APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/90

Neutral Citation Number [2024] IECA 271

Costello P.

Allen J.

Meenan J.

BETWEEN/

FORTBERRY LIMITED AND JAMES FLYNN

PLAINTIFFS

- AND –

ALLIED IRISH BANKS PLC, SHANE MCCARTHY

AND

EVERYDAY FINANCE DAC

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 18th day of November, 2024

Introduction

1. This is an appeal by Fortberry Limited *("Fortberry")* against the judgment of the High Court (Dignam J.) delivered on 15th February, 2024 ([2024] IEHC 83) and consequent order made on 29th February, 2024, directing Fortberry to provide security for the costs of

Allied Irish Banks plc *("the Bank")* of the proceedings; and measuring the security in the sum of €198,147.40.

2. The order for security for costs was made pursuant to s. 52 of the Companies Act, 2014. The legal principles governing the application are well settled and were agreed. There was – and is – no issue as to the existence of reason to believe that Fortberry will be unable to pay the Bank's costs if the Bank is successful in its defence. Neither is there – or was there – any issue as to the existence of special circumstances which might have engaged the discretion of the court not to make the order sought if the basic requirements were established. Rather, the substance of the appeal is whether the High Court judge erred in finding that the Bank had established that it had a *prima facie* defence to the action; alternatively, that he erred in fixing the amount of the security.

Overview

3. In principle, the first step in determining whether a defendant has established that it has a *prima facie* defence to an action is to determine what the plaintiff's claim is. In principle, that first step should be fairly straightforward. In this case – as I will come to – it is not.

4. Before attempting to divine Fortberry's claim(s) against the Bank, it is useful to take a very broad view of the case which it makes.

5. Between 2007 and 2008 Fortberry borrowed a good deal of money from the Bank. The facility letters stipulated that the borrowings were to be secured by legal charges over three properties – an apartment at 5 Aston House, Dublin 2, a property at 10 Anglesea Street, Dublin 2, and Unit 2, Bracken Road, Dublin 4 – and a personal guarantee of Mr. James Flynn for €2.5 million. The facility letters suggested that all three properties were owned by Fortberry. In fact, the properties at Aston House and Bracken Road were owned by

Fortberry, and the property at Anglesea Street by Mr. Flynn. In the event, the charges were not put in place until 12th May, 2016. All of this is common case.

6. Fortberry defaulted on its obligations and on 20th April, 2016 the Bank recovered judgment against Fortberry in the sum of €5,182,308.06 and against Mr. Flynn in the sum of €2,500,000. Execution on foot of those judgments was stayed until 5th October, 2016 on terms that the charges stipulated for in the facility letters would be put in place; which, as I have said, they were. As I will come to, on the Bank's motion for security for costs, Fortberry had something to say about the execution of the charges but the case pleaded is that the mortgages in favour of the Bank were duly executed by Fortberry.

7. On 21st October, 2016 the Bank appointed – or purported to appoint – Mr. Shane McCarthy as receiver over the properties.

8. On 2nd August, 2018 the Bank assigned – or purported to assign – the loans and security to Everyday Finance DAC *("Everyday")*. Thereafter, Mr. McCarthy continued to deal with the properties.

9. In 2021 there was some engagement between the plaintiffs and Everyday which – on the plaintiffs' case – resulted in an agreement in writing dated 11th March, 2021 for the redemption of the loans and security in return for a payment of €2.6 million to Everyday.

10. Fortberry does not know (nor does Mr. Flynn) what price was paid by Everyday for the loans and associated security and one of the reliefs claimed against both the Bank and Everyday is an order directing them to disclose the price paid. It presumes, however – and it is undoubtedly correct in so presuming – that the loans were sold at a substantial discount.

11. A common theme in the claims against both the Bank and Everyday is that Fortberry and Mr. Flynn had a right to pre-empt any sale of the loans by redeeming the facilities at any price offered by any proposed assignee.

12. The primary relief claimed against Everyday is an order for specific performance of the agreement said to have been made on 11th March, 2021 (and which is said to have been part performed by a payment to Everyday of €120,780.70) by which Everyday agreed to take €2.6 million in full and final settlement. Separately, the plaintiffs claim against the Bank *"indemnity or contribution"* in respect of *"the Facilities"* for the difference between €2.6 million and the price paid by Everyday; and against Everyday a declaration that their liability is limited to the price paid by Everyday.

13. In very broad terms, then, Fortberry claims to be entitled to redeem its loans and the security given for them by paying to Everyday the lesser of €2.6 million and the price paid by Everyday.

14. As far as the second defendant, Mr. McCarthy, is concerned, there is a separate claim against the Bank for a declaration that the purported appointment of 21st October, 2016 was null and void, and for damages; and separate claims against Mr. McCarthy for damages, variously on the basis that his appointment was valid, and was invalid.

The claims against the Bank

15. The action was commenced by plenary summons issued on 2nd June, 2021 and a statement of claim was delivered on 15th June, 2021. The statement of claim ran to twenty three pages and set out successively the plaintiffs' case against each of the Bank, Mr. McCarthy, and Everyday. It was – as the judge observed – very lengthy and detailed. No less – as will become evident – it was very confused and confusing.

16. The affidavit of Mr. Mark McGinty, grounding the Bank's application for security for costs, described Fortberry's case against the Bank as broad ranging and sought to distil it into what were described as issues. This summary appears to have been agreed by Fortberry and the judge adopted it. Of the nine *"issues"* identified by Mr. McGinty, only two have survived but to understand the two issues with which this Court is concerned it is useful to

look at the original list and to understand how the issues which were finally disposed of by the High Court were dealt with.

