THE HIGH COURT

2008 No. 8389 P

Between:

NEIL HEALY

Plaintiff

– AND –

ULSTER BANK IRELAND LIMITED AND PROMONTORIA (ARAN) LIMITED

Defendants

JUDGMENT of Mr Justice Max Barrett dated 16th January, 2018.

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I

Introduction

1. Dr Healy is a registered medical practitioner and conducts a general practice in County Westmeath. The defendant is the successor in title to Ulster Bank Ireland Limited *vis-à-vis* certain loan and guarantee arrangements that it seeks now to invoke against Dr Healy. At all material times, Ulster Bank maintained an office in Mullingar. In August 2008, Dr Healy had a sum of US$993,983.03 standing to his credit in his deposit account with Ulster Bank at that branch. On 13th/14th August 2008 (the letter advising of the set-off bears both dates) Ulster Bank appropriated this sum by way of set off against a debit balance allegedly outstanding in respect of a facility extended under facility letter of 20th July, 2006, to Coole Property Holdings Ltd (CPHL), in respect of which, Dr Healy had entered into a guarantee of 9th August, 2006. There was also an alleged personal liability.

2. Dr Healy was outraged at the appropriation of the money standing to his credit in his account in respect of the alleged liabilities mentioned. He instituted proceedings against Ulster Bank in which he claimed that in appropriating the said monies the defendant Bank was guilty of unlawfully converting these sums to its own use, breach of contract, negligence and deceit. His claim was dismissed by the High Court (McGovern J.) on 17th July 2009. On appeal, the Supreme Court, on 21st December, 2015, set aside the order of the High Court and remitted the proceedings for re-hearing. The within judgment follows on that re-hearing. For the avoidance of doubt, it is clear from paras. 25 and 26 of the judgment of Hardiman J. in the Supreme Court that the within proceedings were remitted for a full re-hearing encompassing all issues between the parties.

II

Some Background Facts

3. Dr Healy says that the sums on deposit which were appropriated by way of set-off were the balance of an initial lodgement of €2,213,607. This deposit was made on 1st August 2007. Dr Healy says that this initial deposit represented a sum derived from the sale by him of his interest in CPHL and the sale, at the same time, of his interest in a partnership in a medical practice, between him and another doctor. This other doctor, in addition to being Dr Healy's partner in general practice was also engaged with him, through the medium of CPHL, in the development of an elaborate general practice building and ancillary para-medical and housing development on the grounds of a former hospital in Coole, Co. Westmeath.

4. Unfortunate differences arose between Dr Healy and his former business partner. As a result, it became clear that they could no longer practice medicine in partnership or advance their joint commercial interests together. In relation to the latter, Dr Healy was keen to sell the development in which the two were engaged; his partner wished to retain it. In July 2007, Dr Healy and this other doctor reached an agreement as a result of which, in effect, Dr Healy was bought out by his former partner. The former partner paid

to Dr Healy's solicitor the consideration for this buy-out. On 31st July, 2007, Dr Healy obtained a cheque representing these proceeds from his Solicitor. On the following day, 1st August 2007, Dr Healy attended a meeting in the Mullingar branch of the Ulster Bank. He had an appointment to meet Mr Alan Leech of Ulster Bank there. He was accompanied by his mother, Ms Maria Healy.

III

The Meeting at the Bank

(i) The Evidence of Ms Healy.

5. The court has been presented with three accounts of the meeting at the bank, respectively by Dr Healy, Ms Healy and Mr Leech. The account of Dr Healy and Ms Healy largely overlapped. However, the court was especially struck by the evidence of Ms Healy. She impressed the court as an honest country-woman, she was clearly trying her best to tell the truth, she differed from her son on a couple of inconsequential points, but the fact that she differed suggested to the court that she was not reciting an agreed version of events, and although she was clearly vexed at how her son has been treated by Ulster Bank and not a little upset at the emotional toll that the within proceedings have taken on herself and her son, she sought to be fair and moderate when treating with the evidence of Mr Leech. So what happened at that meeting of 1st August 2007? Ms Healy recounted events as follows:

> *"Ms Healy – …This was about 12:00, 12:30….[W]e parked the car – he [Dr Healy] parked the car somewhere at the back of the bank and he said 'I have to ring him [Mr Leech] and let him know' – or text him, I don't know which…and let him know that we are here.' So we went around into the bank and Neil went up to the reception and told her that he had an appointment with Alan Leech but he was expecting us. So Alan Leech came down the stairs and opened the door…I think, a glass door, and Neil [Dr Healy] said: 'This is my mother'. And I shook his hand and followed him upstairs….into an office. And as I said, he [Dr Healy] said: 'This is my mother' and 'this is Alan Leech'. And I remember saying to him: 'I'm delighted to meet you…to put a face on the name that I had heard so much talk over the last few months. You know, Neil would tell me 'Alan Leech is doing this…' or 'We are doing that and I'm meeting Alan Leech'….I was well tuned in to what was going on. So I told Alan Leech, I said: 'I'm delighted to meet you.' And then we sat down at a desk. The desk was in front of a window and we sat this side of it and Alan Leech sat over there and Neil said to him the closing had occurred and Alan Leech said – this is more or less what happened. And Alan Leech said 'I didn't realise it had closed already. I knew it was imminent or going to happen…'. And Neil said: 'Yes, it has.' And Alan Leech said: 'And have you your cheque?' And Neil said: 'Yes, I have my cheque here….Patrick Groarke [Dr Healy's then solicitor] told me that it is safe to come in here and lodge my money with you and that I have no liabilities to…Ulster Bank.' And Alan said: 'Yes, that's the way…it is with me as well.' Now they are words that are not, maybe, 100%. But he did say that. So Neil said: 'Well there is two things.' Alan Leech asked him: 'Are you going to lodge your money, Neil, with us now?' And Neil said: 'Well that's my intention coming in...' – and that was his intention – '...coming in here today.' 'But', he said, 'before I come to that…there are two things that I want to discuss with you, two important things, and the first thing is about the interest rates.' There was something about interest rates with…AIB and, you know, can you match these interest rates? And Alan Leech said: 'That shouldn't be a problem at all.' And I think at that stage he went out and he got some information on interest rates and he came back in and he said: 'I can do better than the AIB.' And Neil said: 'That's grand.' And they were happy enough with that. But Neil said: 'The second and most important thing that I want to find out is that I have your assurances that my money is safe in the Ulster Bank, regarding the Coole project, regarding my liabilities with the Coole project.' And Alan Leech told Neil that his money was safe and he was giving his assurances that Neil's money was safe, that he was in the clear from Ulster Bank and let Alan do the worrying for…Ulster Bank after that. And Neil said to him: 'Well in that case, when I have your assurances, I'm happy to lodge my money with you.' …'I'm happy to lodge it, Alan, with you'."*

[Why did Dr Healy seek this second assurance? He explains as follows in his affidavit evidence:

> *"The reason I sought Mr Leech's specific assurances that I had no existing liability to the Defendant in respect of CPHL's or the partnership's liabilities was because my instinct was in fact not to lodge the sale proceeds with the Defendant. I have an uncle…resident in the US. [He]…is an individual with a high net worth and from whom I often seek advice on my business dealings….[My uncle] had sought to dissuade me from depositing the sale proceeds with [Ulster Bank]…as a direct result of an experience he himself had a number of years ago when monies held by him with an Irish bank was garnisheed by creditors. Unfortunately I chose to ignore my uncle's advice. The reason I did so is because I trusted Mr Leech and believed that I could rely on his assurances to me."*

Though the court turns more fully to the issue of estoppel later below, it cannot but note in passing that it finds the just-quoted averment (and like evidence given by Dr Healy in the witness-box) to be (and to have been) as surprising as it is significant. What Dr Healy appears to be averring is that he would have taken means to defeat his creditors, and in particular Ulster Bank, if given the opportunity. So when he comes to court claiming an estoppel, what he is in effect claiming is an estoppel that would operate in such a manner as to permit him to act in a fundamentally unlawful fashion and in disregard of his lawful liabilities. It seems to the court to follow inexorably from the equitable maxim that 'He who comes to equity must come with clean hands' that for an estoppel to operate it must be an estoppel which relates to a *bona fide* intention, and when it comes to the reliance which yields the estoppel, that reliance must be for a proper purpose. Equity counters injustice that the law, un-tempered, might otherwise yield; it does not exist to obviate obligations that the law justly imposes.]

[Ms Healy's evidence continues below.]

