of the Supreme Court and in particular of O'Donnell J.

109. The first observation to be made about *SPV Osus* is that on its facts, the impugned transaction was fundamentally different from the assignment in this case.

110. *SPV Osus* had acquired the interests of certain investors in claims against the bankrupt estate of Bernard L. Madoff Investments LLC. The claims were known as "*Allowed Customer Claims*" or "*ACC's".* These carried an entitlement to be paid in priority in the Madoff bankruptcy.

111. The assignment to the plaintiff in that case extended not only to the basic rights to prove in the bankruptcy but also a wide range of rights and benefits previously held by the assignor including any action or claim "*of any nature whatsoever, whether against the*

debtor or any other party arising out of or in connection with the purchased claim", and "*any other rights, action or claim arising out of the assignor's investment in debtor".* (emphasis added)

112. The proceedings against HSBC were for claims not for direct recovery of the amount of the claim made in the bankruptcy, but claims against HSBC and others as custodians for breach of contract, misrepresentation, negligence and breaches of fiduciary duties.

113. The High Court held that the assignment was void as it comprised an assignment of a bare right to litigate. This was upheld by the Court of Appeal and the Supreme Court.

114. O'Donnell J. considered the law on maintenance and champerty extensively and the impact of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 which provides as follows: -

> *"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor".*

115. O'Donnell J. noted that the existence of s. 28 (6) illustrates: -

> *". . . the fact that there is no absolute rule against the assignment of rights of action. In some cases, such as assignment of debts, assignment is permissible, and arguably to be encouraged".*

116. O'Donnell J. started his analysis with the examination of *Williams v Protheroe* [1829] 148 ER 1122. In that case the purchaser of an estate agreed to take over a pending claim for arrears of rent against a tenant and the right to commence a claim for dilapidations against the same tenant. The purchaser was to be entitled to recover anything received from the proceedings. The court found that the purchase of the estate was *clearly bona fide* and the assignment of the claims was ancillary to it.

117. O'Donnell J. described this case as: -

> *". . . an early illustration of the principle that a simple agreement to assign a right of action to sue will normally be void as savouring of champerty, but will be upheld if it is part (although not a necessary part) of a larger transaction (in this case the conveyance of property) to which the cause of action related".*

118. O'Donnell J. also cited with approval a passage on point from the speech of Baroness Hale in *Massai Aviation Services v Attorney General* [2007] UKPC 12 as follows: -

> *"The buying and selling of choses in action is, of course, commonplace. Debts are regularly traded at a discount so that the creditor can obtain some of what he is entitled to while passing on the risks of litigation to others".*

119. Baroness Hale continued: -

> *"In order to decide whether the particular transaction is permissible, it is essential to look at the transaction as a whole and to ask whether there is anything in it which is contrary to public policy. When one looks at this transaction as a whole, it is clear that there was nothing objectionable about it at all"*

120. On the subject of public policy, the submissions made to me focused completely on the concept that the assignment of a chose in action is of itself champertous. I was not referred to any public policy considerations which would justify finding that an assignment of a debt coupled with pending litigation against the debtor offends public policy.

121. Examining questions concerning public policy, O'Donnell J. said: -

> *"Champerty has always been regarded as more obnoxious than maintenance, because it involves not merely the involvement in the proceedings of a third party, but also the possibility that the party will recover some proportion of any award of damages if the claim is successful. The law has always viewed this with suspicion, primarily because it necessarily involves depriving a successful plaintiff of the full amount calculated by the court as necessary to compensate him or her in the circumstances for a wrong he or she has suffered, and for which it is the function of the administration of justice to provide a remedy. However, the law also considers it suspect because the third party funder recovers a portion of the award not as damages for an injury done or for a right breached, but rather as a profit in a commercial transaction, by definition at the expense of the wronged plaintiff. There may be cases where it might be said that this is preferable to no recovery at all, but, as the extract from the judgment of Heydon J. in Jeffrey and Katauskas illustrates, third party profit is regarded, in principle at least, as offensive to the common law unless justified, and - even when capable of justification - unless controlled and regulated".*

122. A critical feature of the assignment of debts and, where appropriate, pending litigation against the debtor, (and which is commonplace in this Court and frequently the subject of application for substitution of the assignee as plaintiffs), is that the assignee has not, as O'Donnell J. put it, acquired a profit "*at the expense of the wronged plaintiff*". Instead, the assignor has offered the relevant debts and security for sale and elected to enter into an outright assignment on freely negotiated terms, which include conferring on the assignee the ancillary right to pursue recovery of the assigned debt.