17. The list of issues identified by Mr. McGinty and adopted by the judge at para 23 was:-

(i) A challenge to the appointment by the Bank on 21st October 2016 of Mr. McCarthy as receiver over properties;

(ii) A challenge to bankruptcy proceedings against Mr. Flynn;

(iii) A challenge to the assignment of the debt/facilities/mortgage/judgments by the Bank to Everyday by global deed of transfer [of 2nd August, 2018];

(iv) An order directing the disclosure [by the Bank] of the price paid by Everyday for the assignment;

(v) [A declaration that] the plaintiffs have no liability to the Bank whether pursuant to the facilities/mortgages/judgment/judgment mortgages or at all;

(vi) An indemnity from the Bank for the difference between the sum of €2.6 million and the sum paid by Everyday for the assignment in the Global Deed of Transfer;

(vii) An order directing the Bank to transfer the facilities/mortgages/judgments set out in the global deed of transfer to Everyday;

(viii) An order restraining the Bank (or its servants or agents) from marketing the properties for sale and from selling them;

(ix) Claims for damages based on these matters.

18. In fact – and I do not believe that I am being pedantic in saying so – the summary was not a list of issues but rather of what were understood to be Fortberry's claims against the Bank. Moreover, it is largely a list of the reliefs claimed, which does not take account of the basis on which the orders are sought, or whether the ground has been laid in the body of the statement of claim for the orders claimed in the prayer.

The decision of the High Court

19. The judge dealt summarily with (ii), (v) and (viii). He found that the challenge to the bankruptcy proceedings against Mr. Flynn was not relevant to whether the Bank had a *prima facie* defence to Fortberry's claim. In that he was undoubtedly correct and there is no appeal against his conclusion. I would add that Mr. Flynn's challenge to the bankruptcy proceedings was a collateral challenge to then live bankruptcy proceedings on substantially the same grounds on which those proceedings were being defended. As to (v) and (viii), there was no claim by the Bank that Fortberry had any liability to it and Fortberry did not express any apprehension that the Bank might attempt to market or sell the properties. Again there is no appeal.

20. As to (iv) and (vi), the judge (at para. 26) had no hesitation whatsoever in concluding that the Bank had a *prima facie* defence to claim that the Bank – whether in contract or as a matter of general law –was under an obligation to allow Fortberry an opportunity to redeem the debts for the same amount as Everyday was willing to pay for them. The judge identified the pleas in the statement of claim as to the existence and breach of the alleged contract and duty, and then the reliefs claimed by reference to the alleged breach of contract and/or duty, which were:-

> *"3. A declaration that the assignment of the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages in or around 2nd August 2018 was in breach of contract and/or the duties owed to the plaintiffs in that it failed to provide the plaintiffs with any opportunity, or, reasonable opportunity, to discharge and/or redeem the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages at any price or value offered by any proposed third party purchaser, including [Everyday].*

4. An Order directing [the Bank] to furnish the price paid, if any, by [Everyday] for the purchase of the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages. …

6. An Indemnity and/or Contribution in respect of the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages in respect of the difference between the sum of €2.6 million and the price paid, if any, by [Everyday] for the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages or, alternatively, for such other amount as this Honourable Court may consider fit or appropriate."

21. Fortberry – said the judge – had not pointed to any contractual provision which entitled it to pre-empt any assignment by redeeming at the price the proposed assignee was willing to pay; and the proposition that the general law imposed such an obligation was – said the judge – a novel one. Again there is no appeal. For reasons which I will come to, I pause to emphasise that there is no appeal against the judge's finding that the Bank had a *prima facie* defence to the claim (at para. 4 of the prayer) for an order directing the Bank to *"furnish"* – which I understand to mean disclose – the price paid, and to the claim (at para. 6) to for an indemnity or contribution in respect of the difference, if any, between the €2.6 million and the price paid by Everyday.

22. For the reasons to which I will come, the judge also found that the Bank had established that it had a *prima facie* defence to Fortberry's claims in relation to the appointment of Mr. McCarthy as receiver and in relation to the assignment to Everyday.

23. He made an order pursuant to s. 52 of the Companies Act, 2014 requiring Fortberry to provide security for costs and – again for the reasons to which I will come – fixed the amount of the security in the sum of €198,147.40.

The appeal

24. By notice of appeal filed on 4th April, 2024 Fortberry appealed against the judgment and order of Dignam J. on 25 grounds, grouped under four headings:-

The purported assignment

The purported appointment of the second named defendant

The indemnity, and

Quantum.

25. The single ground of appeal under the heading *"The indemnity"* was that the judge failed to give any or any adequate weight to the indemnity offered by Mr. Flynn and erred in refusing to take the offer of indemnity into account in considering whether to require security and/or in respect of the amount of the security. In circumstances in which Mr. Flynn is the subject of an unsatisfied High Court judgment for €2.5 million; had sought a personal insolvency arrangement in 2019; and at the time of the High Court hearing had the benefit of a protective certificate, it was wholly unsurprising that this ground was not pursued.

The purported assignment

26. The first ten grounds of appeal are directed to *"The purported assignment"* to Everyday.

27. At para. 32 of his judgment, the judge observed that:-

> *"32. A motion for security for costs should not become a forum for a forensic assessment either of the defence to the claim that is actually advanced in the Statement of Claim or of the rights or wrongs of things that are said in the exchange of affidavits but which do not arise from the pleaded case. It is not a forum for raising matters which are not part of the pleaded case and then pointing to 'holes' in the defendant's response to these issues. There has to be a consideration of both but only insofar as is necessary to determine whether the defendant/applicant has established a prima facie defence. That is why Charleton J. said in Olltech (Systems)*

Ltd. v Olivetti Ltd. [2012] 3 I.R. 396 that '… these motions should be brief applications. The special circumstances which mandate a court, in its discretion, to refuse to make an order securing the costs of a defendant in advance of trial are, however, the essential complicating factors in such applications that extend their duration.'"