> *And he [Dr Healy] said: 'Moving forward I intend to open another practice in Mullingar and I hope to continue to do business with you going forward into the future.' So then Alan Leech – oh yeah, he had asked me first when we sat down would I like a cup of tea or coffee and I think I had a cup of coffee. And I don't know if Neil had tea or coffee. I don't know what he had. Or did he have anything. But I had definitely a cup of coffee. And then I nudged Neil and I said: 'Can you get a copy of that cheque?' I said: 'I would love to have a copy of that to see it, just to see it. I will never see another one.' And Neil asked Alan: 'Will you give – my mother is looking for a copy of the cheque.' So Alan got a photocopy of the cheque. He didn't actually give it to me, he put it in his own file, Neil did, and I didn't see it actually again anyway. But it didn't make any difference. And then when all that bit of talk was over Alan – they were all in great form and Alan Leech invited us to – he said: 'Would you like to come for a celebratory lunch over to Con's?' And Neil said: 'We definitely would.' He said to me: 'Are you on for it?' I said: 'Most certainly.' So we walked over to Con's, down the*

stairs, over to Con's and we just had a bit of lunch. It is a pub with lunches and stuff. Nothing fancy.

Counsel

– Is Con's far away from the bank?

– Far enough. A few minutes' walk….I don't like walking too far.

– How long were you in Mr. Leech's office?

– I would say about, maybe, an hour….

– So you go over to Con's, a few minutes' walk?

– We went over to Con's. The two men walked in front of me. I walked, dilly-dallied behind just thinking 'God, this is great now…we are all over'….And we went to Con's and we had the bit of lunch and that was it.

– How long were you in Con's?

– I'd say maybe another hour. Maybe less….

– So you had another hour there and then I assume Mr. Leech departed and you went on your way, is that correct?

– Mr. Leech departed, yes, and then we went on our way. And that was it.

– Who got you the tea or coffee, can you recall, in the office?

– You know, I had this discussion with my husband, we were talking about it one day, and I think that – well a girl definitely came in. It wasn't Alan Leech himself that gave it. A girl came in and she put down the tea or coffee, it was coffee in front of me. But I don't know did he ring up and say 'Can you bring in a cup of coffee to Mrs. Healy?' or how. But somebody came and handed me the cup of coffee….

– [W]e know that Mr. Leech will say that he doesn't recall you being present upstairs. He will say that he met you in Con's and that he met you downstairs in the bank….[D]o you want to comment on that?

– It is nonsense. Maybe that's not the right thing to say in court. Nonsense.

– And he will say that he doesn't believe he made tea or coffee for anybody?

– He didn't make it. Some girl made it and brought it in.

– [Junior Counsel]…reminds me to invite you to comment on the mood after the meeting….or at the meeting in 10 Mr. Leech's office?

– The mood was very good. I mean, if it wasn't a good mood that day when would it be a good mood? It was great. Everybody, these two were on the same page. Neil went in looking for assurances that his money would be safe with the Ulster Bank. Because otherwise Neil would not have lodged that money into an account there if – he knew going in, he had been talking to [Ms Healy's brother, the above-mentioned uncle]…and if he never talked to…[that uncle] he's smart enough to know that you are not going to hand in a cheque without – and he trusted Alan Leech. He had been doing business with Alan Leech for a couple of years through the Coole thing and he trusted him implicitly –

– Thank you.

– – and held him in very high esteem. But he did ask him for those assurances because Neil is cautious enough….[a]nd Alan Leech did give him those assurances that his money was safe."

6. Despite impressive effort by counsel for Promontoria, Ms Healy never departed to a material extent from the above-quoted evidence when under cross-examination. This being the third time that she has given evidence on this matter (she previously gave evidence before McGovern J. and the Medical Council) there were, of course, some inconsistencies of detail; it would have been surprising were there not. Some of her sequencing of events changed over time, though Ms Healy has had long to think over matters in her mind, she may have sequenced them differently as she recalled them more and more, just as the matters concentrated upon by her on each occasion that she gave evidence would have been impacted by what her questioners concentrated upon. As to parallels in the sequencing identified by mother and son over time, some of that sequencing, it seems to the court, must have been prompted by conversations between mother and son over the years, albeit that the court accepts (and understands) that they "*try not to talk about it* [all that has happened] *because*", as Ms Healy stated in her evidence, "*if we talked about it we* [Dr Healy and her] *would both get annoyed*". However, the parallels in sequencing also appear to the court to have been informed by the focus and thrust of the questioning of Ms Healy on each occasion that she was questioned.

7. In truth, the identification by the defendants of not especially significant differences presenting in Ms Healy's evidence over the three times that she has given evidence on the matters that are the subject of the within proceedings, followed what seemed to the court, with respect, to be an unrealistically forensic examination of that evidence, which examination appeared to rest, at least impliedly, on the somewhat strained premise that a person is less credible as a witness unless there is complete consistency in every aspect of evidence that she gives on successive occasions after significant gaps in time. That is a standard that the court suspects no human being could ever attain, unless perhaps she had learned a script and was reciting it off pat. Had Ms Healy's evidence tripped unhesitatingly off her tongue in a manner that was consistent in every conceivable detail with her past evidence, the court might well have found her somewhat less credible as a witness. Some minor inconsistencies coupled with a general consistency of evidence given on the same matters at different times over many years rendered her an impressive witness who displayed the usual and expected frailties of human memory without being any the less credible for that, in fact quite the opposite.

(ii) The Evidence of Dr Healy.

8. Ms Healy's evidence, as mentioned, chimed closely with that of her son. It does not seem necessary to recount in detail the oral evidence given by Dr Healy. But for the sake of completeness, and for those additional details which he provides that his mother does not, it is perhaps worth quoting his version of the meeting of 1st August, 2007, as averred to by him in his affidavit evidence. Per Dr Healy:

> *"On 1 August 2007…I met with Mr Leech at the Defendant's Mullingar Branch Office. My mother accompanied me to this meeting. At this meeting I informed Mr Leech that the deal in relation to the sale to Dr X…of my interest in CPHL and my interest in the partnership…had closed the previous day and that I had secured payment of the sale proceeds from Dr Cullen. Mr Leech expressed surprise that the deal had closed indicating that he was aware the closing was imminent however he had not been aware that it had in fact taken place. I expressed my thanks to Mr Leech for his and Ms… Finnegan's assistance and support to me. Mr Leech commented that, now the deal was done and I had my cheque, I was not going to forget about him. I indicated that I would not. I advised Mr Leech that I intended to lodge the cheque representing the sale proceeds with him, but before I did, there were two things I wished to discuss with him.*
>
> *The first of these two issues I discussed with Mr Leech was whether the Defendant [Ulster Bank] would match the rates of interest which I would secure from other banking institutions. Mr Leech assured me the Defendant would do so and he commented that I was not to worry and he will arrange a meeting with the Defendant's wealth managers.*
>
> *The second issue I discussed with Mr Leech was that he give me confirmation that I was released from any liability to the Defendant in respect of CPHL and the partnership's liabilities. In response, Mr Leech replied that I was 'in the clear with Ulster Bank', that I had 'nothing to worry about' in that regard and that Mr Leech 'would now do the worrying for Ulster Bank'….*
>
> *Following my handing over the monies Mr Leech invited my mother and I for a celebratory lunch at a local restaurant Cons which invitation we accepted."*

9. Mother and son remember the representation as having been given in the same general terms. Ms Healy in her oral evidence describes it thus: "*Alan Leech told Neil that his money was safe and he was giving his assurances that Neil's money was safe, that he was in the clear from Ulster Bank and let Alan do the worrying for…Ulster Bank after that.*" And Dr Healy avers that the representation was that "*I was 'in the clear with Ulster Bank', that I had 'nothing to worry about' in that regard and that Mr Leech 'would now do the worrying for Ulster Bank*'". So the substance of the representation is apparent: you are in the clear; any worrying about the continuing arrangements at Coole is now for Ulster Bank. The legal effect of such a representation, in the circumstances given, is a matter to which the court turns in some detail later below.

(iii) The Evidence of Mr Leech.