123. The defendants submitted that what distinguishes this case from many others is that the assignment occurred after the commencement of these proceedings and when the motion for summary judgment was pending before this Court.

124. I invited the parties to address me as to the relevance to this issue of the judgment of the Court of Appeal (Hogan J.) in *Morrissey v IBRC* [2017] IECA 162. No submissions were made as to the impact of that judgment.

125. In *Morrissey*, the debt recovery proceedings had been commenced in 2011.

126. In 2014, the special liquidators of IBRC entered into an agreement to sell loans, including those of Mr. Morrissey. The deed of transfer effected a transfer to the purchaser both of the loans and the pending debt recovery proceedings.

127. Hogan J. considered the question of champerty and certain case law, notably *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, [1980] QB 670 (which O'Donnell J. considered extensively in *SPV Osus*) and said the following: -

> *"In Trendtex the House of Lords held that the agreement under which the assignment was made savoured of champerty because it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in it in return for a division of the spoils. The critical point, of course, was that the assignee in that case had no genuine commercial interest in the litigation. The difference here is that the present litigation which has been assigned is manifestly simply in aid of the enforcement of the loans which themselves have already been found by the High Court to have been lawfully assigned…*
>
> *there is nothing to suggest that the loan sale agreement involved anything other than a bare loan sale agreement, comprising the assignment of the loans from IBRC to Stone, along with the associated right to sue in respect of the recovery of the loans".(emphasis added)*

128. Hogan J. concluded that the objection that the loan sale agreement was champertous must fail.

129. The judgment in *Morrissey* was not considered in *SPV Osus*. I can only conclude that this was because the transaction was so radically different to that considered in *SPV Osus* that none of the parties considered that it would inform the court's consideration. The case now before me is clearly akin to the facts of *Morrissey*, which informs me in rejecting the submission made as to champerty.

130. It was submitted on behalf of the defendants that on an application for summary judgment, it was only necessary for the defendants to demonstrate that an arguable case could be made out to the effect that the transaction of the assignment was champertous. I was urged to find that it was not "*very clear*", to quote Hardiman J. in *Aer Rianta cpt v Ryanair*, that the defendants have no case that the assignment was champertous. It

seems to me that the judgment in *Morrissey* is clearly on point and I have therefore followed that approach.

Proof of the debt

131. I have already observed that the only statement of the account exhibited in the grounding affidavit of Mr. O'Sullivan sworn 28 August, 2019, being a statement in respect of the facility prepared at Mr. O'Sullivan's request by Pepper on Beltany's behalf, is of limited, if any, probative value in relation to the debt.

132. In his first replying affidavit sworn 25 October, 2019, Mr. McCarthy does not deny that the facilities were drawn down, with the exception of an objection made in relation to two parts of the final facility in respect of interest arrears and a working capital amount.

133. Mr. McCarthy then makes the following observations in relation to the quantum of the debt: -

    (i) That two particular statements dated 10 February, 2017, and 7 December, 2017, appear to refer to a different balance as at 1 June, 2011, and that he received no explanation for this discrepancy of €102,377.36. Mr. McCarthy exhibited one page from each of these statements, being respectively page "*10 of 38*" and page "*1 of 10";*

    (ii) That the claim has been based on an incorrect interest rate;

    (iii) That the Euribor rate was inappropriately applied and no account taken of the fact that in June 2015 the Euribor rate had turned negative;

    (iv) That the bank and subsequently Beltany have been charging penalty interest since the maturity of the facility in June 2011 which is a generic rate and therefore not a genuine attempt at recovering a pre-estimated loss, which he says is unenforceable;

    (v) That fees associated with the receivership were inappropriately debited to the account.

