

THE HIGH COURT

[2021] IEHC 443

[RECORD NO: 2018 564 S]

BETWEEN

CABOT FINANCIAL (IRELAND) LIMITED

PLAINTIFF

AND

ANDREW WILSON

DEFENDANT

EX-TEMPORAE RULING of Mr. Justice Mark Heslin delivered on the 10th day of June, 2021

1. The following emerges from an examination of the pleadings which are before the Court. On 8 May 2018 "Cabot Asset Purchases (Ireland) Ltd", or "CAPI", issued a summary summons naming Mr Andrew Wilson as defendant. The special indorsement of claim pleaded that pursuant to an 18 September 2009 facility letter between "Ulster Bank Ireland Ltd", (or "Ulster Bank"), on the first part, and the defendant, on the second part, (i.e. "the facility") €201,646 was borrowed by the defendant.
2. It was also pleaded that Ulster Bank provided an overdraft to the defendant in respect of account 40307020 (i.e. "the overdraft").
3. It is pleaded that the defendant defaulted on his repayment obligations in respect of both the facility and the overdraft and that Ulster Bank demanded €174,591.10, by letter of 20 September 2012, which sum the defendant failed to pay.
4. It is also pleaded that CAPI acquired the legal and beneficial rights in respect of the facility and the overdraft pursuant to the terms of a "Portfolio Acquisition Deed", dated 24 April 2017, and a "Global Deed of Transfer", dated 23 June 2017, made between Promontoria (Oyster) DAC, (or "Promontoria") , of the first part, and CAPI, of the second part, following a previous transmission of legal and beneficial rights in respect of the facility and overdraft, from Ulster Bank to Promontoria, pursuant to the terms of a "Global Deed of Transfer" made between Ulster Bank and Promontoria, on 19 December 2016.
5. The special indorsement of claim goes on to plead that the plaintiff, through its solicitors, messrs Belgard, made a demand, by letter of 2 October 2017, and that the defendant has failed to make any payment on foot of that 7-day demand, and that €123,011.73 is owing by the defendant.
6. Judgement against the defendant in the aforesaid sum is sought, with the total figure said to comprise €116,753.97, in respect of the facility, and €6,257.76 in respect of the overdraft. In an affidavit sworn on 12 June 2018 by a Mr Eamon MacEoin, it is averred that personal service was effected on the defendant on 31 May 2018. A memorandum of appearance is recorded as having been entered, in person, by the defendant, on 13 July 2018.
7. On 5 September 2018, Belgard solicitors for the plaintiff issued a motion seeking liberty to enter final judgement against the defendant in the sum of €123,011.73, which motion was grounded on an affidavit sworn by Mr Niall Purcell, a director of the plaintiff, CAPI. In

that affidavit, reference was made to the aforesaid 24 April 2017 Portfolio Acquisition Deed, between Promontoria and the plaintiff, and to what was said to be the previous transmission of interest, from Ulster Bank to Promontoria.

8. The first of the exhibits to Mr Purcell's affidavit comprised the aforementioned Global Deed of Transfer, dated 23 June 2017, between Promontoria and the plaintiff. The exhibited copy contains certain redactions said to result from commercial sensitivity, data-protection or banker/client confidentiality issues. The second of the exhibits comprised a copy of the facility and a copy of Ulster Bank's general conditions. The third exhibit comprised the aforementioned, 20 September 2012 demand letter from Ulster Bank to the defendant. The fourth exhibit comprised the aforesaid 2 October 2017 seven day demand letter from Belgard solicitors to the defendant. The fifth and final exhibit comprised Ulster Bank statements of account for the facility and overdraft, (specifically a four-page statement in respect of account number 10224585, covering the period from 21 June 2010 to 7 April 2017; and a 30-page statement in respect of account number 40307020, covering the period from 14 June 2010 to 7 April 2017) both accounts being in the name of the defendant the latter being described as a current account.
9. On 16 November 2018 the defendant swore a 6-page replying affidavit in opposition to the plaintiff's motion. Among other things the defendant asserted that there was no evidence of any transfer from Ulster Bank nor was any deed of transfer to Promontoria exhibited and the defendant asserted that summary judgement could not be granted as there was no proof of the plaintiff's title to the loans allegedly due. A variety of assertions were made in that regard. Further assertions were made with reference to the statements which had been exhibited by Mr Purcell. Among these was the assertion that, as of the date of the portfolio acquisition deed, i.e. 24 April 2017, and as of the date of the deed of transfer, i.e. 23 June 2017, there was a "zero balance" in respect of account 1022 4585 and a "nil balance" in relation to account 4307020, as at 7 April 2017. In para. 7 (iii) of his affidavit, the defendant averred that, as of 7 April 2017, both accounts relied upon by the plaintiff in seeking judgement "had nothing due upon them".
10. A range of further assertions were made, including with reference to Ulster Bank's general terms and conditions. Among these was the assertion that any proceedings in respect of the debt allegedly due should have been issued, at the earliest, prior to 18 February 2018 and that, in circumstances where proceedings issued on 8 May 2018, the proceedings were issued outside of what was said to be the relevant six-year period and, thus, it was asserted that the proceedings are statute barred.
11. In particular it was asserted that, as regards the facility, the entire amount due became payable on 18 February 2012 and, as regards account 40307020, it was asserted that the last credit was on 30 March 2012, also outside what was described as "the 6-year limitation period".
12. A copy of an order made by the Master on 22 March 2019 and perfected on 25 March of that year is exhibited in the pleadings and states as follows:

"The summary summons herein coming on for hearing this day pursuant to notice of motion dated the 5th day of September 2018 for an order granting the plaintiff liberty to enter final judgement against the defendant in the sum of €123,011.73; And said counsel for the plaintiff seeking to adjourn the said summons; The court doth refuse said adjournment. Whereupon and on hearing the plaintiff's counsel and on reading said Summons said Notice of Motion, Affidavit of Niall Purcell served with the said Notice and filed on the said date and Affidavit of service of the said Notice and Affidavit and on hearing said Solicitor for the Defendant, IT IS ORDERED that the said Motion be and the same is hereby dismissed AND IT IS ORDERED that the plaintiff do pay to the defendant the costs of this motion and an order for taxation"

13. On 29 March 2019 the plaintiff's solicitors issued a notice of motion which was initially returnable for 13 May 2019 seeking an order by way of an appeal setting aside the whole of the Master's order dated 22 March 2019 and seeking if necessary an extension of time for the bringing of that application (something which is unnecessary given that the present motion was issued within time) as well as seeking an order granting the plaintiff liberty to enter final judgement in the sum of €123,011.73.
14. The plaintiff's motion was grounded on an affidavit sworn, on 27 March 2019, by Mr Kevin Callan, solicitor for the plaintiff. At paragraph 5 of his affidavit, Mr Callan avers, inter alia, that: "... when the matter came before the Master...on 22 March 2019, counsel for the plaintiff applied to adjourn the matter, which application the Master refused". He goes on to aver "In the circumstances the plaintiff was not in a position to proceed in any event in circumstances where the motion before the Master was contested".
15. It is appropriate to observe, at this juncture, that it is not in dispute that the plaintiff's motion came before the Master on 22 March 2019 and that, firstly, as of that date, it was an application which was fully contested; secondly, on that date, the plaintiff was not in a position to proceed with its motion; thirdly, the plaintiff signalled no intention to abandon its application. On the contrary, the plaintiff initially sought an adjournment and, when that was not forthcoming, the plaintiff sought that the matter go to the Judge's List. It does not appear to me that anything turns on the precise point at which the plaintiff made an application for the matter to go to the Judge's List. There is no dispute about the fact that such an application was made by the plaintiff's counsel.
16. To return to the contents of Mr Callan's 27 March 29 affidavit, he goes on, in paragraph 5, to aver that: *"The Master then struck the motion out and awarded costs in favour of the defendant to be taxed in default of agreement before the plaintiff could apply to have the matter transferred to the judges list. When the plaintiff attempted to apply for same the Master indicated that in circumstances where the plaintiff indicated they could not proceed with their application today the matter stood struck out."*
17. In paragraph 6 of his affidavit, Mr Callan says that he is advised and believes that: *"...in the circumstances the Master acted outside of his jurisdiction in striking the contested motion out and ought to have properly transferred the within matter to the Judges List to*

be dealt with by this Honourable Court in the usual course." A similar averment is made in paragraph 7 and, in paragraph 8, Mr Callan avers that he is advised by the plaintiff and believes that the sum of €123,011.73 remains due and owing by the defendant. At paragraph 9, he avers that he believes the defendant has no defence and, at paragraph 10, he seeks relief as per the motion.

18. Earlier in this Ruling, I quoted the Master's 22 March 2019 Order, *verbatim* and in full. It seems uncontroversial to say that an order which recites that, after refusing the adjournment application, the Master heard from counsel for the plaintiff, and read the plaintiff's motion, and read Mr Purcell's affidavit on which the motion was grounded, and heard from the solicitor for the defendant, and then ordered that the motion be "*dismissed*", suggests that a determination was made, namely a determination that the motion failed and that it be dismissed.
19. At this point, it also seems uncontroversial to make 3 further comments as follows: firstly; the affidavits which I have examined thus far disclose a significant contest, including contests both in relation to matters of fact and law; secondly, the jurisdiction enjoyed by the Master in respect of summary judgement applications is a limited one as the Ord. 37 Rules of the Superior Court make clear; thirdly, and equally uncontroversially, where a Judge of this court, in considering an application for *summary judgement in which the relevant affidavits discloses a contest such that it is not "very clear that there is no defence"* to the claim, the matter will typically be sent for plenary hearing (the well-known authorities such as Mr Justice McKechnie's 2002 decision in *Harrisrange Ltd v Duncan* being relevant, insofar as the test for the court to apply when deciding whether or not to grant summary judgement).
20. The plaintiff's motion was served on Messrs. Applebe and Thornton, solicitors for the defendant, on 2 April 2019, as averred in an affidavit sworn, on 24 April 2019, by Mr Stephen Dillon. On 3 May 2019 Mr Gerald Corcoran, solicitor, swore an affidavit on behalf of the defendant. In this affidavit he sets out, inter alia, the chronology of events leading up to 22 March 2019. Among the matters he refers to, are that the plaintiff's original motion seeking liberty to enter final judgement (which was initially returnable for 2 November 2018) was, by consent, adjourned to 23 November 2018. He refers to the service, on 19 November 2018, of the defendant's replying affidavit and he refers to a telephone conversation, on 22 November, wherein it was agreed that the matter would be adjourned to enable the plaintiff or their solicitors to file a replying affidavit, which agreement was reflected in a letter, also of 22 November 2018, which letter he exhibits.
21. That consent adjournment (confirmed by letter dated 26 November 2018 which Mr Corcoran exhibits) was to 18 January 2019. Mr Corcoran avers that no replying affidavit was delivered by the plaintiff by that date. Rather, as Mr Corcoran avers, his office received a phone call from the plaintiff's solicitors, on 11 January 2019, requesting a further adjournment of the Motion, to allow for the filing of a replying affidavit and he avers that this request was granted (and confirmed by a letter, also of 11 January 2019, which he exhibits). Mr Corcoran goes on to say that, on 18 January 2019, the matter was