10. Mr Leech's evidence did not just suffer from a failure to remember certain aspects of what occurred on 1st August, 2007. There was also a very significant disparity between the evidence that he gave, respectively, at the original High Court case, before the Medical Council and before this Court regarding the meeting of 1st August, 2007. Unlike Ms Healy, these were not the kinds of inconsistency that one would half-expect of someone recounting the same events three times over. Rather, new aspects of what occurred on 1st August, 2007, were presented for the first time in remarkable detail. So, for example, for the first time ever, Mr Leech gave a detailed account of having first met Ms Healy by the ATM inside the Ulster Bank branch, an account that was so detailed it is remarkable that this meeting was not previously recounted in some shape or form (and it was, of course, decried by Ms Healy as "*nonsense*"). Mr Leech also had a hugely improved recollection about his discussion with Dr Healy at the meeting of 1st August on the subject of interest rates, again so hugely improved that it is remarkable that matters were not previously recalled by him so. This amplified evidence, were it credible, would, as it happens (counsel for Dr Healy suggests, not un-coincidentally) have assisted in addressing certain deficiencies identified by the Supreme Court in the evidence for Ulster Bank at the first trial of this matter. As Mr Leech, as part of the natural progression of his career, has, in the years since the events that are the focus of the within proceedings, elected to take employment other than with Ulster Bank, the court does not consider that he had any motive to advance the defendants' case. However, the fact remains that many years after the events at issue in the within proceedings, Mr Leech suddenly recalled vast and vastly detailed memories of aspects of what occurred on 1st August 2007 (though still no recollection as to the critical representation). The court regretfully must conclude that it found Mr Leech's evidence, for this reason, to be somewhat wanting in credibility, and the evidence of Dr Healy, and particularly Ms Healy, greatly to be preferred.

III

Afterwards

(i) Introduction.

11. Ulster Bank conducted various transactions on behalf of Dr Healy with the deposit-money prior to the set off, which occurred just over a year after the money was lodged. Some of the interactions with Dr Healy and within Ulster Bank over this timeframe are instructive as to what had happened at the meeting of 1st August, 2007.

(ii) The World as Dr Healy Saw It.

12. Subsequent to his meeting with Mr Leech on 1st August, 2007. Dr Healy proceeded, demonstrably proceeded, on the clear understanding that his deposit-money was safe with Ulster Bank and that there was no other debt, pursuant to a guarantee or otherwise, whereby that money could be taken from him.

a. The E-mail of 1st August, 2007.

13. On the evening of 1st August, 2007, Dr Healy sent a letter to his solicitor, stating, inter alia, *"I lodged the cheque to a deposit account with them for the moment. He [Mr Leech] was not aware that our deal had concluded and I am keen to ensure that I am protected…and indeed that my name is removed from any shared accounts concerning the Coole project….Perhaps we might seek a letter from UB confirming same."* With the benefit of hindsight, the court cannot but observe that Dr Healy should perhaps have got a letter of release before leaving the bank and should not perhaps have relied on an oral assurance from a bank manager that all was in order; and it is perhaps even a little strange that he did not proceed as the court has just indicated, but everyone acts unwisely from time to time.

b. The E-mail of 24th September, 2007.

14. On 24th September 2007, Dr Healy wrote to a Ms Fox, then of Ulster Bank, enclosing a copy of a bank statement in which his name appeared with that of the other doctor with whom he had been in the now-dissolved partnership, stating that he would be

grateful "*if you would remove my name from this account, and any correspondence letters in relation to Coole Practice should be for the attention of Dr [Name]…and forwarded to Coole Practice. If you have any queries please do not hesitate to contact me.*" Again, these are not the actions of a man who wishes to steer clear of the bank or who believes himself to have anything to worry about. They are prudent actions, in effect asking that his name be cleared from accounts with which he is no longer associated, just '*ar eagla na heagla*' that some future issue might arise if he allowed his name to continue to be associated with the accounts. Notably, no response ever issued from the bank to indicate that there was some issue presenting of which Dr Healy was unaware or that the bank's world-view as to how Dr Healy was positioned *vis-à-vis* Ulster Bank was different from what he so clearly understood it to be from and after the meeting of 1st August 2007 with Mr Leech.

c. The E-mails of 20th and 21st December, 2007.

15. On 20th December 2007, Dr Healy sent an e-mail to Mr Leech, copied to Ms Fox, which stated as follows:

> *"Hi Alan*
>
> *Just a reminder on those overdrafts.*
>
> *30k for my personal a/c*
>
> *20k for business a/c*
>
> *I'm still getting statements with my name that are for Dr [Name]…and Coole. Specifically a/c [account numbers given] ….*
>
> *Would you mind removing my name from these statements and sending them to Dr Cullen solely in Coole.*
>
> *Sorry about this, but I don't want any problems down the line.*
>
> *I'll cc this to Margaret at Pollard in addition…"*

16. On 21st December 2007, Mr Leech replied to Dr Healy over the top of the just-quoted e-mail (so if the e-mails are printed out on a sheet of A4 paper, Mr Leech's e-mail sits right over the top of Dr Healy's e-mail), stating as follows:

> *"Done Neil. Will confirm in writing.*
>
> *Happy Xmas to you and a pleasant 2008."*

17. Mr Leech suggested in evidence that when he wrote 'Done Neil', he meant merely to refer to the overdraft arrangements and not to the removal of Dr Healy's name from the accounts. Even if this is what Mr Leech meant, it is, with respect, a strange way of communicating that message. It seems to the court that anyone who sent an e-mail in any business context saying 'Please do A and B' and who received back an official e-mail saying 'Done' would reasonably proceed, as Dr Healy proceeded, on the basis that both A and B had been done, and would not understand that just one or other of A and B had been done. It is fanciful to suggest otherwise. Notable again is that there was in Mr Leech's reply no indication to suggest that there was some issue presenting vis-à-vis Ulster Bank of which Dr Healy was unaware, or to suggest that the bank's world-view as to how Dr Healy was positioned with regard to the bank was different from what he so clearly understood it to be from and after the meeting of 1st August 2007 with Mr Leech.

d. More Generally.

18. Separate from the foregoing, there was nothing in Ulster Bank's behaviour until August 2008 which suggested that Dr Healy's understanding of events from and after the meeting of 1st August 2007 was mistaken. In his affidavit evidence, Dr Healy avers, inter alia, as follows in this regard:

> *"Post 1 August 2007*
>
> *Until August 2008 I heard nothing further from either Mr Leech, or any other employee or agent of [Ulster Bank]…in relation to the matter. At no time subsequent to my meeting with Mr Leech on the 1st August 2007 up to August 2008 did [Ulster Bank]…its servants or agents disclose to me the fact that it considered me still bound by the Guarantee or that I had any liability to [Ulster Bank]….*
>
> *…*
>
> *Dealings with sale proceeds*
>
> *Acting on advice received by me from Mr Leech, I proceeded to open a money desk deposit account with [Ulster Bank]… for a fixed period of 3 months maturing on 7 November 2007. At the request of Mr Leech, I subsequently met on 4 October 2007 with Mr Leech and an Ulster Bank 'wealth manager'….Acting on the advice of [the wealth manager], I furnished a cheque payable to Irish Life…with an application form to Ulster Bank Wealth for investment on my behalf. I subsequently dealt, by phone and email with…Ulster Bank Capital Markets in relation to my purchase of US dollars utilising part of the sale proceeds. In or around the 19 October 2007 I purchased from the Defendant US dollars to the value of 1,200,000 at an exchange rate of 1.4500. In or around 13 November 2007 I purchased from the Defendant US$885,000 at an exchange rate of 1.475."*

19. Curiously, in the course of this case, Ulster Bank failed to produce a single bank statement from the period of August 2007 to August 2008, in particular any bank statements or correspondence in any way relating to the Coole partnership or company after Dr Healy requested that his name be removed from the accounts. The absence of any such correspondence, coupled with the failure by both Mr Leech and Ms Finnegan, between August 2007 and August 2008, to mention to Dr Healy any liabilities relating to either the Coole partnership or company, despite acknowledged interactions between Dr Healy and those parties, supports Dr Healy's contention that on 1st August 2007 he was given an assurance that he had no liability to Ulster Bank. Additionally, in certain documents exhibited before the court that were submitted by Ms Finnegan to Ulster Bank's credit team during this timeframe (on 18th October, 2007 and 8th April, 2008) there is no reference by Ms Finnegan to any liability on the part of Dr Healy *vis-à-vis* the Coole project. The only logical inference, it seems to the court, that can be drawn from these documents is that each of Mr Leech and Ms Finnegan (who, when Mr Leech was absent from the office, would do necessary client-work for those Ulster Bank clients for whom Mr Leech was responsible) personally considered Dr Healy to have no liability to Ulster Bank. Again, this supports the version of events offered

by Dr Healy and Ms Healy as to what occurred at the meeting of 1st August, 2007.