28. I agree. The real challenge in this case, however, was to discern what the claim was.

29. The judge, at paras. 26 and 27, identified the relevant pleas in the statement of claim against the Bank in relation to the assignment. At para. 29, he noted that in the course of the exchange of affidavits on the motion for security for costs and in the course of submissions, Fortberry had sought to challenge the assignment by reference to alleged defects in the documentation. At para. 30, the judge held that the question of whether a defendant had established a *prima facie* defence must be determined by reference to the pleadings in the case. Later in the same paragraph the judge held that the alleged infirmities in the documentation were simply not in the case so that it could not properly be said that the Bank did not have a *prima facie* defence to a challenge to the assignment on those grounds.

30. There is no appeal against the judge's finding that the question whether the Bank had established a *prima facie* defence must be determined by reference to the pleadings. Rather, Fortberry contends that the statement of claim sufficiently paved the way for its reliance on the alleged deficiencies in the assignment which were first identified in the copy documentation exhibited by Mr. McGinty in his affidavit grounding the Bank's application and/or that the judge failed to give any or any adequate weight to the fact that Fortberry had yet to deliver a reply to the Bank's defence *"which could have (quite) easily remedied any deficiencies, if there were any, in the statement of claim."*

31. I will deal with the second point first. The statement of claim was delivered on 15th June, 2021. The defence of Mr. McCarthy and Everyday was delivered in September, 2021.

The Bank's defence was delivered on 19th October, 2021. The Bank's notice of motion was filed on 14th March, 2022 and the motion was heard on 6th and 7th December, 2022.

32. Order 23, rr. 1 and 2 of the Rules of the Superior Courts provide that:-

> *"1. No reply shall be necessary in any case where all the material statements of fact in the relevant pleading are merely to be denied and put in issue.*
>
> *2. A plaintiff shall deliver his reply, where necessary, within fourteen days from the delivery of the defence or the last of the defences unless the time shall be extended by the Court."*

33. Therefore, the pleadings were closed in November, 2021 and there was no application for an extension of time to deliver a reply. And that is the end of that.

34. The argument which Fortberry would advance in relation to the validity of the assignment requires closer scrutiny.

35. In his affidavit sworn on 11th July, 2022 on behalf of Fortberry, in response to the affidavit of Mr. McGinty on which the motion was grounded, Mr. Flynn identified a number of alleged deficiencies in what he described as the purported deed of transfer dated 2nd August, 2018 by the Bank to Everyday. Of the nine alleged deficiencies listed by the judge at para. 29, Fortberry – on the appeal – pressed four, which are:-

(a) That the schedule to the purported global deed of transfer lists only one of the two mortgages dated 12th May, 2016 which were made by Fortberry in favour of the Bank;

(b) That the purported global deed of transfer did not *prima facie* include a transfer of the underlying judgment;

(c) That the judge failed to give any or any adequate weight to the fact that clause 7.15 of the loan terms and conditions only permitted the assignment of the facilities to a *"financial institution"* – which Everyday is not; and

(d) That the judge failed to give any or any adequate weight to the fact that the Bank had not adduced evidence of the underlying mortgage conditions insofar as they related to the validity of the purported assignment of the mortgages.

36. As I have said, the judge found that none of these points were part of Fortberry's pleaded case and that the sole claim against the Bank in respect of the assignment was that Fortberry was not given the opportunity to redeem the debt for the same or a better price than was paid by Fortberry. He also highlighted the fundamental inconsistency between any challenge to the validity of the assignment and Fortberry's claim for an order compelling the Bank to complete all steps necessary to complete the transfer to Everyday. Fortberry does not quarrel with the judge's conclusion that its claim for an order requiring the Bank to complete the transfer is inconsistent with an attack on the validity of the deed of transfer but suggests that he erred in failing to take into account that the order directing the Bank to complete and perfect the transfer was only sought to the extent that such an order might be necessary. I cannot accept this argument. Any implicit acceptance in the words *"insofar as necessary"* that the order ought might not be necessary does not go to the inconsistency between a challenge to the validity of the transfer and a claim for an order requiring completion. The necessity for an order requiring the Bank to perfect the transfer would only arise if there was some deficiency in the paperwork executed to complete the assignment. Moreover, any challenge to the validity of the assignment is utterly inconsistent with the substance of the claims against Everyday.

37. The first ground of appeal is that the judge erred in concluding that the Bank had a *prima facie* defence to Fortberry's claim in respect of the purported assignment on the basis that there was a valid assignment to Everyday. Insofar as this suggests that the judge decided that the assignment – or purported assignment – was valid, it is wrong.

38. The substance of Fortberry's argument, as it is put in the written submissions on the appeal, is that the judge erred in his conclusion that there was *prima facie* evidence of a valid assignment. I see the argument. As security for the loans the Bank had three mortgages dated 12th May, 2026; two from Fortberry – of the Aston House and Bracken Road properties – and one from Mr. Flynn – of the Anglesea Street property. The schedule to the deed of assignment lists one mortgage by Fortberry and one by Mr. Flynn. However, the premise of Fortberry's argument that the Bank was obliged to but has not adduced sufficient evidence of the *prima facie* validity of the transfer is that there is, on the pleadings, a challenge to the validity of the transfer.