134. In his affidavit of 28 October, 2020, Mr. Quealy refers to these items and states that whilst the plaintiff does not accept the validity of Mr. McCarthy's arguments concerning the figures claimed in these proceedings, the plaintiff is prepared for the purpose of this application for summary judgment only to waive elements of the claim challenged by Mr. McCarthy, being the items referred to above. He says that the total of those figures is €1,383,448.36. He states, and counsel for the plaintiffs confirmed in submissions at the hearing, that if the court were to award summary judgment, the plaintiff would waive these amounts in these proceedings.

135. The defendants submit that this approach is inappropriate and that it is "*in terrorem*" of the court. They submit that since the plaintiff is reserving its right to revert to claiming

these sums if the matter is remitted to plenary hearing, this amounts to an acknowledgment that the application for summary judgment would fail.

136. It is a valid position for a plaintiff to adopt at the hearing of an application for summary judgment to indicate that it is willing to have certain contested elements of the claim remitted to plenary hearing. In this case, the plaintiff has gone further and stated that if the court grants summary judgment, it does not intend to pursue those otherwise disputed items at all. Far from being "*in terrorem*" of the court, this seems to me to be an appropriate approach. It does not influence or inform my decision in relation to the elements of the claim which are not the subject of those waivers and I now turn to a consideration of the matters touching on the proof of the balance of the debt itself.

137. In Mr. McCarthy's affidavit of 25 October, 2019, he exhibits, in support of the complaints regarding the calculation of interest charges, fees and such matters, a report dated October 2019 prepared by his financial advisors, Messrs. Smith and Williamson. The contents of that report are relevant only to the issues regarding calculation of interest and surcharges and other items. However, it contains a very important statement at page 1 where reference is made to the "*Documentation Reviewed*". Messrs. Smith and Williamson stated under this heading the following: -

> *"Our review was confined to an examination of documentation provided by Mr. John McCarthy in his capacity as Director of the Company, as follows: -*
>
> *(a) KBC Statement of Loan and Facility Arrears Account issued 25 April, 2018. We note that the statement period is 1 December, 2004, to 24 April,, 2018; however, we did not review any transactions prior to 1 June, 2011.*
>
> *(b) KBC Statement of Facility Arrears Account issued 7 December, 2017. We note that the statement period is 1 January, 2018, to 30 April, 2018.*
>
> *(c) Pepper Statement of Account issued on 27 August, 2019. We note that the statement period is 30 November, 2018, to 27 August, 2019.*
>
> *(d) Summaries of the bank statements at (a) to (c) above, provided in Excel format by Mr. McCarthy (the "excel summaries")."*

138. The statement referred to at (a) above is a statement dated 25 April, 2018, and is exhibited to the later affidavit of Mr. Quealy. It comprises 29 pages, identifying entries on the account from 1 December, 2004, through to 3 April, 2018. That statement reveals details of amounts advanced, interest charges, (including details of the rates of interest where appropriate) lodgements and other credits, fees charged and received, repayments, and a running balance throughout identifying where appropriate so much of the balance as is in arrears at any given time.

139. It is clear from the Smith and Williamson Report exhibited by Mr. McCarthy and from Mr. McCarthy's own evidence that Mr. McCarthy was in possession of this comprehensive statement, even before it was exhibited by the plaintiff. It enabled him to make *"excel*

summaries" to brief Smith and Williamson, whose Report then informed the contents of his replying affidavit.

140. In the affidavit of Mr. Quealy, sworn 30 September, 2020, grounding the application for substitution of the plaintiff for Beltany, Mr. Quealy states that it is intended that the plaintiff in the amended summary summons will make reference to statements of account furnished to the defendants.

141. Paragraph 17 of the summons is then amended by the addition of the following sentence: -

> *"The said sum was calculated by reference to the details contained in the statements of account furnished from time to time by the bank and/or Beltany and/or Pepper to Emerald in respect of the facility. Pepper will rely on said statements of account for their full terms, true meaning and effect".*

142. It is said by the plaintiffs that this amendment coupled with the production of the statement which is then exhibited to Mr. Quealy's affidavit of 28 October, 2020, being the statement of 25 April, 2018, meet the test regarding particularisation of the claim identified by Clarke J. in *Bank of Ireland Mortgage Bank v O'Malley* [2019] IESC 84, [2020] 2 ILRM 423.