(iii) The World as Ulster Bank Saw It.

20. On 10th September, 2007, Mr Leech wrote to the Ulster Bank Credit Department stating, inter alia, as follows:

> *"The position now is that X…has bought out Neil Healy's entire interest in all the lands, the buildings and the practice at Coole. To do this X…raised all the monies with BOSI who secured their exposure in the form of a second legal charge from X…over our security, i.e. all the land and buildings at Coole. In order for BOSI to take a second charge from X...Healy had to sign over his interest in all the lands and property at Coole. Hence in order to expediate matters, the closing of the purchase of Healy's interest by X…for 2.25m and the transfer of Healy's interest in the various properties were both executed at the one meeting with all the solicitors present. Hence all our security is held from…X only. Healy effectively no longer has any liability to us and as I say he has signed contracts signing over any interest he had in all lands and property at Coole to X….I have amended this on the security screen now. This can be changed back if not correct.*
>
> *Holders have requested the release of Lot 2 but I am not willing to release same until I have a replacement policy in the sole name of X….I appreciate that Healy would need to sign a guarantee in favour of X…for us to continue to rely on this policy. This is not going to happen and the policy is really on hold on a for what worth basis."*

21. It is clear from the just-quoted text that as of 10th September, 2007, Mr Leech himself was entirely convinced that Dr Healy had no security (including guarantee) obligations towards Ulster Bank. And this buttresses the court in its view, grounded on the evidence of Dr Healy and, more particularly, Ms Healy, that this is precisely what Mr Leech communicated to Dr Healy on 1st August 2007, with nothing having occurred in the meantime to alter Mr Leech's view in this regard. However, more widely within Ulster Bank the view was taken that in fact Dr Healy was still liable to Ulster Bank on his guarantee. But this was never indicated to Dr Healy. Until August 2008, he continued in the view instilled in him by Mr Leech at the meeting of 1st August 2007, and was allowed by Ulster Bank to continue thereafter in the view, even when Ulster Bank internally held an alternative view, that Dr Healy should, to paraphrase Mr Leech at the meeting of 1st August 2007, leave the worrying to Ulster Bank, that he had no need for further worry, and that his deposit with Ulster Bank was safe.

(iv) The Evidence of Ms Finnegan.

22. Ms Finnegan is a retired senior manager with Ulster Bank. Although Mr Leech was the manager who had the principal charge of Dr Healy's business with the bank, she appears to have helped out with Dr Healy's business when Mr Leech was out-of-office. In the course of her evidence, Ms Finnegan confirmed that sometime after 18th June, 2007, she received a Bank of Scotland Ireland letter of loan offer to Dr Healy's then medical/business partner, which anticipated a two loan arrangement, *viz*. Loan A "*To find the acquisition of the Partners 50% interest in Medical practice for €2,660,000 including costs of €434,000*" and Loan B "*To refinance loan A on the completion of the contract for the sale of 22 residential units and the redemption of Ulster Bank's facility in full.*" Ms Finnegan's evidence was that Ulster Bank effectively dictated the sequencing of payments and consented to Bank of Scotland Ireland taking a second legal charge (which was given on the basis that Ulster Bank would be provided with (a) written confirmation that an unconditional contract was in place for the sale of the site and (b) a solicitor's undertaking to deliver the sale proceeds to Ulster Bank.

23. What seems clear from the known sequencing of payments is that, all else being agreed and done, it was intended that Dr Healy was to be paid first and thereafter Ulster Bank would receive payment from the sale of the residential site with 22 units. But while this appears to have been what was intended, it was not in fact what was done in the end. Instead, the loan and guarantee documentation remained extant; no letter of release ever issued; and Dr Healy has been left to plead his estoppel by representation case.

(v) The Set-Off.

24. On 4th August, 2008, Dr Healy forwarded an e-mail to Mr Leech requesting that he check the position in relation to a cash withdrawal request he had made on his account. On 6th August, 2008, he received an e-mail response from Mr Leech which stated, inter alia, that *"[T]here is a letter gone out to you regarding Coole, which you are not going to be happy with. When you read it, give me a call and I will arrange to meet you."* Thereafter, Dr Healy received a letter of 5th August, 2008, from Ulster Bank which stated, *inter alia*, as follows:

> *"Re: Facilities in the name of Dr Pat Cullen & Dr Neil Healy and Facilities in the name of Coole Property Holdings Ltd*
>
> *The balance on the various facilities above currently equates to €2,251,387 excluding accrued interest. It was understood that these facilities would have been repaid at this point from the sale of development land at Coole and other properties at Coole Medical Centre. This has not happened to date and Ulster Bank requires that the debt be repaid in the short term.*
>
> *The facilities provided in the joint names of Dr Healy and X…were placed on a joint and several basis. The borrowings in the name of Coole Property Holdings Ltd are also secured by a joint and several letter of guarantee dated 9th August 2006. Therefore I would appreciate if you could confirm to me by return your alternative repayment proposal for the above debt in the event that contracts for the sale of various properties do not proceed."*

25. On 13th August, 2008, Ulster Bank, in exercise of its rights on foot of a guarantee that Dr Healy had executed during his time of involvement in the medical and development practice in which he had joined with a fellow doctor, transacted a set-off of deposit monies then standing in Dr Healy's name with Ulster Bank against a debit balance outstanding in respect of finance previously extended by Ulster Bank to Coole Property Holdings Limited. The court notes in passing that the guarantee did not require that prior demand be made thereunder before set-off could be effected, cl.5 of same providing, *inter alia*, that "*The Bank shall further be entitled (as well before as after demand hereunder) to set-off against any credit balance in any account of the Guarantor…*".

IV

Points of Fact Arising

26. It is useful to identify what facts are and are not agreed. It is not in dispute that (1) Dr Healy deposited the sum of €2,213,607.00 with Ulster Bank on 1st August 2007, (2) Dr Healy and Ulster Bank entered into a commercial relationship on 1st August

2007 for the provision of wealth management services by Ulster Bank to Dr Healy, in the context of which Ulster Bank received the aforesaid sum, (3) Ulster Bank took no steps to advise Dr Healy post-1st August 2007 of the fact that it considered Dr Healy to have a continuing exposure to Ulster Bank, whether on foot of the guarantee or otherwise, (4) a set off was exercised on 13th/14th August 2008 (the letter advising of the set-off bears both dates) in the amount of $993,983.03 in purported performance of Ulster Bank's rights on foot of the guarantee, (5) the provision of wealth management services to Dr Healy post-1st August 2007 were in order to assist Dr Healy in arranging his financial affairs following on his disposal of his share in the Coole partnership and company, and (6) the servants or agents of Ulster Bank in making representations (which representations are denied by the defendants but accepted by the court to have been given on the terms identified in the evidence of Dr and Ms Healy as quoted above) were acting with the authority of Ulster Bank.

27. The core issue to be determined by the court is what assurances/representations were given by Mr Leech at the meeting of 1st August 2007. The court has just indicated at point (6) what it has concluded in this regard by reference to the evidence before it.

V

Claims Now Made

28. By amended plenary summons of 13th October 2008, the plaintiff claims (1) damages for (a) breach of contract, (b) negligence, (c) conversion, (d) deceit, (e) breach of duty, including statutory duty, (f) negligent misstatement and/or misrepresentation, (2) judgment in the amount of €667,210, (3) a declaration that Ulster Bank Ireland Limited was at all material times in breach of its fiduciary duty to Dr Healy, (4) full accounts and enquiries, (5) payment of the sum of €667,210 as money had and received, (6) full accounts and enquiries, (7) a declaration that Dr Healy stands released from all liability to Ulster Bank Ireland Limited on foot of a guarantee dated 9th August, 2006 executed by Dr Healy in favour of Ulster Bank Ireland Limited, (8) a declaration that at all material times after 1st August 2007 and, in particular, prior to 13th August, 2008, Dr Healy stood released of all liability to Ulster Bank Ireland Limited on foot of a guarantee of 9th August 2006 executed by Dr Healy in favour of Ulster Bank Ireland Ltd, (9) if necessary, a declaration that Ulster Bank Ireland Ltd is estopped from denying the representations made to Dr Healy on or about 1st August 2007 that Dr Healy had no further liability to Ulster Bank Ireland Ltd on foot of the guarantee dated 9th August, 2006 executed by Dr Healy in favour of Ulster Bank Ireland Ltd, and (10) interest on all heads of loss and costs. By amended counterclaim of 22nd November, 2016, Promontoria (Aran) Limited claims (1) judgment against Dr Healy in the sum of €1,277,370.64 in respect of the liabilities on stated joint borrowings, (2) judgment against Dr Healy on foot of the guarantee aforesaid in the sum of €1,064,222.75 (being the 'un-set off' figure), (3) in the alternative, a judgment against Dr Healy on foot of the said guarantee in the sum of €356,761.52 (being the residual post-set off amount), and (4) interest until payment or judgment and costs.