39. The third of the *"issues"* identified in the affidavit of Mr. McGinty is:-

> *"(iii) A challenge to the assignment of the debt/facilities/mortgage/judgment by AIB to Everyday by global deed of transfer."*

40. It seems to me that if and to the extent that this is to be understood as an acknowledgement that there is a challenge by Fortberry to the validity of the assignment, it is not correct.

41. The first reference to the transfer to Everyday is at para. 26 of the statement of claim where it is pleaded that:-

> *"26. In or about 2 August, 2018 [the Bank] purported to assign the benefit of the Facilities and/or the Mortgages and/or Judgment and/or Judgment Mortgages to [Everyday]. Said transfer and/or assignment was in breach of contract and or duty in that:-*
>
> *PARTICULARS OF BREACH OF CONTRACT AND/OR DUTY OF [THE BANK] IN RELATION TO THE PURPORTED TRANSFER AND/OR ASSSIGNMENT TO [EVERYDAY]*

(i) The plaintiffs were given no opportunity, or, at least, no reasonable opportunity, to discharge or redeem the Facilities and/or the Mortgages and/or the Judgment Mortgages and/or the Properties, at any price offered by any third party purchaser and/or assignee, including [Everyday], and/or at least at a better price and/or value thereto, and were given no relevant information to do so; and

(ii) The purported transfer or assignment to [Everyday] was for a lesser sum than which the plaintiffs were prepared to pay and/or could pay or discharge for the Facilities and/or the Mortgages and/or the Judgment Mortgages."

42. Previously, at para. 12, it had been pleaded that the plaintiffs had a contractual and/or equitable right to redeem at any price that might be offered by any third party or, at least, at a better price (whatever that is supposed to mean) and to be entitled to be given a reasonable opportunity, including relevant information, to do so; and that it was an express and/or implied term of the facilities and/or mortgages and that it was the contractual, equitable, statutory and fiduciary duty of the Bank that it would not seek to transfer or assign the facilities etc. etc. to a third party for less than the plaintiffs were prepared to pay.

43. Then it was pleaded that:-

"28. For the avoidance of doubt, it is pleaded that the purchase of the Facilities and/or the Mortgages and/or the Judgment Mortgages was at a significant discount as compared to the actual indebtedness, and the plaintiffs expressly reserve their right to seek discovery regarding the purchase price paid, if any, by [Everyday].

29. It is further pleaded that [Everyday], and/or its servants or agents, took any assignment or transfer of the Facilities and/or the Mortgages and/or the Judgment Mortgages subject to the contractual, equitable, fiduciary and/or statutory duties owed by [the Bank] to the plaintiffs, as outlined aforesaid. As such, [Everyday]

'stood in the shoes' of [the Bank] as secured lender. Moreover, [Everyday] took any lawful assignment subject to the 'equities' which had accrued to the plaintiffs in respect of the Facilities and/or the Mortgages and/or the Judgment Mortgages."

44. It is impossible to doubt the draftsman's determination on the one hand to cover all bases and on the other to give nothing away, but there is no clear challenge to the validity of the assignment. Variously, reference is made to a purported assignment; a transfer; an assignment; a purported transfer and/or assignment; an assignment, if any; and any third party purchaser and/or assignee, including Everyday The reference – here and elsewhere – to the purchase price *"if any"* appears to contemplate that the Bank might have given away the loans and security, which, apart from being inherently unlikely, is not the plaintiffs' case. In those circumstances is it difficult to see what the words *"if any"* took away from *"assignment"*.

45. No less to the point, the substance of the complaint in relation to the assignment is that the plaintiffs, specifically Fortberry, were not given the opportunity to redeem at the price which Everyday was prepared to pay and did pay. The High Court judge found that the Bank had a *prima facie* defence to that claim and it seems to me that it makes no difference whether the alleged consequences of the alleged breach of contract or duty was the invalidity of the assignment or loss and damage.

46. In fact, notwithstanding the formulation of the issue on Mr. McGinty's list, and the frequent use of the words *"purported"* and *"if any"*, it is quite clear that Fortberry does <u>not</u> impugn the validity of the assignment.

47. The first relief claimed against the Bank in respect of the assignment is:-

"3. A declaration that the assignment of the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages in or around 2nd August 2018 was in breach of contract and/or the duties owed to the plaintiff, in that it failed to

provide the plaintiffs with any opportunity, or reasonable opportunity, to discharge and/or redeem the Facilities and/or the Mortgages and/or the Judgment and/or Judgment Mortgages at any price or value offered by any proposed third party purchaser, including [Everyday]."

48. There was no appeal against the finding of the High Court judge that the Bank had a *prima facie* defence to Fortberry's claim that it had a right to pre-empt any assignment and at the oral hearing of the appeal counsel confirmed that it was not contested that the Bank had a *prima facie* defence to the claim for this relief.

49. The formulation of the declaration claimed against the Bank reflects Fortberry's – to use a neutral word – complaint in relation to the transfer: which was that Fortberry was not afforded the opportunity to pre-empt the assignment by redeeming at the price Everyday was prepared to pay. There was no complaint as to the form of the assignment, specifically, by reference to the schedule of security in the global deed of transfer or that the Bank's general right to assign the debts was somehow restricted by the general conditions attached to the loans to an assignment to a financial institution. It follows that the Bank cannot have been obliged to establish a *prima facie* defence to claims which had not been pleaded.

50. The same applies to the relief claimed at para. 4 of the prayer: an order directing the Bank to disclose the price paid for the assignment.