adjourned by consent to the Masters list for hearing on 8 February 2019, as confirmed in a letter from the plaintiff's solicitors to his firm, dated 23 January 2019, which he also exhibits.

22. He then avers that on 8 Feb 2019 the plaintiff's solicitors made a further application to have the matter adjourned and he avers that no prior notification of such an application had been received prior to the attendance in the Master's court on 8 February 2019 by Mr Fergus Applebe. He goes on to aver that this application for an adjournment was granted by the Master on 8 February and the matter was adjourned to 22 March 2019 for hearing. He also exhibits a letter dated 25 Feb 2019 sent by the plaintiff's solicitors to his firm which confirms the position.
23. At this juncture it seems appropriate to observe that there was never any objection made by either side to an adjournment of the motion. It also seems uncontroversial to say that it is not unusual for more than one adjournment, and often a series of adjournments, to take place, including by agreement, in respect of summary judgement applications. Therefore the position, immediately before court on 22 March 2019, is that the matter was listed for hearing, just as it had been listed for hearing on a number of previous occasions, but on each of those previous occasions, the matter had been adjourned, and on the most recent occasion, namely on the 8th of February 2019, the defendant's consent to an adjournment was not sought in advance (in contradistinction to what had occurred in respect of previous adjournments, all of which had been agreed by the parties).
24. Mr Corcoran avers that he attended the Master's court on 22 March 2019 and that there was no appearance on behalf of the plaintiff at the initial call over, resulting in the matter going back to second call. He avers that, when the matter was reached at second call, counsel for the plaintiff applied for an adjournment on the grounds that there had been extensive ongoing negotiations between the parties and the plaintiff had not filed a replying affidavit in the circumstances, as the plaintiff did not wish to prejudice such negotiations. Mr Corcoran avers that he informed the court that he was fully familiar with the case and that there had been no negotiations of any kind between the parties and that he further advised the court that the matter was listed that day for hearing and showed the court the 25 February 2019 letter from Belgard solicitors for the plaintiff, to Applebe solicitors for the defendant.
25. Mr Corcoran avers that it was when this was outlined to the court, that counsel for the plaintiff indicated to the court that he was not in a position to proceed with his application on that date. Mr Corcoran avers that it is not correct to say that the Master struck out the motion and awarded costs to the defendant: "*before the plaintiff applied to have the matter transferred to the Judges List*" and he avers that, when counsel for the plaintiff stated that he was not in a position to proceed, and after Mr Corcoran advised the court that there were no negotiations ongoing between the parties, the Master asked counsel if he had any further application and Mr Corcoran avers that counsel simply repeated his application to have the matter adjourned. Mr Corcoran avers that counsel never asked the

court to have the matter transferred to the Judges List. He goes on to aver that, at that juncture, the Master asked Mr Corcoran what his application was, and he applied to have the motion dismissed on the grounds of the plaintiff's inability to proceed. He avers that the Master acceded to this application, whereupon Mr Corcoran applied for costs which were granted. He avers that it was only at this point that counsel on behalf of the plaintiff sought to have the matter transferred to the Judges list and he avers that the Master indicated to him that it was too late.

26. In paragraph 6 of his affidavit, Mr Corcoran avers that, neither on 8 February, nor on 22 March, 2019, had contact been made with the defendant's solicitors, in advance, as regards an adjournment application; and he also avers that, on both of those, dates either Mr Appleby, or he, were present in court, having travelled from West Cork, in circumstances where the motion was listed for hearing on both dates, as the relevant correspondence confirms. At paragraph 8 Mr Corcoran avers that the decision made by the Master on 22 March 2019 was neither unreasonable nor in excess of his jurisdiction and he goes on to make the following averment:-

"I say that if this matter is to proceed, then it should proceed by way of full plenary hearing and the plaintiff's should at this stage file their statement of claim at which time the defendant can raise the necessary particulars (if any are deemed appropriate) and filed his defence."