VI

Ostensible Authority

29. As stated above, the court understands, from the submissions before it, that it is not disputed that, inter alia, Mr Leech in making representations (which representations are denied by the defendants but accepted by the court to have been given on 1st August, 2007, on the terms identified in the evidence of Dr and Ms Healy as quoted above) was acting with the authority of Ulster Bank. This being so, it is not entirely clear to the court why counsel for Dr Healy pressed on the court the law as to ostensible authority, but, its having been raised, the court pauses to consider the law in this regard.

(i) Kett v. Shannon

[1987] ILRM 364

30. The starting-point as regards ostensible authority under Irish law is, surprisingly, the not especially vintage judgment of Henchy J. in *Kett v. Shannon*. In that case, the second defendant, a garage owner (the seller) sold to the first defendant (the buyer) a Fiat motor car which, after proving defective, was taken back for repairs. The buyer was given the use of a Renault car until his own car was repaired. A few days later he returned the car but the seller was not present in the garage. A mechanic on duty informed the buyer that the Fiat would be ready that evening and when he said he required a car immediately the mechanic let him have a Mini car which was standing in the garage. Two days later the buyer, driving the Mini, negligently collided with the plaintiff as she was walking on the public road and she suffered severe injuries. The plaintiff sued the seller and the buyer for damages. A jury found that at the time of the accident the buyer was driving with the consent of the seller. The seller appealed. The net question was whether the mechanic was acting as agent for the vendor when he allowed the purchaser to take the Mini. In the Supreme Court, Henchy J. observed as follows, at 366:

> *"In the law of agency a distinction is drawn between actual (or real) authority and ostensible (or apparent) authority. Actual authority exists when it is based on an actual agreement between the principal and the agent….*
>
> *Ostensible authority…derives not from any consensual arrangement between the principal and the agent, but is founded on a representation made by the principal to the third party which is intended to convey, and does convey, to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal. It is agency of this kind that is contended for by the plaintiff and the purchaser.*
>
> *It is a contention which I fear cannot be sustained in the particular circumstances of this case. The essence of ostensible authority is that it is based on a representation by the principal (the vendor) to a third party (the purchaser) that the alleged agent (the mechanic) had authority to bind the principal by the transaction he entered into. Such a representation, however, was absent in this case.*
>
> *The law on ostensible or apparent authority is fully and illuminatingly dealt with by Diplock LJ in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480. Having referred to that judgment, Robert Goff LJ in Armagas Ltd v Mundogas SA [1985] 3 All ER 1795 says:*
>
> > *It appears, from that judgment, that ostensible authority is created by a representation by the principal to the third party that the agent has the relevant authority, and that the representation, when acted on by the third party, operates as an estoppel, precluding the principal from asserting that he is not bound. The representation*

which creates ostensible authority may take a variety of forms, but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has (at p. 804)."

(ii) Fennell and anor v. N17 Electrics Ltd (in liq.)

[2012] IEHC 228

31. Coming closer in time, in *Fennell*, the owner of four retail units, Mr Naughton, had entered into four charges with ACC Bank, whereby these four units were charged as security. All of the charges contained similar clauses, which precluded the borrower, Mr Naughton, from assigning, leasing, subletting or parting with the possession of the charged premises or any part thereof without the prior consent in writing of the bank. The various charges also empowered the bank to appoint a receiver in the event that an act of default under the terms of the respective charges occurred. Subsequently, Mr Naughton, as lessor, entered into a business lease agreement with N17 Electrics, the lessee, with respect to the four retail units. The bank thereafter appointed a receiver in relation to the four retail units. This application was subsequently brought for a declaration that the business lease agreement in respect of N17 Electrics Ltd was not binding on the applicants and was not an asset of the company for the purposes of the winding up. In the course of her judgment, Dunne J., at para. 45 made the following observations of relevance to the issue of ostensible authority:

"I was referred also by the respondent to the decision in First Energy (UK) v. Hungarian International Bank Limited [1993] B 3 LV1409, a decision of the Court of Appeal in the United Kingdom, which concerned the issue of ostensible and actual authority and whether or not an official of a bank had ostensible or actual authority to sanction a credit facility and had authority to communicate the offer of credit facility and in that regard it was held in construing a letter of the 2nd August 1990, enclosing draft hire purchase agreements in respect of a number of contracts that 'the Court would take into account the surrounding circumstances which reasonable persons in the position of the parties would have in mind. On the facts, a reasonable business man placed in the same objective setting as C would have read the letter as communicating an unconditional and firm offer. That offer was capable upon acceptance of being converted into a binding contract.' The Court went on to indicate that on the facts, J.'s position as senior manager clothed him with ostensible authority to communicate that head office approval had been given for the facility offered in the letter of the 2nd August 1990. That decision was relied on to argue that while the bank's employees may not have had an authority to commit the bank they were in a position to communicate a decision made by the bank in relation to sanction of loans and to that extent it was argued that they had ostensible authority to bind the bank. That may be so but it does not seem to me that the fact that loans having been sanctioned on certain terms and then advanced to the borrower without those terms being fully implemented assists the respondent in this case."

(iii) Playboy Club of London Ltd and ors v. Banca Nazionale Del Lavoro Spa

[2014] EWHC 2613 (QB), [2016] EWCA Civ 457

32. In *Playboy Club of London Ltd and ors v. Banca Nazionale Del Lavoro Spa* [2014] EWHC 2613 (QB), Judge Mackie QC, in the High Court of England and Wales, at paras. 33-37 of his judgment, made the following observations concerning ostensible authority in the context of a reference given by the defendant bank in relation to a customer of the plaintiff's casino:

"33…Lord Keith, sitting in the House of Lords in Armagas Ltd v. Mundogas S.A. (The Ocean Frost) [1986] A.C. 717 , at page 777 described ostensible or apparent authority as follows:

> 'Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it. Ostensible general authority can, however, never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the type in question, and so cannot have relied on any contrary representation by the principal: *Russo-Chinese Bank v. Li Yau Sam* [1910] A.C. 174.'

34. The Bank says that the two salient points are that (i) apparent authority depends upon a representation by the principal, and (ii) the relevant representation may arise when the principal has placed the agent in a particular position which the outside world generally regards as carrying authority to enter into transaction of the kind in question. The Bank says that there was no holding out or representation. Ms Guidetti's business card, which is the only document from the Bank that any of the Claimants says that they saw prior to the reference described Ms Guidetti as being in business development. It did not represent or convey the impression that Ms Guidetti had the authority unilaterally to give a reference on behalf of the Bank. Indeed, the role of business development does not have any obvious connection to the provision of the reference about the affairs of an existing customer. It is also notable that Burlington addressed the Request to 'the Manager' of the Reggio Emilia branch of the Bank. Further, the holding out cannot come from the fact that the Request was answered by Ms Guidetti (or some other employee). The provision of a response to the Request would not clothe the person responding with authority to give that response (see British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd [1983] 2 Lloyd's Rep 9).

35. As regards course of employment, the provision of a bank reference is not sufficiently closely connected to Ms Guidetti's role in business development. This is particularly so given that the request for a reference involves the dissemination of confidential material about a customer of the Bank.

36. The Club responds that this is as much a question of common sense as legal analysis. When someone receives a letter from a bank employee one is not expected to ask oneself the question whether that employee had authority to provide the letter. It is taken as a given that the employee had usual or apparent authority to send the letter by reason

of occupying the particular position within the bank, unless particular circumstances ought to reasonably indicate otherwise. A copy of Ms Guidetti's business card was provided to the Club; it knew that was she an employee who dealt with Mr Barakat's account. The request for a reference was addressed to the manager and the response came back from Ms Guidetti.

There can be no real question that the Club was entitled to assume that Ms Guidetti had authority to provide the reference.