143. In *O'Malley,* objection was taken by the defendant to the form of the indorsement of claim on the summons. It was said that it was not compliant with the requirement in O.4 r.4 of the Rules of the Superior Courts which states: -

> *"The indorsement of claim on a summary summons and on a special summons shall be entitled "special indorsement of claim," and shall state specifically and with all necessary particulars the relief claimed and the grounds thereof."*

144. In *O'Malley*, the court examined earlier case law concerning the level of particulars which ought to be provided to enable a defendant to meet a claim. The court referred to the judgment of the Court of Appeal in *Allied Irish Banks v. Pierce* [2015] IECA 87. In that case the court had considered particulars to have been sufficient in the special indorsement of claim where they referred to the sum outstanding, the date of demand and the relevant account. In circumstances *"where it was clear that the defendant in question was fully acquainted with the nature of the bank's claim against her and had not asserted any confusion or uncertainty as to her liability*".

145. In Pierce, Hogan J. said the following: -

> *"I do not doubt but that there might be special cases involving proceedings brought by way of summary summons where more elaborate particulars might be required. Yet such cases are likely to be unusual – perhaps even exceptional – and no objection to the form of pleading should properly be entertained unless the defendant has first made out a convincing case by way of replying affidavit to the*

effect that, absent such additional particulars, the fair defence of the proceedings would be compromised".

146. The court also referred to the judgment in *Allied Irish Banks Plc v Marino Motor Works Ltd* [2017] IEHC 522, where a claim for summary judgment was remitted to plenary hearing, and the court said the following: -

> *"I have reached this conclusion with some considerable reservation, but my concern is that a summary judgment would be entered for a particular sum when neither the defendant nor the court is in a position to check, on the information available, that the figures are correct. This is not a straightforward case of a single loan with a single loan account on which the interest charged can be easily calculated. There were multiple accounts and the interest calculation is potentially complex. It has not been done in a manner sufficiently transparent for a professional accountant, on the information available to date, to be able to assess whether the figure is correct. Further, the bank has refused to provide the information when it was requested, albeit that the request was made late in the day".*

147. The Chief Justice then considered the question of adequacy of pleadings and said the following: -

> *"So far as the pleadings are concerned, it does seem to me that a court may be entitled to take into account, in assessing the adequacy of the manner in which a debt claim is particularised, any documentation which has been sent to the defendant in advance of the commencement of the proceedings. The procedures are intended to be summary. They are not intended to involve an overly detailed account of every twist and turn of a banking relationship which might go back many years and involve, in at least some cases, thousands of transactions or measures potentially affecting the liability of the borrower. The more detail the borrower has been given in advance, the more it may be possible to justify a relatively shorthand way of describing how the amount due is calculated. But even there, it seems to me that it is necessary for a plaintiff, if they wish to rely on previously supplied details, to at least make some reference to those details in its special indorsement of claim…*
>
> *If the indorsement specifies the liquidated sum due but says it is calculated in accordance with some identified document or documents already sent to the defendant, then he has sufficient information, provided that those documents, in turn, themselves provide the necessary detail. (emphasis added)*
>
> *While the special indorsement of claim in this case sets out the terms of the loan, the fact that it was accepted and that the monies were drawn down and an assertion that Mr. O'Malley has failed to repay monies demanded in accordance with the terms of the loan which are therefore said to be due, there is only a bald reference to the fact that the sum said to be due in those circumstances is the amount of €221,795.53. No detail whatsoever is given as to how that sum is*

calculated. It is true that the same sum is mentioned on the Statement of Account as previously supplied to Mr. O'Malley. That fact would, therefore, in my view have at least been sufficient to transfer the analysis of the sufficiency of the details given from the special summons to the Statement of Account, had there been some reference in the special indorsement of claim to the fact that the sum in question was calculated in accordance with the terms of the Statement of Account".