27. At para. 9, Mr Corcoran avers that, having twice consented to adjournments, and having twice attended court to be met with unexpected applications for further adjournments, it was not unreasonable for the Master to award costs of the plaintiff's motion to the defendant, in circumstances where, through no fault of the defendant, the plaintiff was unable to proceed with its own motion. He also makes the following averment in paragraph 9: *"I have little doubt that if contact had been made by the plaintiff's solicitor with either me or Mr Appleby prior to both dates then an adjournment would have been agreed to allow the plaintiff to put in its replying affidavit."* At para. 10, Mr Corcoran refers to the fact that the Master's order employs the term "dismissed", not the term "struck out", as stated by Mr Callan. Mr Corcoran avers, inter alia, that this: *"... is significant as an indicator that the Master dismissed the motion due to the plaintiff's inability to proceed"*. At paragraph 11, Mr Corcoran says that the plaintiff has not averred to sufficient evidence of debt or to the required proofs for a motion seeking liberty to enter final judgement and he summarises what he describes as the *"failings in the plaintiff's claim"*, in the following terms:

" a. the plaintiff's claim is statute barred. b. there is no evidence exhibited or before this court of the alleged sale of the defendant's loan from Ulster Bank Ireland Ltd to Promontoria Oyster DAC. Thus, there is a complete break in the chain of title and the plaintiff cannot show any title to the loan in question. c. the bank statements exhibited with the grounding affidavit of Mr Niall Purcell show that on the date of the purported sale from Promontoria Oyster DAC to the plaintiff there was a zero balance on both of the accounts the subject of these proceedings. Thus, when both

of these accounts were purportedly transferred to the plaintiff there was prima facie nothing due on them."

28. The book of pleadings also contains an Order made on 3 July 2019 by the Master, being an order made pursuant to Order 17, Rule 4, of the rules of the Superior Courts that the title of the proceedings: *"...be amended to disclose the correct title of the plaintiff henceforth to read 'Cabot Financial (Ireland) Ltd'"*. It is clear that the said order was made on foot of an ex parte application by counsel for the plaintiff on 3 July 2019. Service of the aforesaid 3 July 2019 order was effected on the defendant's solicitors, on 20 August 2019, as averred by Ms Maria Tracey in an affidavit sworn by her, on 18 October 2019.
29. On 3 February 2020 Mr Sean Webb swore what is described as a supplemental affidavit on behalf of the plaintiff and in response to the affidavit sworn by Mr Corcoran on 3 May 2019. In it, he avers that he is a director of "Cabot Asset Purchase (Ireland) Ltd" (i.e. "CAPI") and also a director of "Cabot Financial (Ireland) Ltd" (or "CFI"). It will be recalled that CAPI was originally named as the plaintiff. Among other things he asserts that a number of averments made on behalf of the defendant constitute legal submissions. He avers that he is advised by his solicitor and believes that the Master does not enjoy the jurisdiction to strike out the plaintiff's motion for judgement. At paragraph 7 Mr Webb makes the following averment: *"the defendant's bald claim that the proceedings are statute barred is entirely without merit in circumstances where the demand issued by the plaintiff's predecessor is dated September 2012 and the within proceedings issued within six years of that date on 8 May 2018"*. He avers, in paragraph 8, that, on 19 December 2016, Ulster Bank Ireland DAC (formerly Ulster Bank Ireland Ltd) executed a Global Deed of Transfer together with Ulster Bank Ltd and Promontoria (Oyster) DAC (formerly promontory (Oyster) Ltd) (or "PODAC"), whereby the bank as "seller", amongst other things, unconditionally transferred to PODAC as "purchaser" all rights, title and interest in the defendant's facility and related security documents, with effect from the transfer date.
30. During the course of skilled submissions made today on behalf of the defendant Mr Corcoran submits that the aforesaid transfer deed does not clearly evidence a transfer. Unfortunately, it appears that two pages -which appear behind the execution page- were missing from the copy served on Mr Corcoran's office. These do, in fact, contain a reference to the defendant and to the sum claimed. It is unfortunate that Mr Corcoran did not receive a copy containing these pages but, in fairness to Mr Corcoran, he made clear in his submissions that he did not take issue with what Mr Newman, counsel for the plaintiff, outlined in relation to the existence and contents of those pages. Let me say at this juncture that the decision I give to date does not hinge on the fact that those pages were missing from Mr Corcoran's copy.
31. Mr Webb avers that paragraph 4 of the grounding affidavit, sworn by Mr Purcell clearly sets out the mechanism by which the plaintiff acquired the defendant's facility from PODAC and he refers to the 23 June 2017 Deed which was exhibited by Mr Purcell. It will be recalled that this was a copy of what is described on the first page as being a 23 June

2017 Global Deed of Transfer made between PODAS, as “seller” and Cabot Asset Purchases (Ireland) Ltd (or CAPI) as “buyer”. In the manner referred to earlier Cabot Asset Purchasers (Ireland) Ltd (or CAPI) is no longer and is not the plaintiff named in the proceedings. The Master’s order made on 3 July 2019 confirms this. At paragraph 12 of his affidavit, Mr Webb avers that the plaintiff, being Cabot Financial (Ireland) Ltd (or CFI) is the parent company and the sole shareholder of CAPI. He goes on to aver that since CAPI acquired the debt the subject matter of these proceedings it engaged CFI to manage and service the debt on its behalf.