37. Decision. In my judgment the Club is right. The facts of British Bank of the Middle East involved a special undertaking to be executed by 'duly authorised representatives' and the posing of explicit questions about this. They are very different from those involved in a routine bank reference. Bank employees have a wider variety of titles than they used to both in this country and abroad. 'Business Development' may cover a variety of levels of responsibility but they all connote a degree of executive as opposed to routine activity. The request was sent by NatWest to Ms Guidetti addressed to the manager. The Club could reasonably expect this lady to pass the request up the chain if that was necessary and, when replying herself, to have obtained the appropriate level of clearance. The fact that Ms Guidetti replied caused no surprise to Mr Rothwell, a highly experienced chartered accountant. There was nothing unorthodox or informal about the approach for or giving of the reference. Bank references are a routine feature of international trade. It is something of a surprise to learn that the Bank's witness was unaware of them. The fact that the standard Club form is addressed to 'the manager' was no reason for it to be cautious when it saw a reply from an employee apparently responsible for its account. Whether put as apparent authority or vicarious liability the Bank is responsible for this reference which it issued through a conventional channel in circumstances which would not have put a third party on enquiry. As Etherton LJ put it in So [v. HSBC Bank Plc [2009] EWCA Civ 296], after referring to the observation of Lord Nicholls in Dubai Aluminium [Co Ltd v. Salaam [2002] UKHL 48] that 'liability for agents should not be strictly confined to acts done with the employer's authority', the conduct for which the employer is sought to be held liable must be so closely connected with acts the employee was authorised to do that the wrongful conduct may fairly and properly be regarded as done by the employee in the course of the employee's employment. That is this case."

33. Although this decision of the High Court was later successfully appealed, the Court of Appeal was concerned with the issue of *Hedley Byrne*-style liability. So far as the issue of ostensible authority was concerned, Longmore L.J. notes, in *Playboy Club of London Ltd and ors v. Banca Nazionale Del Lavoro SPA* [2016] EWCA Civ 457, para. 10, that although there was originally an appeal against the High Court judge's finding that the bank was responsible for the reference (since it was issued through a conventional channel in circumstances which would not have put a third party on enquiry), that appeal had subsequently been dropped. Hence the above-quoted text appears to remain good as a matter of English law.

(iv) Vanguard Auto Finance Ltd v. Browne and ors

[2015] 1 ILRM 191

34. In this case, Vanguard brought proceedings as the assignee of a lease and guarantee on foot of a legal assignment between it and Lombard Ireland Ltd. Mr Paul Browne, the first named defendant was the managing director and beneficial owner of the majority shareholding in Browne Corporate Finance Ltd, the second-named defendant, subsequently put in liquidation. Ms Wall, the third-named defendant, was the owner of one share in Browne Corporate Finance. Vanguard sought to recover, against Mr Browne and Ms Wall, the proceeds of a cheque drawn by Lombard in favour of Ms Wall. The cheque had been drawn on the basis that legal title to goods for the fitting out of a development in which Browne Corporate Finance was involved would be transferred to Lombard as security. The cheque was issued to Ms Wall but no goods were ever purchased or supplied. Upon receipt of the cheque, Ms Wall ultimately remitted the amount to Browne Corporate Finance, purportedly on the instructions of Mr Browne. Vanguard sought the recovery of the money on a number of grounds, namely, restitution, deceit and conspiracy. Mr Browne and Ms Wall denied liability, including on the basis that they had derived no benefit from the amount drawn on the cheque, it having been transferred to Browne Corporate Finance. Giving judgment against Mr Browne and Ms Wall, Barton J., *inter alia*, made the following observations, at 210, as to the liability of a principal for a tort committed by his agent, acting within his authority, whether express or implied:

"90. In law it is well settled that a principal is liable for a tort committed by his agent acting within his authority whether expressed or implied. In the tort of deceit a representation made by an agent, which the agent knows to be false and which if made with actual or ostensible authority, will render the principal liable even if the principal is entirely innocent. If the principal is not innocent then both are liable as joint tortfeasors. See Briess v Wooley [1954] A.C. 333; Pearson v Dublin Corporation [1907] A.C. 351 and Anglo Scottish-Beet Sugar Corporation Ltd v Spalding UDC [1937] 2 K.B. 607 at 621.

91. Where, however, the principal is the intended victim of the fraud the principal will not be vicariously liable to other victims of that fraud: see Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2 Q.B. 459.

92. Vicarious liability will also attach to a blameless employer for a deceit committed by a dishonest employee in the course of his employment provided the employee has actual or ostensible authority to act. An employer has no liability in law for unauthorised statements. See Armagas Ltd v Mundogas SA [1986] A.C. 717. It is an essential proof that the employee acted dishonestly and committed the act amounting to the tort of deceit. See Credit Lyonnais Nederland NV v Export Credits Guarantee Department [2000] 1 A.C. 486."

(v) Learned Commentary and Some Case-Law Referenced Therein.

a. Learned Commentary.

35. The court has been referred to the following observations in Andrews, G. and R. Millett, Law of Guarantees, 7th ed., para.5-006, in which the learned authors observe as follows regarding the nature and effect of certain complaints often made by sureties (here Dr Healy) about creditor misrepresentations:

"Complaints made by sureties about misrepresentation by the creditor usually fall into one or more of the following categories:-

(1) statements made by the creditor or its agents about the nature and extent of the surety's liability under the guarantee (e.g. a statement that the guarantee is limited to a certain sum when it is an 'all moneys' guarantee, or that it covers future indebtedness when in fact it covers past indebtedness;

(2) statements about the nature and extent of the principal's liability or his ability to meet his obligations;

(3) statements about the creditor's policy or likelihood of enforcement.

It is fairly common for the surety to complain that he was reassured by the creditor that the guarantee would be a 'mere formality', or that it was highly unlikely that he would ever be called to pay under it; but it has been held in Australia that the expression of an opinion that the creditor was unlikely to place reliance upon the guarantee is not a promise that it will never be enforced; Morris v Wardley Australia Property Management Limited (1994) ASC 56-228. However, a binding promise or an assurance that the creditor will release the surety in certain circumstances or a promise not to enforce the guarantee may give rise to a defence. The difficulty for the surety generally lies in proving that the promise was made by the creditor in the first place, since the surrounding documents will usually contradict it. However, such a defence was successfully established in the case of Bank of Baroda v. Shah (Dilip) (July 30, 1999) CA. The Bank required a personal guarantee to be given by all of the directors of a company to which it intended to grant financial assistance. One of the directors was given a verbal assurance by the bank's representative that he would be released from his guarantee on his resignation as a director. On the strength of that assurance he entered into a share purchase agreement with his fellow directors, and gave the guarantee. After he resigned the bank reneged its assurances and tried to enforce the guarantee against his. A strong Court of Appeal (Evans, Lindsay and Schiemann L.JJ.) upheld the decision of the trial judge that the bank was estopped from enforcing the guarantee."

36. It is perhaps worth noting, in light of the foregoing, that the case at hand is not one in which Dr Healy was assured that the guarantee, though subsisting would not be enforced. Rather, it is a case in which the representation of Mr Leech was to the effect that, as of that moment, Dr Healy was 'in the clear' with, *i.e.* had no liabilities, actual, contingent or otherwise, towards Ulster Bank.

b. Bank of Baroda v. Shah (Dilip)

(July 30, 1999) CA

37. In *Bank of Baroda*, S, one of the directors of a property development company, PRE, claimed to have been verbally assured by the appellant bank, BB, that upon his resignation as a director he would be released from his personal guarantee to BB in relation to monies advanced to PRE. He entered into a share purchase agreement with the other directors of PRE on the strength of BB's assurance, but several years later BB sought to enforce the guarantee.

38. The trial court found that BB had given the assurance alleged by S and that BB was therefore estopped from enforcing the guarantee. BB appealed against the judgment and the costs order. The central issue in the appeal was an alleged telephone conversation between S and K, a representative of BB, during the course of which the verbal assurance was said to have been given. S conceded that K had told him that the release would have to be sanctioned by BB's head office in Bombay, but that this was 'a mere formality'. The issues which fell to be decided were: (1) whether the conversation took place and (2) if so, did K give the assurance which S said he relied upon? K claimed to have no recollection of the conversation and his evidence at trial was based on subsequent correspondence between the various parties. It was BB's contention that S failed to prove that K gave the assurance and that the trial court had been wrong to come to the contrary conclusion. BB challenged S's evidence on the basis that it was inconsistent with later correspondence, in that S by letter sought written confirmation of his release from the guarantee. BB contended that this conflicted with S's evidence that he had relied on the earlier verbal assurance. BB submitted that any release discussed between K and S was dependent on the condition of M, S's co director, providing some further security to BB, and that if K had given any undertaking, he had no authority to do so. BB further contended that the trial had not been fair, due to the manner in which the judge had dealt with the evidence, and justice had not been seen to be done.