51. As was acknowledged by counsel at the oral hearing of the appeal, the same also applies to the relief claimed at para. 6 of the prayer for:-

"6. An Indemnity and/or Contribution in respect of the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages in respect of the difference between the sum of €2.6 million and the price paid, if any, by [Everyday] for the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment

Mortgages or, alternatively, for such other amount as this Honourable Court may consider fit or appropriate."

52. Moreover, this is – as the several various claims for damages are – a money remedy. It is quite clear that the plaintiffs challenged the entitlement of the Bank to have sold the loans without affording them the opportunity to match whatever price Everyday was prepared to pay but the premise of the claims against both the Bank and Everyday is that it did so. The challenge, then, is not to the validity of assignment but to the entitlement of the Bank to have done what it is effectively acknowledged that it did.

53. In the High Court and on the appeal, Fortberry emphasised the plea in the Bank's defence where it was:-

"... specifically pleaded that [the Bank] validly and lawfully assigned the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages to [Everyday] who is the lawful owner of same ..."

54. If it might be inferred from this plea that the Bank understood – or misunderstood – that there was a challenge to the validity of the assignment, any such understanding or misunderstanding cannot alter the claim actually made. Moreover, while the judge correctly said that the question of whether the Bank had established a *prima facie* defence was to be determined by reference to the pleadings, it would be more correct to say that the question is to be determined by reference to the statement of claim. In principle as well as in practice applications for security for costs are generally made before a defence is delivered and the *prima facie* defence is established (or not) in the affidavit grounding the motion. For the reasons I have given, the statement of claim did not challenge the validity of the assignment and no such challenge is to be inferred or deduced from the liberal sprinkling of *"purported"* or *"in any"*.

55. Before moving on, I want to say one more thing about the assignment. In *Allied Irish Banks plc v. James Flynn* [2022] IECA 60 this Court (Costello J., Haughton and Murray JJ. concurring) found that Mr. Flynn, having previously in personal insolvency proceedings acknowledged that Everyday was the assignee of the same debt, was not entitled to challenge the validity of the assignment. Without getting bogged down in the detail, there was some debate in argument as to the significance, if any, of this decision to a challenge by Fortberry to the validity of the assignment. However, in the light of my conclusion that there was in fact no challenge by Fortberry to the validity of the assignment, the issue does not arise.

The purported appointment of Mr. McCarthy

56. By sharp contrast with the relief claimed arising out of the *"purported"* assignment, the statement of claim clearly and unambiguously claims a declaration that the purported appointment of Mr. McCarthy is null and void and/or of no legal effect. However, before contemplating whether the Bank has established that it has a *prima facie* defence to this claim, it is necessary to examine what it is. The *"issue"* identified by Mr. McGinty does not engage with the basis on which the relief is claimed.

57. As far as the appointment or purported appointment of a receiver is concerned, the case pleaded against the Bank (at para. 12) is that it was an express and/or implied term of the facilities and/or the mortgages and/or the judgment mortgages and/or that the Bank owed the plaintiffs a contractual, equitable, statutory and/or fiduciary duty, that it would not exercise its rights in respect of the facilities and mortgages dishonestly, unreasonably, capriciously, arbitrarily or for an improper purpose; and that:-

> *"14. Despite the aforesaid, on or about 21 October 2016, in breach of contract and/or duty, the [Bank] purported to appoint [Mr. McCarthy] as receiver over the Properties. There was no basis for the said purported appointment whereby [Fortberry] had already agreed to a sale of two of the Properties.*

15. Further, and/or in addition to the foregoing, it is denied that the purported appointment of Mr. McCarthy complied with all of the legal formalities required under Mortgages or by law, and [Fortberry] and [Mr. Flynn] require proof thereof."

58. The plea at para. 14 is clear. Fortberry's claim is that there was no warrant for the appointment of a receiver – and that the Bank was not entitled to do so – because Fortberry had agreed to a sale of two of the three properties (one of which was owned by Mr. Flynn, personally) to an unidentified purchaser or purchasers at an unspecified price or prices, which may or may not have been sufficient to allow redemption of the loans at par. The judge found (at para. 37) that this claim required legal submissions on the scope and nature of a mortgagee's duties against a particular factual backdrop and that it followed that the Bank had a *prima facie* defence. Fortberry does not quarrel with this conclusion.

59. To my mind, the plea at para. 15 is at best unclear. Fortberry does not assert any failure to comply with the legal formalities required by the mortgages or by law; or even what legal formalities are alleged to have been required. Left to my own devices I would be strongly inclined to wonder whether this was a proper challenge to the formal validity of the appointment but the Bank took up the gauntlet.

60. The first of the nine grounds of appeal under the heading *"The purported appointment of the second named defendant"* is that the judge erred in concluding that the Bank had a *prima facie* defence to Fortberry's claim that Mr. McCarthy was invalidly appointed. This wholly general assertion did not engage with the judge's reasoning. In Fortberry's written submissions the proposition was modified to say (at para. 30) that the judge erred *"... in determining that [the Bank] had established a prima facie defence to the claim that the purported appointment of Mr. McCarthy complied with 'all' legal formalities under the relevant mortgages and/or at law."* This, with respect, is very confusing.

61. The judge, at para. 34, distilled from the statement of claim and the exchange of affidavits seven bases for the claim against the Bank that the appointment of Mr. McCarthy was invalid. The first and seventh grounds were expressly pleaded in the statement of claim. The first was that a receiver should not have been appointed because Fortberry had already agreed a sale of two of the properties; and I have addressed this. The seventh ground was that even if the appointment of Mr. McCarthy was valid and effective, it did not survive the assignment to Everyday. But, as the judge found, whether Mr. McCarthy's appointment survived the assignment was a matter between Fortberry and Everyday and/or Mr. McCarthy. The effect of the assignment to Everyday in 2018 did not – at least *prima facie* – go to the validity of the appointment of Mr. McCarthy in 2016.