32. At this juncture it is appropriate to point out that although Mr Webb uses the words “...since CAPI acquired the debt the subject matter of these proceedings it engaged CFI to manage and service the debt...”, it is not clear how the plaintiff, namely CFI, in fact, acquired the debt the subject matter of these proceedings. I say this in circumstances where the 23 June 2017 Global Deed of Transfer identifies CAPI as buyer, not CFI, yet the latter is the plaintiff.
33. Mr Webb avers that CFI is regulated by the Central Bank of Ireland as a credit servicing firm. He then refers to the Consumer Protection (Regulation of credit servicing firms) Act 2018, which was commenced on about 24 December 2018. He avers to his belief that “...the practical consequences of the said legislation is to require the legal owner of certain debts to be itself registered by the Central Bank of Ireland whereas previously it was permissible for the owner of certain debts to have engaged a servicer regulated by the Central Bank of Ireland to manage the accounts on behalf of the legal owner”.
34. At para 14 Mr Webb avers that CAPI engaged CFI to service its accounts and engage with its customers regarding the said accounts and he goes on to aver that the majority of all correspondence has been issued by CFI and the majority of all engagements has been between CFI and customers to the accounts, on behalf of CAPI.
35. At para 15, Mr Webb avers that “...this application arises from the intercompany transfer of the entire loan books by CAPI to CFI necessitated by the enactment of...” the aforesaid Act of 2018, in circumstances where, as Mr Webb puts it: “... the regulated servicer of the loan book is inter alia now required to become the legal owner of the loan book.”
36. In para 16, he avers that, on 31 May 2019, CAPI and CFI executed an “Irish Law Deed of Transfer” whereby CAPI transferred all rights, title and interest in what is described as “...all underlying loans, related security, debts, proceedings and/or judgements then owned by CAPI to CFI” and Mr Webb exhibits a copy of this Deed.
37. At para 17, he avers that he is advised by counsel and believes that, by virtue of the aforesaid transfer, CFI is now the legal owner of the debt and all rights and entitlements relating to the present proceedings.
38. He goes on to aver, at para 18, that, as a consequence, all interests of CAPI in respect of the within proceedings have transferred to CFI, and he avers to his belief: “that CAPI has no further interest of claim against the defendants such that might justify CAPI remaining

as plaintiff together with CFI who out [presumably "ought"] to be substituted as plaintiff in lieu of CAPI".

39. At this juncture, it seems appropriate to observe that these averments appear to be made in support of an application to substitute CFI as plaintiff, instead of CAPI, yet they are averments made in an affidavit sworn on the 3rd of Feb 2020 and filed in the High Court Central office on the 7th of Feb 2020, which is a full seven months *after* the order made by the Master on 3 July 2019, which amended the proceedings to disclose the correct title of the plaintiff, namely CFI. Nowhere in Mr Webb's affidavit is reference made to 3 July 2019 order. If there was a grounding affidavit in respect of the plaintiff's ex parte motion to amend the title of the proceedings that affidavit is not before the court.
40. At para 19, Mr Webb makes the following averment, namely, *"I say that CAPI has written to the Defendants advising of its intention to transfer the debt to CFI and subject matter of this application"*. He goes on to exhibit of letters sent by both CAPI and CFI to the defendants confirming the relevant transfer completed on 31 May 2019 and confirming that CFI would continue to be the defendants point of contact in respect of the debt. Both of those letters are dated 19 June 2019.
41. At para 20., Mr Webb avers that an appropriate means of giving effect to the transmission of interest is by the direct substitution of CFI as plaintiff, in the place of CAPI, and that the proceedings should continue in the sole name of CFI.
42. At para 21 Mr Webb avers that *"...the zero balance on the Ulster Bank statement exhibited by the plaintiff merely reflects that the indebtedness of the defendant has been transferred from Ulster Bank to the plaintiff in the manner described herein such that the defendant is now indebted to the plaintiff and not Ulster Bank"*. With regard to the foregoing averment in respect of the contents of an Ulster Bank statement, it is appropriate to observe that Mr Webb does not hold himself out to be either an officer or employee of Ulster Bank. Nor does Mr Webb aver that he has any personal knowledge of Ulster Bank's operations. It is also appropriate to note that no bank statements, other than those produced by Ulster Bank, have been exhibited.
43. Mr Webb's affidavit concludes with the following averment at paragraph 22: *"I confirm that as at the date of swearing hereof the sum now being claimed by the plaintiff of €123, 011.73, together with the further interest claimed herein remains due and owing by the defendant to the plaintiff after all just credits and allowances and despite demand for payment having been made of it"*. He then exhibits what is described as a copy statement of account.
44. This final exhibit to Mr Webb's affidavit appears to be one and the same as the 5th exhibit to Mr Purcell's 31 August 2018 affidavit, namely "Ulster Bank" statements, running to 4 pages in respect of account number 10224585, and running to 30 pages in respect of account 40307020, both showing a zero, or nil, balance at the end of the respective statements.

45. The penultimate item in the book of pleadings before the court is an 8 July 2020 affidavit in which a Ms Debbie Toner avers that, on 12th Feb 2020, she served a true copy of Mr Webb's 3rd Feb 2020 supplemental affidavit by registered post on Appleby, solicitors for the defendant. Yesterday, 8 June 2021, Mr Tom Dillon swore a short affidavit in which he averred that he is a director of CFI. He went on to aver that the books and records reviewed by him in preparation in preparing his affidavit were prepared in the ordinary course of business of CFI and what he described as "*its predecessor in title*".
46. He averred at para 2. that the books and records were supplied to CFI by its immediate predecessor in title and he averred as to his information and belief that:

"...the relevant loan owner at the time had custody of the said books and records and duly transferred the books and records relating to the Defendants on completion of each of the transfers described hereunder. I believe that each entity and/or predecessor in title received and supplied the books and records in the ordinary course of their respective businesses."