39. The Court of Appeal held, dismissing the appeal, that there was sufficient evidence for the judge to make his finding, as S's oral evidence was believable and was backed up by his subsequent conduct and correspondence with BB and the other directors of PRE. There was no inconsistency with regard to the correspondence, which was found to support S's evidence entirely. The contention concerning further security to be given by M was without basis, as was the question of K's authority, which, moreover, had not been pleaded at trial. K had apparent authority to deal with the matter as far as S was concerned. The Court of Appeal considered that the trial judge could have set out his findings more thoroughly, and made an unwise intervention during the trial; however, BB's application to amend the notice of appeal in order to plead that the trial had been unfair was, the Court of Appeal concluded, without merit. In the course of a relatively brief judgment, Lindsay J. observed, *inter alia*, as follows:

"In the context that the Bank had no apparent economic interest in releasing Mr Dilip Shah from his guarantee, it is surely inherently improbable that both the Local and Head Offices in England would have written as they did to contemplate and recommend the release of Mr Shah (given that Mr Shah had already asserted that he had been given something which entitled him to a release, namely a personal assurance) if there had been no such personal assurance given or if whatever conditions, if any, which the Bank understood were attendant upon that assurance had not been met. That seems to me to be a telling inherent improbability."

40. What is notable about this, of course, is that the trial judge and the Court of Appeal were satisfied to rule as they did, on facts akin to those at play in the within proceedings, save that in *Bank of Baroda* it was represented that the plaintiff would be released in the future, on carrying out some act; in the within case, by contrast, it was represented by Mr Leech to Dr Healy that he was 'in the clear' immediately prior to the deposit of the cheque being taken on 1st August, 2007.

(vi) A Distillation of Principle.

41. The following principles, it seems to the court can be identified from the above-mentioned case-law and commentary.

A. Actual and Ostensible Authority

1. In the law of agency a distinction is drawn between actual (or real) authority and ostensible (or apparent) authority.

2. Actual authority exists when it is based on an actual agreement between the principal and the agent.

3. Ostensible authority derives not from any consensual arrangement between the principal and the agent, but is founded on a representation made by the principal to the third party which is intended to convey, and does convey, to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal.

4. The representation which creates ostensible authority may take a variety of forms, but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has.

5. In assessing whether or not a person has ostensible authority, a Court will take into account the surrounding circumstances which reasonable persons in the position of the parties would have in mind.

6. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question.

7. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.

8. Ostensible general authority can never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the type in question, and so cannot have relied on any contrary representation by the principal.

9. Liability for agents should not be strictly confined to acts done with the employer's authority.

10. The conduct for which the employer is sought to be held liable must be so closely connected with acts the employee was authorised to do that the wrongful conduct may fairly and properly be regarded as done by the employee in the course of the employee's employment.

B. Sureties and Creditors

11. The expression of an opinion that the creditor was unlikely to place reliance upon the guarantee is not a promise that it will never be enforced.

12. A binding promise or an assurance that the creditor will release the surety in certain circumstances or a promise not to enforce the guarantee may give rise to a defence.

C. Vicarious Liability for Deceit

13. A principal is liable for a tort committed by his agent acting within his authority whether expressed or implied.

14. In the tort of deceit a representation made by an agent, which the agent knows to be false and which if made with actual or ostensible authority, will render the principal liable even if the principal is entirely innocent. If the principal is not innocent then both are liable as joint tortfeasors.

15. Where the principal is the intended victim of the fraud the principal will not be vicariously liable to other victims of that fraud.

16. Vicarious liability will attach to a blameless employer for a deceit committed by a dishonest employee in the course of his employment provided the employee has actual or ostensible authority to act. An employer has no liability in law for unauthorised statements.

17. It is an essential proof that the employee acted dishonestly and committed the act amounting to the tort of deceit.

(vii) Some Observations.

42. Confining itself to the points made under A and B above (the issue of deceit is addressed later below), the court would make the following observations. These observations come subject to the overriding understanding of the court that it is not disputed that the servants or agents of Ulster Bank in making representations (which representations are denied by the defendants but, so far as the meeting of 1st August 2007 is concerned, are accepted by the court to have been given on the terms identified in the evidence of Dr and Ms Healy as quoted above) were acting with the authority of Ulster Bank.

43. First, all of Dr Healy's extensive dealings with Ulster Bank appear to have been done through or with the assistance of Mr Leech (save when he was out when another staff member would assist). Mr Leech, a senior bank manager, was, in effect, the voice of the bank *vis-à-vis* Dr Healy. It was the bank who put Mr Leech in the position where he could exercise the authority he did. (And liability for agents is not, in any event, strictly confined to acts done with the employer's authority).

44. Second, as a senior bank manager and the principal bank manager to whom dealings with Dr Healy had been entrusted by Ulster Bank, Ulster Bank placed Mr Leech in a position which in the outside world would be generally regarded as carrying authority to give binding statements as to the state of Dr Healy's balances with, and liabilities towards, Ulster Bank.

45. Third, in assessing whether or not a person has ostensible authority, a court will take into account the surrounding circumstances which reasonable persons in the position of the parties would have in mind. One question that might usefully be posed in this regard is 'Who else was Dr Healy to turn to in terms of asking whether he had a liability to the bank?' He could ask his solicitor (he did, as it happens, ask his solicitor) but in terms of getting assurance from the bank directly, Mr Leech was his point of contact. It does not seem to the court that a reasonable person, placed in the position of Dr Healy, would have seen fit to look to any person other than

Dr Leech for the assurance given.

46. Fourth, the conduct for which Ulster Bank is sought to be held liable is, it seems to the court, so closely connected with acts that Mr Leech was authorised to do that his representation concerning the fact that Dr Healy whether or not he was 'in the clear' with, *i.e*. had no liabilities to, Ulster Bank, even if it was wrongful conduct by Mr Leech (as employee/agent) may fairly and properly be regarded as done by Mr Leech in the course of his employment.

47. Again, the court understands, from the submissions before it, that it is not disputed that, *inter alia*, Mr Leech in making representations (which representations were denied by the defendants but accepted by the court to have been given on 1st August, 2007, on the terms identified in the evidence of Dr and Ms Healy as quoted above) were acting with the authority of Ulster Bank. If, notwithstanding the tenor of the submissions before the court, this is disputed, the court concludes by reference to the foregoing considerations that Mr Leech was clothed with the ostensible authority to bind the bank when it came to advising Dr Healy that he was 'in the clear' with, i.e. had no liabilities to, Ulster Bank.

VII

Estoppel

(i) Overview.

48. It would be fair to say that to this point in its judgment, the findings of the court have broadly favoured Dr Healy. However, as touched upon previously above, it is when one gets to the issue of estoppel that the tide turns and that the court finds itself coerced, as a matter of law, into concluding that Dr Healy must fail in the case that he has brought. Before turning to the issue of estoppel, however, it is necessary to deal briefly with the issue of whether there was an enforceable contract between Dr Healy and Ulster Bank whereby Ulster Bank agreed to release Dr Healy from the partnership liabilities or the guarantee.

(ii) No enforceable contract to release Dr Healy.

49. It is common case between the parties that as of 19th July, 2007, the date of the dissolution of partnership agreement between Dr Healy and his then medical/business partner, Dr Healy was jointly and severally liable with that partner to Ulster Bank for the partnership liabilities and also under a related guarantee. The dissolution agreement obliged Dr Healy's former partner to assume solely all of those debts and liabilities; it did not require him to secure Dr Healy's release by Ulster Bank from his liabilities to same. So Dr Healy's case, in essence, is that at or prior to the meeting of 1st August 2007, Ulster Bank resolved to release him from his liabilities, and that at the meeting of 1st August, 2007, Mr Leech represented (and the court has found that he did represent) to Dr Healy that he was now 'in the clear'.

50. The court respectfully does not see how Dr Healy can contend on the basis of the foregoing that there was an enforceable contact whereby Ulster Bank agreed to release him from the partnership liabilities or the guarantee. In the absence of consideration, there was no binding agreement whereby Ulster Bank agreed to release Dr Healy from the partnership liabilities or the liability under the guarantee. What presents instead is an informal, unilateral and, in truth, gratuitous undertaking by Ulster Bank which is not enforceable under contract law. The want of enforceability arises because Ulster Bank can of course pray successfully in aid the so-called rule in *Pinnel's case* (1602) 5 Co. rep. 117a, held to be a rule of continuing force in Irish law by Laffoy J. in *Barge Inn Ltd v Quinn Hospitality Irl Operations 3 Ltd* [2013] IEHC 387, para.62, following a consideration of relevant authority.