62. None of the remaining five grounds relied on by Fortberry had been expressly pleaded. Rather, they arose out of Mr. McGinty's evidence and the copy documents – or purported copy documents – exhibited by him. The judge, however, took the view – and the Bank appears not to have argued otherwise – that the formal validity of the mortgages of the Aston House and Bracken Road properties and the formal validity of the deeds of appointment of Mr. McCarthy was in issue by reason of the plea at para. 15 of the statement of claim by which Fortberry denied that the purported appointment of Mr. McCarthy complied with all of the legal formalities required under the mortgages or by law.

63. As to the formal validity of the mortgages, the judge rejected Fortberry's argument that the Bank had not established that it has a *prima facie* defence to the claim of invalidity on the ground that the mortgages had not been exhibited. He pointed to the plea at para. 10 of the statement of claim that Fortberry had duly executed mortgages in favour of the Bank; to a copy letter from Mr. Flynn to the Bank – which had been exhibited – which recorded that the original mortgages, in duplicate, were enclosed; and to a copy Companies Office printout

– which had been exhibited – and which showed that particulars of the charges over Bracken Road and Aston House had been registered with the Companies Registration Office.

64. The deeds of appointment of Mr. McCarthy were not exhibited by Mr. McGinty in his grounding affidavit but – after Mr. Flynn had pointed out the omission – they were in his supplemental affidavit. There appears to have been a certain amount of confusion in the argument below as to whether – as the Bank contended – it had established a *prima facie* defence and whether – as Mr. Flynn put it – the court could be satisfied that the appointments were validly done and complied with all formalities, including that they were executed *"under the seal or under the hand of a duly authorised officer".* The proposition that a receiver might have been appointed *"under the hand of a duly authorised officer"* appears to have been based on the AIB Mortgage Conditions (2014 Edition), a copy of which was exhibited as part of a bundle of copy documents in relation to the appointment of Mr. McCarthy as receiver over the Anglesea Street property. But on the face of the copy deeds of appointment in relation to Aston House and Bracken Street, the appointment was made – or purportedly made – under the common seal of the Bank. The judge (at para. 41) found that there was *prima facie* evidence that the deeds of appointment had been validly executed on behalf of the Bank and, in the end, Fortberry does not quarrel with that finding.

65. What the judge identified as the second issue under the point as to the validity of the appointment of Mr. McCarthy was that – he said – the relevant mortgage conditions were not exhibited. The significance of this, he said, was (i) that any contractual power to appoint a receiver must derive from the mortgage terms and conditions and (ii) without evidence of the terms and conditions the court could not be satisfied that there was *prima facie* evidence of compliance with the terms and conditions. He found, at para. 46 of the judgment, that:-

"... in the absence of evidence of the applicable terms and conditions, I simply cannot conclude that AIB has established a prima facie defence to the claim that the formalities in respect of the appointment of the receiver were not complied with."

66. Before going any further I must pause to say that there was no cross appeal against this finding. It will be little consolation to counsel for Fortberry if I say that there was considerable force in his submission that this Court ought to confine itself strictly to the issues raised by the notice of appeal but, with the greatest respect, for the reasons given by the judge himself, this conclusion was clearly erroneous.

67. Mr. McGinty, in his first affidavit, had exhibited the mortgage in relation to the Anglesea Street property, including the terms and conditions thereto. The terms and conditions were in a standard printed form called *"AIB Mortgage Conditions (2014 Edition), AIB Mortgage Bank, Allied Irish Banks, p.l.c."*, which provided for the appointment of a receiver upon the occurrence of an event of default and provided that any receiver so appointed should have and be entitled to exercise various powers in addition to all powers conferred by the Land and Conveyancing Law Reform Act, 2009. It will be recalled that all three mortgages were executed on the same day and until the hearing of the motion there was no suggestion that the terms and conditions applicable to the Fortberry mortgages might have been any different to those applicable to the Mr. Flynn mortgage. Although on the face of the copy deeds of appointment it did not arise, Fortberry's argument directed to the execution of the deeds of appointment *"under the hand of a duly authorised officer"* of the Bank was clearly based on the terms and conditions.

68. The judge found (at para. 46) that *"It does appear very likely that the same terms and conditions applied to the other two mortgages as they were created on the same day ..."*. However he went on to find that this was not expressly stated on behalf of the Bank and, in the absence of that, such a conclusion would require the court to engage in speculation. I

cannot agree. While the judge was careful to distinguish between the requirement that the Bank establish a *prima facie* defence and the requirement that it should prove the validity of the appointments on a *prima facie* basis, it seems to me that he ultimately set the bar too high. In my firm view, the judge's finding that there was no evidential basis to support a *prima facie* defence was fundamentally at variance with his finding – which I believe was abundantly justified – that it is highly likely that the same terms and conditions applied to all three mortgages. The last minute and last ditch argument made at the hearing of the motion, in my view – to borrow the judge's expression – amounted to an attempt to point to a hole in the evidence put up by the Bank. I respectfully agree with the judge that the court ought not to have been asked to engage in speculation as to the terms and conditions, but it seems to me that it was Fortberry's submission that the terms and conditions applicable to the Fortberry mortgages might have been different to those which applied to the Anglesea Street mortgage which called for speculation.

69. The judge then turned to what he characterised as two fall back positions of the Bank which were that even if there was not sufficient evidence of the applicable terms and conditions it had (i) a statutory power to appoint a receiver under s. 108 of the Land and Conveyancing Law Reform Act, 2009 or (ii) an equitable mortgage.