At this juncture it is appropriate to observe that although Mr Dillon uses the phrase "*...each of the transfers described hereunder...*" he does not go on to describe any transfers. Nor is the precise identity given of the entity or entities Mr Dillon intends to refer to, when he uses the phrases "*the relevant loan owner at the time*" or "*the predecessor in title*" or "*the immediate predecessor in title*".

47. At paragraph 3 of his affidavit he refers to the pleadings and proceedings had herein when produced and that paragraph 4 makes the following averment:

"I make this affidavit supplemental to the plaintiff's affidavits already sworn hearing I say and believe that all of the books and records perused by your deponent and exhibited to the plaintiff's affidavits in the within proceedings constitute business records within the meaning of the civil law and criminal law miscellaneous provisions act 2020 and the plaintiff gives notice of its intention to rely on the documents exhibited thereto pursuant to section 15 of the..."

This is where paragraph 4 ends and paragraph 5 simply prays for the relief set out in the motion. It is also appropriate to say that, although Mr Webb avers that his is an affidavit made from facts within his own knowledge and from a diligent perusal of the books and records of CFI, he does not identify precisely what those books and records are that he perused.

48. However my reading of the contents of paragraph 4 (even though that paragraph ends abruptly) clearly seems to be an averment that Mr Dillon has perused everything exhibited to the plaintiff's affidavits and that he asserts that all of these exhibits constitutes business records within the meaning of s. 15 of the aforementioned act of 2020. Section 15 of the Civil Law and Criminal Law Miscellaneous Provisions Act of 2020 is entitled "*notice of business records evidence*" and it goes on to provide that, information in a document shall not, without the leave of the court, be admissible by virtue of section

14 of the same Act at a civil trial, unless certain things are done, namely, a copy of the document has been served on the other party, or, not later than 21 days before the commencement of a civil trial, a notice of intention so to give the information in evidence, together with a copy of the document, is served by the party proposing to give it in evidence.

49. Subsection 2 provides that a party on whom notice has been served pursuant to subsection 1 shall not, without leave of the court, object to the admissibility in evidence of the whole or any specified part of the information concerned, unless, not later than seven days before the commencement of the civil trial, they serve a notice objecting to its admissibility. Subsection 3 concerns service pursuant to section 15, whereas subsection 4 makes clear that section 15 is without prejudice to provisions in any other enactment concerning the power to produce evidential material.
50. Section 14 of the 2020 act is headed "admissibility of business records: general". Subsection 1 provides that, subject to this chapter, information contained in a document shall be admissible in civil proceedings as evidence of any fact in the document of which direct oral evidence would be admissible, if the information; firstly, was compiled in the ordinary course of a business; secondly, was supplied by a person (whether or not he or she compiled it and is identifiable) who had or may reasonably be supposed to have had personal knowledge of the matters dealt with and; thirdly, in the case of information in non-legible form that has been produced in permanent legible form, was produced in the course of the normal operation of the reproduction system concerned.
51. Subsection 2 of section 14 goes on to provide that subsection 1 shall apply, whether the information was supplied directly or indirectly but, if it was supplied indirectly, only if each person (whether or not he or she is identifiable) through whom it was supplied received it in the ordinary course of a business.
52. Given the relief which is sought, I am satisfied that it is appropriate not to separate matters out, but, instead, to give this court's decision in respect of all the relief which is canvassed in the motion. Doing otherwise would seem to me to involve a waste of time and effort for both parties and for the court. Having regard to the sworn evidence before this court, it is fair to say that had the plaintiff, in the run-up to 22 March 2019, asked for the defendant to consent to a further adjournment such consent would have been forthcoming. This is perfectly clear from the final sentence in paragraph 9 of Mr Corcoran's affidavit.
53. As things transpired the plaintiff did not seek, and therefore did not receive, the defendant's consent to an adjournment and in circumstances where the Master refused an application made by the plaintiff's counsel to adjourn the matter, the order of 22nd March was made. That order dismissed the plaintiff's application and on the face of the order this was done after the Master heard from counsel for the plaintiff, read the relevant motion, read the plaintiff's affidavit, read the motion and heard from the defendant's solicitor. To the extent that dismissing the plaintiff's application represented a merit-based determination, such a dismissal was not in my view appropriate.