148. In *O'Malley*, the court found that the only evidence of detail as to the calculation of the amount due was to be found in the statement of account. The Chief Justice continued that he did not consider that it would be too much to ask that a financial institution availing of the benefit of a summary judgment procedure should specify both in the special indorsement of claim and in the evidence presented at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest. He continued: -

> *"Neither the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court…*
>
> *A defendant who wishes to proceed to a plenary hearing has to do more than merely assert a defence. This obligation cuts both ways. The particularisation of the amount of the claim must also go beyond mere assertion on the part of a plaintiff if they are to benefit from the use of the summary procedure."*

149. The court then concluded that the special indorsement of claim was defective because the statement of account which itself provided sufficient particularisation of a claim was not referred to in the indorsement of claim.

150. In that case the court determined that instead of remitting the matter to plenary hearing, it would remit the matter to the High Court with leave for the plaintiff to deliver an amended special of indorsement of claim to include such details as would be appropriate in the light of the court's judgment and to tender further evidence to fill the evidential gap identified.

151. The 29 page statement of 25 April, 2018, which clearly was in the possession of the first defendant, was sufficient to enable the defendant's financial advisors, Smith and Williamson, to examine the history of the account from 1 June, 2011, onwards and identify any issues which were controversial. This professional examination enabled the defendant to describe and raise those matters in his replying affidavit in these proceedings.

152. The plaintiff applied for the order to be substituted for Beltany as plaintiff and sanctioning the amendment to the indorsement of claim, and the revised para. 17 of the indorsement of claim was delivered following the grant of that leave.

153. That paragraph 17 simply states that the sum claimed is calculated by reference to the details contained in "*the statements of account furnished from time to time by the bank and/or Beltany and/or Pepper to Emerald in respect of the facility*." I have doubts as to whether that quoted sentence meets the test described in *O'Malley*. However, the distinguishing feature of this case is that the defendant himself relied on the 25 April, 2018 statement to consult his professional advisors and to formulate his response to the application for judgment. Thus, he cannot complain that he was required to meet these proceedings without being possessed of sufficient particulars, albeit from that statement. Therefore, the "*fair defence of the proceedings*" (per Hogan J. in *Pierce*) was not compromised.

154. The defendant in submissions stated that it would make no objection if the plaintiff sought to deliver an amended summons, being a second amendment, following the approach in *O'Malley*. In circumstances where the defendant has clearly been able to meet the detail of the claim, in that the statement of 25 April, 2018, relied on by him provided the necessary particulars to do so, I see no useful purpose in the service of a third version of the indorsement of claim, despite my reservations as to the contents of its paragraph 17.

155. As regards the statement of 25 April, 2018, itself, the defendant utilised it to identify in his replying affidavit the items making up the balance claimed and which he contests. He does not otherwise dispute that the loans were advanced to Emerald and guaranteed by the second and third defendants.

The receivership

156. In Mr. McCarthy's affidavits he complains of the conduct of the receiverships. He states in his affidavit of 25 October, 2019, that *"Far from maximising and realising the assets, the appointment of the receivers has had a catastrophic effect on Emerald's finances".*

157. Mr. McCarthy complains that the balance owed has risen since the date on which the receivers were appointed despite the sale of certain assets. He says that it is inappropriate that the second and third named defendants, as guarantors, would have to pay the price for what he characterises as "*the receivers' poor performance".*

158. Mr. McCarthy exhibits certain correspondence which he claims suggests that even the plaintiff or its predecessor has been dissatisfied with the performance of the receivers in relation to the assets.

159. Mr. McCarthy exhibits a further report by Smith and Williamson entitled "*Rent Review*". He says that this shows that significant sums have been lost in terms of rent on the relevant properties despite what he describes as a rising market. He says that if the rent received were compared with the *"potential in the period*", it shows a loss in the order of €901,082.

160. Mr. McCarthy also complains that he has not been given sufficient access to information in relation to the stewardship of the assets by the receivers.

161. In conclusion Mr. McCarthy states the following: -

"Whilst I am advised that these issues are perhaps more appropriately dealt with by way of an action for damages against the joint receivers (an action which we intend to bring whether by way of joining them to these proceedings or otherwise) I believe they may also provide a defence in equity to a substantial portion of the within claim and that it would be inappropriate, in the circumstances, for the bank to recover the full amount of the debt on a summary basis in the circumstances".

162. In his second affidavit sworn 19 November, 2020, Mr. McCarthy repeats these complaints, and concludes by stating that if the court were to grant summary judgment he would seek a stay, having regard to proceedings which he intends to bring against the joint receivers.