70. The *tabula in naufragio* of an equitable mortgage is easily disposed of. Any equitable mortgage would not have carried a right to appoint a receiver but a right to apply to court for the appointment of a receiver. There was never any question of a court appointed receiver.

71. The judge carefully considered the Bank's argument that even if there was an evidential deficit by reference to the terms and conditions, it had a statutory right to appoint a receiver. There was, he said, undoubtedly a *prima facie* case that the circumstance contemplated by s. 108(1)(b) had arisen – that it to say, a failure to pay some interest or instalment of capital and interest for upwards of two months. However, he said, s. 96(3) of

the Act expressly provides that the powers and rights conferred by Chapter 3 (which includes s. 108) *"take effect subject to the terms of the mortgage"* and in the absence of the terms and conditions, the court could not determine whether or not the mortgage terms were different to the statutory terms. Again, I find myself compelled to disagree. *"It is the case",* as the judge said, *"that in very many cases"* – I would say invariably – *"the mortgage terms and conditions remove or lessen the limitations on the appointment of receivers provided for by section 108 ..."* In my view, the judge's rejection of the Bank's first fall-back position required speculation that the terms and conditions – if they were not the same as those which had been established applied to Mr. Flynn's mortgage of the same date – ran counter to invariable practice and experience. In my view, even without the terms and conditions, the Bank, as the holder of a duly executed mortgage, was *prima facie* entitled to appoint a receiver in the uncontested event of default.

72. As far as the existence of a defence is concerned, the assessment is to be conducted on a *prima facie* basis. As Charleton J. put it in *Oltech (Systems) Ltd. v. Olivetti UK Ltd. [2012] 3 I.R. 396, at para. 5*:-

> *"This approach emphasises that no assessment of ultimate liability ought to be made, much less any decision beyond stating whether there is a reasonable prospect of a defence succeeding at trial. Consequently, these motions should be brief applications."*

73. Stepping back from the thicket of argument this way and that, the issue is whether the Bank – which on Fortberry's case was the holder of two duly executed legal mortgages – had on a *prima facie* basis a power to appoint a receiver in the event of a default. It seems to me that it plainly had. The Bank does not assert a right or power beyond the statutory power. I am prepared to contemplate, if only for the sake of argument, that the terms and conditions

theoretically might limit or restrict the exercise of the statutory power but in my view a *prima facie* defence is established by the assertion of the power.

74. Simply put, the question is whether there a reasonable prospect of the Bank establishing at trial that it had a right to appoint a receiver. The answer to this, in my view, is unquestionably yes.

The effect of the assignment

75. Having found that the Bank had not established that it had a *prima facie* defence to the challenges to the validity of the appointment of Mr. McCarty, the judge went on, at para. 55, to find that it nevertheless had a *prima facie* defence to the claims arising out of the alleged invalidity. It followed – said the judge – from his finding that the Bank had a *prima facie* case that the assignment was valid, that it had a *prima facie* case to make that any liability arising from the alleged wrongful – or purported – appointment of Mr. McCarthy had been assigned to Everyday. The judge came to this conclusion on the basis of the plea, at para. 29 of the statement if claim, that Everyday took any assignment subject to the various duties said to have been owed to Fortberry by the Bank and therefore *"stood in the shoes"* of the Bank. If – he said – Everyday stood in the shoes of the Bank, then there must be a *prima facie* case that Everyday had assumed liability for any wrongful action on the part of the Bank in respect of the appointment of Mr. McCarthy.

76. I follow the logic, but, with respect, it is founded on an error of law. In fairness to the judge, the error of law can be traced directly to Fortberry's pleading; specifically, the doomed attempt to articulate a complex legal proposition in the vernacular. Doing the best I can, the substance of Fortberry's case against Everyday is that it took the assignment with notice of the Bank's failure to afford Fortberry the claimed right of pre-emption and is jointly and severally liable for the consequences of that failure. However, the appointment or purported appointment by the Bank of Mr. McCarthy long predated the assignment. There is no plea

that Everyday was on notice of any infirmity in the appointment of Mr. McCarthy and the alternative case pleaded against Mr. McCarthy and Everyday is that even if the appointment of 21st October, 2016 was valid, it did not survive the assignment. As against Mr. McCarthy, the statement of claim sets out in detail the alleged duties (to sell the properties, maximise the rent and so forth) and the alleged breaches in the event that his appointment was valid, but not the claimed consequences in the event that his appointment was invalid. As far as the Bank is concerned, Fortberry claims that the purported appointment of Mr. McCarthy was invalid and in breach of duty and contract but – as in the case of Mr. McCarthy – there is no attempt to identify the consequences of the purported appointment if it was invalid. In principle, however, whatever, if any, damage arose from any infirmity in the appointment of Mr. McCarthy must date back to the appointment – or purported appointment.

77. Other than in the plea that Everyday *"stood in the shoes"* of the Bank, there is no plea (nor is there any evidence) that Everyday assumed liability for any wrongful action on the part of the Bank. The judge's analysis and conclusion were based solely on the plea in the statement of claim. Assuming, for the sake of argument – and for the avoidance of doubt I express no opinion on the question – that the effect of the assignment was that Everyday would assume responsibility for any liability previously incurred by the Bank to its customer or for any claims arising out of the prior dealings between the Bank and the borrower, Fortberry was not privy or party to the assignment. To be sure, it is perfectly possible to contemplate that an assignee of a chose in action might agree to indemnity the assignor against any claims or liabilities arising out of the previous dealings between the assignor and the borrower but without the concurrence of the obligee, it is legally impossible to assign a liability.