54. Quite apart from the foregoing, it was plain that what was before the court was an application which was contested and although the plaintiff was not at that particular point, on 22 March, in a position to proceed and can justifiably be criticised for not in advance seeking consent from the defendant to a further adjournment to enable the delivery of what remained outstanding, namely an affidavit, it seems to me that the justice of the situation requires this court to grant the relief at paragraph 1 of the plaintiff's motion which was initially returnable for 13 May 2019, namely setting aside the Masters order made on 22 March 2019 and perfected on 25 March 2019.
55. On behalf of the defendant Mr Corcoran submits that the Master acted within jurisdiction. He also submits that the plaintiff should not have brought the present appeal and that, instead, the plaintiff should have issued a new motion seeking summary judgement, rather than appealing the Master's order. That submission does not seem to me to be determinative of the issue before the court in the motion which the plaintiff issued that was entitled to issue.
56. Despite the skill with which Mr Corcoran makes his submissions, the obligation on the Master to send forward a contested application when the papers are ready does not, it seems to me, give the Master jurisdiction to deal with an application summarily in the manner which is apparent from the face of the order appeal against. It does not seem to me from the face of the order that an application was simply "*struck out*" because it was not ready to go on. Rather the terms of the order made indicate that the application was *dismissed* after the papers had been read and after Counsel had been heard from. That was to deal summarily with a contested application.
57. In the 4 November 2013 decision by Mr Justice Hogan in *ACC bank v, Heffernan* [2013] IEHC 557, a distinction was drawn between the Master's power in contested as opposed to uncontested cases. In short, in uncontested cases the Master can deal with matters summarily. However, in contested cases, the Master has no such jurisdiction. The foregoing decision was affirmed by Kelly J as he then was in *AIB v. Peirce* [2015] IECA 87. Thus the Master lacked jurisdiction to dismiss an application which, at all material times, the plaintiff wished to maintain, being an application which at all material times the defendant engaged with and opposed and indeed continues to engage with and oppose. It was open to the Master to have refused to adjourn the application and to have sent the matter to the Judge's List having regard to what was already plainly a contest in light of the affidavits sworn by the respective parties.
58. At paragraph 8 of Mr Corcoran's affidavit sworn on 3 May 2019, he avers that if this matter is to proceed it should proceed by way of full plenary hearing and that plaintiff should file a statement of claim in response to which the defendant can raise particulars if this is deemed appropriate and filed his defence.
59. It is clear from the foregoing averment which was made in an affidavit which post -dates the Master's order dismissing the application and which appears in an affidavit in response to the plaintiff's present motion, that there is still a "live" dispute between the parties and the parameters of that dispute emerge from the contents of the various

affidavits I have referred to. It is clear from Mr Corcoran's averments that the defendant adopts the stance that summary judgement would not be appropriate and that a plenary hearing should be directed. I have very carefully considered the submissions made with great clarity and skill by Mr Newman for the plaintiff and by Mr Corcoran for the defendant.

60. Among the submissions made by Mr Newman was that the proper interpretation of the terms of general condition 8.2 wholly undermines the proposition that the plaintiff's claim is statute barred. He also laid emphasis on the defendant's failure to reply to Mr Webb's affidavit. The gravamen of his submissions was that the case before this court is a simple one with no possibility of any defence and where the defendant has not "cleared" what is, Mr Newman fully and very properly accepts, is in relative terms a "low bar" insofar as avoiding summary judgement. He submitted with reference to the various averments and documents I have referred to in this ruling that there is clarity as regards the figure owing that the Ulster Bank statements are perfectly clear and that they constitute documents which the plaintiff can rely upon. He submitted in essence that the test outlined in the relevant jurisprudence including *Harrisrange* is not met by the defendant.
61. The thrust of his submissions was that none of the issues canvassed by the defendant are truly issues or in the alternative they are issues of such simplicity that they can be determined in favour of the plaintiff at the summary stage. With regard to the nil or zero balances in the Ulster Bank statements, his submission was to say that this is obviously the way these things are going to be referenced on the Ulster Bank statements. As regards Mr Corcoran's point that the plaintiff has not exhibited its own statements nor have any statements from Promontoria been exhibited, Mr Newman submitted that we all know they will show no entries. His submission was to the effect that it is patently clear that the relevant loans were sold to the plaintiff and that there is no dispute about the amount due and the plaintiff is entitled to rely on Ulster Bank's demand and Ulster Bank statements and nobody else is seeking judgement from the defendant who does not deny receiving the money in question also submitting that there is no or no issue of reality as regards the statute of limitations.
62. Mr Newman went on to submit that there is an authority entitling this court to adjourn the case to plenary hearing on specific or limited grounds, reliance being placed on *Cabot Asset Purchases v. Boyle* [2019] IEHC 401. Mr Newman encouraged this court to take a similar approach to that taken by Mr Justice McGrath, in the event that the court considered that a plenary hearing was required in respect of a limited number of issues.
63. Among the submissions made by Mr Corcoran are that the main sum issue was not an "on demand" facility but, rather, a "committed loan facility" and he stressed the defendant's contention that default arose in February 2012 more than six years prior to the proceedings being issued in 2018. Mr Corcoran also submitted that neither Promontoria, nor Cabot, have accounts of their own showing the debt and he submitted that no accounts, other than the Ulster Bank statements, are exhibited or relied upon. He stressed in submissions on behalf of the defendant that the two accounts referred to as

being sold, were sold on 23 June 2017, whereas, at that point, the Ulster Bank statements showed nil or zero balances; and he emphasised that zero balances appear as of April 2017 (which predates the transfer relied upon by two months). He submits that Mr Webb's affidavit goes nowhere near explaining matters and he also submits that Ulster Bank sold to Promontoria in 2016 whereas Promontoria sold to Cabot in June 2017 and, in that context, he submits that what Mr Webb says might be comprehensible if the exhibited statements with nil balances post-dated, not pre-dated, the sale in June 2017.