163. The defendants do not claim that the receivers were invalidly appointed. Nor was any challenge made to their appointment in 2014.

164. The defendants are correct in their acknowledgment that complaints regarding the conduct of the receivership and the performance of the receivers in relation to the maintenance and value of the assets are matters for the joint receivers. Despite having made this statement of intention in his first affidavit of 25 October, 2019, no such proceedings have been commenced against the receivers.

165. The separate proceedings in which the receivers are plaintiffs, and which I have referred to earlier, are plenary proceedings still pending against the second and third named defendants. Those defendants will therefore have the facility should they wish to do so to counterclaim in those proceedings, albeit that those proceedings relate to only one of the assets the subject of the receivership. I make no comment here as to whether such a counterclaim would be appropriate or meritorious, but it is a procedure potentially available to the defendants, as an alternative to commencing their own proceedings.

Recent information

166. Whilst the complaints against the receivers do not disclose a defence to the plaintiff's claim in these proceedings, there is one aspect of the receivership which is directly relevant to this application for summary judgment. In his affidavit of 19 November, 2020, Mr. McCarthy exhibits recent correspondence between his solicitors and the plaintiff's solicitors in which *inter alia* his solicitors requested verification of the sale prices of certain of the assets under receivership in respect of which "*sale agreed"* signs had been erected. The plaintiff's solicitors declined to provide this information.

167. The plaintiff's entitlement to recovery of the balances due on loans and pursuant to guarantees is not suspended pending the conclusion of all realisations by receivers appointed pursuant to security validly held. However, the plaintiff relies on evidence advanced by it as to the likely "*shortfall"* contained in Mr. O'Sullivan's affidavit sworn 28 August, 2019. He states that there will be a shortfall of approximately €2.5 million following the sale of the security, and he states that that shortfall may increase to €4.5 million if the joint receivers are unable to sell No. 22 Lansdowne Road. In as much as the

plaintiff adduces and relies on that evidence, the court cannot ignore the more recent information which emerged at the hearing of this application.

168. On the second day of the hearing, it was said that one of the assets, namely No. 24 Lansdowne Road had been sold for €2.1 million. Reference was made to correspondence – not exhibited – between the parties some weeks before the hearing in which this figure was not disputed by the plaintiff.

169. In circumstances where the plaintiff has originally asserted in its grounding affidavit that there will be a shortfall of €2.5 million, which could rise to €4.5 million and where information is clearly available as to recent realisations, it would be unjust for the court to enter summary judgment without any reference to that recent information, referred to in open court but unverified, as to realisations credited against the loan account. I shall direct that this information be now put on affidavit by the plaintiff. This is not to require a wider "*update*" on the receivership or updated estimates of realisations, and this court will not undertake an "*audit*" of the receivership, but requires a simple verification of what amounts have been credited to the account of Emerald.

170. In directing the plaintiff to provide this verification, I am informed by the defendants' own confirmation at the hearing that they would not object to the delivery of an amended summons, having regard to *O'Malley*. In this case, I have found no purpose would be served by such an amendment. However, in light of what was stated at the hearing regarding recent events this verification of the outstanding balance on the account is required.

171. I shall direct that this affidavit be delivered within two weeks from the delivery of this judgment and the matter will be listed before me one week thereafter.

Conclusion

172. The defendant has not made out an arguable case as to the existence of a collateral contract made on 12 November, 2008, or that the assignment to the plaintiff was champertous.

173. As regards the particulars of the debt and its calculations, the amended indorsement of claim contained only a vague reference to "*statements furnished from time to time".* Nonetheless, the defendants have met this part of the application in reliance on a statement of account already in their possession which was sufficiently comprehensive to enable the second defendant and his professional advisors to formulate a report as to disputed items comprised in the balance claimed which was exhibited by him and formed the basis of his own replying affidavit. Therefore, they cannot protest that the claim is insufficiently particularised such as to justify remitting it to plenary hearing.

174. I shall enter judgment for the amount claimed, less the sum of €1,383,448.36, referred to in the affidavit of Mr. Quealy sworn on 28 October, 2020, and after the up to date balance has been verified in the manner directed in this judgment.