78. For these reasons I am satisfied that Fortberry is correct in its submission that the judge erred in his conclusion that the Bank had established a *prima facie* defence on the

ground that Everyday had assumed liability for any wrongful action on the part of the Bank in respect of the appointment – or purported appointment – of Mr. McCarthy, but in view of the conclusions to which I have come as to the challenge to the appointment, I am afraid that it is of no avail.

Quantum

79. The judge, as I have said, measured the amount of the security at €198,147.40.

80. By its notice of motion issued on 14th March, 2022 the Bank asked not only for an order pursuant to s. 52 of the Act of 2014 directing Fortberry to provide security for costs but also an order measuring the level of security. The grounding affidavit of Mr. McGinty asked that the quantum of the security should be fixed at €297,708, which was the amount of a costs estimate made by Cyril O'Neill, legal costs accountants, which was exhibited. The estimate was based on a summary of the claims against the Bank; an estimate that the trial was likely to last seven days; and that senior and junior counsel would be briefed. There was a global solicitors' professional fee and an estimate of counsels' brief fees and refreshers.

81. When the replying affidavit of Mr. Flynn was eventually filed on 11th July, 2022, it was said that the costs sought were entirely excessive. Mr. Flynn, who is a former taxing master, suggested that *"reasonable costs for a case of this nature would be in the region of €100,000 for a 3 – 4 day trial, which would tally up with what was ordered by the Court of Appeal in the aforementioned Netterville proceedings."* I offer a number of observations. Firstly, Mr. Flynn is a solicitor who acts for himself as well as Fortberry. Secondly, it is a matter of public record that Mr. Flynn retired as a taxing master on 21st December, 2011. Thirdly, there is no direct challenge to the Bank's time estimate. Fourthly, there is no challenge to any of the constituent elements of Cyril O'Neill's estimate.

82. At para. 68, the judge said that while ultimately the amount of security was in the discretion of the court, the default position was that it should direct security in the full amount of the probable costs. There is no appeal against that finding.

83. The judge noted that Mr. Flynn was a former taxing master but found that he could not be treated as an expert because he lacked the independence necessary to give expert evidence. There is no appeal against that finding.

84. The judge found that Mr. O'Neill's estimate was reasoned and considered and was the only evidence as to the likely quantum of costs to which any weight could be given. It is now said baldly that the judge erred in failing to give any weight to the views *"afforded"* [*recte.* expressed?] by Mr Flynn as a former taxing master; but not why. Mr. Flynn can be taken to know a great deal about the measurement of legal costs before and until 2011 but he is not independent and therefore, for present purposes, not an expert. As between the Bank's estimate that the trial would take seven days and Mr. Flynn's oblique suggestion that it might take three to four days, the judge found that the estimate of seven days was far from unreasonable or inaccurate and certainly more accurate than three to four days. There is no clear challenge to that conclusion.

85. The judge came to the figure which he did by discounting the full amount of the costs estimate by 35% to take account of the fact that there were two plaintiffs and that there were some elements of the claims that were individual to the different plaintiffs.

86. The first ground of appeal is that the sum of €198,147.40 *"was disproportionate in all the circumstances, but particularly the basis on which [the judge] held that [the Bank] had established a prima facie defence to the claim."* This was not really developed. Counsel did not identify any authority for the proposition that the basis or nature of the *prima facie* defence might be material to the question of quantum.

87. Four of the six grounds under this heading – which suggested, this way and that, that the High Court judge erred in failing to accede to an application first made at the end of the argument – and nearly nine months after the motion issued – to adjourn to question of quantum to allow Fortberry to adduce expert evidence were not pursued.

88. The first argument offered in Fortberry's written submissions in support of the proposition that the amount fixed was *"disproportionate in all the circumstances"* is that the Bank has not established a *prima facie* defence *"either to the purported appointment … or the assignment"*. But this does not go to quantum but rather whether security should have been ordered at all.

89. In the alternative, it is submitted that the sum fixed – €198,147.40 – was excessive in all the circumstances in any event, representing effectively two thirds of the sum sought – €310,992.00 – and that an award of one third of the total sought – *"roughly €100,000"* – would have been more proportionate. This – the €100,000 – was said to tie in to the security paid by Fortberry in the separate proceedings which it has brought against Promontoria (Aran) Limited. This, with no disrespect, is entirely woolly. It does not engage with – or challenge – the reduction of 35% of the total amount of the estimate. There is no evidence of the nature of Fortberry's action against Promontoria (Aran) Limited – which I presume is the action referred to elsewhere as the Netterville proceedings – beyond a summary in the affidavit of Mr. McGinty in which he suggests that the complaints are similar to these proceedings but describes a claim against an assignee and receivers for damages in connection with a sale by the receivers.

90. The submission that the amount of the security was disproportionate is no more than an incantation and I have no hesitation in rejecting the appeal under this heading.

Summary and conclusions

91. For these reasons, albeit by a different route, I am satisfied that the High Court judge was correct in his ultimate conclusion that the Bank had established that it has a *prima facie* defence to Fortberry's action and that there are no grounds on which this Court should interfere with the judge's assessment of the amount of the security to be provided.

92. I would dismiss the appeal and affirm the order of the High Court.

93. As to the costs of the appeal, the Bank having been entirely successful on the appeal is presumptively entitled to an order for its costs. If Fortberry wishes to contend for any other order in relation to the costs of the appeal, it may within fourteen days file and serve a written submission limited to 1,000 words, in which case the Bank will have fourteen days to respond, similarly so limited.

94. As this judgment is being delivered electronically Costello P. and Meenan J. have authorised me to say that they agree with it and with the orders proposed.