64. Mr Corcoran also emphasised, inter alia, what he described as a discretion under general condition 8.2 of the Ulster Bank general conditions, arising from the use of the word "may", to make a demand or not. He submitted that the statute of limitations speaks of when the cause of action accrued, which the defendant claims is February 2012. He submitted that the bank's discretion pursuant to clause 8.2 does not do away with the fact of when the cause of action accrued. He also relied on special condition 4 in relation to the specific loan in question which, he submits, provides that if any monthly repayments were missed, matters would immediately be transferred to the Bank's debt recovery department. He submitted that the bank cannot unilaterally extend the relevant statute of limitations and the gravamen of his submission was that an issue arises in that respect which cannot be determined at the summary stage.
65. The jurisprudence in relation to whether or not summary judgement should be granted is very well known. The principles which emerge from cases, including Mr Justice McKechnie's decision in *Harrisrange v. Duncan* [2003] 4 IR 1 make it clear that this court's jurisdiction to grant summary judgement is to be used sparingly and with "discernible caution". Summary judgement is only appropriate where it is very clear that the defendant has no case, or to put it another way, where it is very clear that there is no possibility of the defendant having a *bona fide* defence. That is not the same as a defence which would probably succeed or even a defence whose success is not improbable. Rather, leave to defend should be granted unless it is very clear that the defendant has no defence. The principles which emerge from the jurisprudence also makes clear that this court, when considering a summary judgement application cannot resolve any factual contradictions which are material to the issues in dispute.
66. On the contrary, the summary judgement procedure is suitable for use where there are no issues, or where there are issues of simplicity only, or issues easily determinable. Having carefully considered the entirety of the evidence before the court comprising the various averments and exhibits on behalf of the plaintiff, it is not sufficiently clear as to allow this court, safely, to grant summary judgement. It seems to me that the affidavits disclose contests, in relation to both issues of fact and issues of law, which cannot safely be determined at this juncture. In other words, there seem to me to be issues which cannot easily or readily be determined in favour of the plaintiff. It seems to me that this court cannot be sufficiently confident to grant summary judgement, thereby denying the opportunity for the defendant to make their case at a plenary hearing and to adduce evidence in respect of facts and issues which are in dispute.

67. One issue concerns the significance of a "nil" or "zero" balance at the end of both of the statements which are exhibited - on two different occasions - on behalf of the plaintiff. The zero balances appear two months prior to the June 2017 transfer which is relied upon by the plaintiff. Furthermore, the Statements were produced by Ulster Bank and no employee or officer of Ulster Bank has sworn any affidavit in respect of the contents of those Ulster Bank statements relied on by the plaintiff, or the significance of the zero balance at the end of each. Nor is an explanation given for the fact that the zero balance appears two months prior to the transfer).
68. Quite apart from the foregoing, other issues have been raised including as to the relevant date of default, and the significance of this from a statute of limitations perspective, having regard to what the defendant contends is the proper interpretation of Ulster Bank's general conditions, in light of what is said to be a default in February 2012 which is more than six years prior to the present proceedings being issued in May 2018. This is clearly raised, having regard to paragraphs 14 to 16 of the defendant's November 2018 affidavit, in which the defendant purports to rely upon the alleged primacy, or priority, of special conditions 4 over general condition 8.2.
69. In opposition to the defendant's reliance on a statute of limitations issue, it is clear from paragraph 7 of Mr Webb's 3 February 2020 affidavit, that the plaintiff relies, for the purposes of seeking judgement, on a demand which was not served by it, but served by what Mr Webb describes as the "*plaintiff's predecessor in title*", being a demand of September 2012. It will be recalled that the third exhibit to Mr Purcell affidavit of 31 August 2018 comprised a letter of demand sent by Ulster Bank on 20 September 2012. Thus, issues appear to arise concerning CFI's reliance on Ulster Bank's 2012 demand and the significance of same regarding the statute of limitations issue raised by the defendant. As regards the foregoing, a legal issue clearly arises in the present application, insofar as the plaintiff seeks to rely on the provisions of the aforementioned Act of 2020, in particular section 15.
70. The fourth principle set out by Mr Justice McKechnie in *Harrisrange* is as follows:- "*Where truly there are no issues, or issues of simplicity only, or issues easily determinable, then this procedure is suitable for use*" (the procedure being, of course, the summary judgement procedure).
71. In my view, there plainly are issues in this case and they are *not* issues of simplicity only, or issues easily determinable on the basis of what is before the court today. Fairly considered, the affidavits sworn in opposition to the application for summary judgement contain averments which go beyond what might be called "bald assertions"; and disputes of fact as well as issues of law have been raised which render the summary judgement procedure inappropriate for use in the present instance. In short, I cannot say that I am very clear that there is no defence and, taking into account the constitutionally protected entitlement of access to justice, and very mindful of the overarching obligation on this court to do justice to the issues before it, I am satisfied that it is appropriate to remit this matter to plenary hearing. For the reasons detailed in this judgement there are a number

of issues canvassed by the defendant and I do not feel that it is appropriate to limit the defendant insofar as defending at a plenary hearing those issues which he has raised. In other words I have not determined any of them but plainly the defence of the claim must be confined only to the issues which have been canvassed by on behalf of the defendant to date.

72. In coming to the view that it would not be appropriate to grant summary judgement, this court is not for a moment predicting the outcome of a plenary hearing. That will be a matter for a trial judge at a future date. The defence canvassed by and on behalf of the defendant may prove to be successful, or it may prove to be wholly unsuccessful. For present purposes, all this court is deciding is that the defendant has cleared the relatively low bar required to be entitled to defend the claim against him at a plenary hearing.