51. The rule in *Pinnel*'s case has the effect that if a liquidated sum is owed by A to B, a promise by B to take a lesser sum (here nothing) in satisfaction of the larger debt will not bind B. In the case at hand, there is not, to borrow from the terminology of Laffoy J. in *Barge Inn*, para.62, any "*new element*" in "*the relationship of the debtor and creditor*", here that of Dr Healy and Ulster Bank that would remove the said relationship from the scope of the rule. Of course, as Laffoy J. moves on to note "*The application of the doctrine of promissory estoppel may obviate an inequitable outcome to which the application of the rule in Pinnel's Case would otherwise give rise*". But, as will be seen hereafter, the doctrine of promissory estoppel is of no avail to Dr Healy in the circumstances now presenting.

(iii) Promissory Estoppel.

a. Overview.

52. In the absence of a binding agreement whereby Ulster Bank agreed to release Dr Healy from his partnership liabilities and the consequences of his guarantee, Dr. Healy claims that Ulster Bank is permanently estopped in equity from enforcing its rights against him. There are two main forms of equitable estoppel, viz. promissory and equitable estoppel. Both are species of estoppel that sit within the genus of estoppel by representation. The "*essential basis*" of estoppel by representation is defined by Professor Biehler in *Equity and the Law of Trusts in Ireland*, 6th ed., 826, as "*the making of a representation by a person whether by words or conduct of an existing fact which causes another party to incur detriment in reliance on this representation. In these circumstances, the person making the representation will not be permitted to act subsequently in a manner inconsistent with that representation.*" One of the most frequently quoted descriptions of the circumstances in which estoppel may arise is identified in the following terms in the judgment of Griffin J. in *Doran v. Thompson* [1978] I.R. 223, 230:

> *"Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance." [Emphasis added].*

53. The underlined text presents a difficulty for Dr Healy. Even if the court were to accept that the representation made by Mr Leech at the meeting of 1st August, 2007, was "*clear and unambiguous*", Dr Healy hits what seems to the court to be an insurmountable difficulty when it comes to "*altering his position to his detriment*"; and there is too, as the court considers later below, an issue as to the temporal scope of promissory estoppel.

b. Altering One's Position to One's Detriment.

I. Case-Law.

54. In *Bank of Scotland v Kennedy* [2013] IEHC 420, summary judgment was sought on foot of personal guarantees entered into for borrowings. Bank of Scotland served letters of demand. Mr Kennedy asserted that he had reached an arrangement through negotiations as to the debt. The court considered whether Mr Kennedy's evidence was capable of successfully grounding a plea of promissory estoppel and whether the application was one which was appropriate for summary judgment, McGovern J. observing as follows, at paras.11-16, under the heading "*Promissory Estoppel*":

> *"11. It is submitted on behalf of the plaintiff that the defendant has failed to establish a fundamental ingredient in the defence of promissory estoppel: that he acted in reliance upon the plaintiff's representations to his personal detriment.*
>
> *12. In Doran v. Thompson Ltd [1978] IR 223, Griffin J. stated the basis of promissory estoppel as follows at p. 230:-*
>
> > 'Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance.'
>
> *13. The foregoing statement of the law was considered by Keane C.J. in Ryan v. Connolly [2001] 1 IR 627, where he added at p. 632:-*
>
> > "…Griffin J. had pointed out that…it was not necessary that the representation should be one 'positively incapable of more than one possible interpretation'.. A party seeking to rely on the principle cannot, in other words, rely on a strained or fanciful interpretation of the words used, he must show that it was reasonable in the circumstances for him to construe the words used by the other party in a sense which would render it inequitable for that party to [resile from them]."
>
> *14. In Industrial Yarns Ltd v Leo Greene and Arthur Manley [1984] ILRM 15, Costello J held at p. 23:-*
>
> > *'But to establish that an estoppel has arisen the representee must show that what was said or done by the representor influenced both the belief and conduct of the representee to his detriment.'*
>
> *15. In Daly v. Minister for the Marine [2001] 3 IR 513, Fennelly J., speaking for the Supreme Court, affirmed this position, strongly reiterating that a the party seeking to raise a promissory estoppel must establish that he had relied upon an unambiguous representation to his or her detriment, at p. 529:-*
>
> > 'It is the fact that it would be unconscionable for one party to be permitted to depart from a position, statement or representation, upon which the other party has acted to his detriment, that justifies the courts in intervening to restrain him from doing so. If the recipient of a promise or representation, is to be dispensed from any obligation to demonstrate reliance, the doctrine would be more than exceptionally generous. It would be a virtually ungovernable new force affecting potentially not only equity but the laws of contract and property and, as here, the exercise of administrative powers.'
>
> *16. The nature and extent of the detriment sufficient to ground a promissory estoppel was considered by Kinlen J in McGuinness v. McGuinness (Unreported, High Court, 19th March 2002), holding at p. 7:-*
>
> > 'The Court is satisfied having regard to all the authorities that the alleged detriment has not been proven. It must be pleaded and proved. It must be substantial although not necessarily confined to monetary considerations. It must be tested against the principle that it would be unjust or inequitable to allow the assurance to be disregarded.'"

55. McGovern J also considered analysis in learned commentary (McDermott, P. *Contract Law*, 2nd ed.) and English authority, to the effect that the reliance required in the case of promissory estoppel need not be detrimental, observing as follows, at paras.18-19:

> *"18…[McDermott] goes on to state…*
>
> > '…In reality the distinction between detriment and reliance is probably more semantic than one of any real importance. This is because an estoppel can only be raised if it would be inequitable to allow the representor to go back on his representation. As Burrows has noted 'The point is that if the promisee's position has not changed at all as a result of the promise it will not normally be inequitable for the promissor to resile from it' Mee makes the same point when he suggests that '[i]f one interprets acting to one's 'detriment' to mean conduct which would make it unconscionable for the representor to withdraw the representation, then this difference seems to disappear'.
>
> *19. It is clear, therefore, that whether one is to characterise it as 'detriment' or 'reliance', there must be conduct on the part of the party seeking to raise a promissory estoppel such as to render it unconscionable for their counterparty to resile from representations purportedly altering the state of legal relations between them. Indeed, the authorities opened by the plaintiff make it clear that it is incumbent upon the representee to demonstrate that his conduct on foot of the representation caused him a detriment that is, in the words of Kinlen J in McGuinness v. McGuinness , '… substantial although not necessarily confined to monetary considerations. It must be tested against the principle that it would be unjust or inequitable to allow the assurance to be disregarded'.*

II. Application of Principle.

56. The acts of reliance relied upon by Dr Healy are confined to the placing of monies on deposit, with the detriment complained of being the fact that Ulster Bank was able to effect set-off in respect of those monies by way of set-off when it 'called in' the

partnership facilities and enforced the associated guarantee. Insofar as the placing of the monies on deposit *per se* is concerned, Dr. Healy does not contend that he would otherwise have been able to obtain better deposit or foreign exchange rates in relation to the transactions entered into by him. Moreover, although during the course of the evidence and, more particularly in cross examination of Ulster Bank's witnesses, reference was made to the proposition that Dr Healy would have conducted his affairs differently had it been made clear to him that he remained liable to Ulster Bank, there is no pleaded case or evidence referable to this suggestion. In substance therefore, the alleged detriment relied upon is that the placing of the monies on deposit facilitated collection by the Bank of Dr. Healy's admitted liabilities. But how can this be detriment? Had Dr Healy not placed the monies on deposit with Ulster Bank or had Ulster Bank given Dr Healy notice that it was withdrawing its forbearance, in what respect would Dr. Healy's position be different? He would have had or, more accurately, perhaps he would have had, the monies on deposit in an account with another bank but that would not have impacted upon Dr Healy's legal position: he would still have been liable to repay the full amount of the partnership liabilities and the associated guarantee to Ulster Bank or its successor in title. The fact of the monies being on deposit (a) meant that, to the amount of those monies, Dr Healy was prevented from breaching his obligations to the Bank, but (b) did not affect the nature or scope of the obligations aforesaid.

c. Temporal Limitations on Promissory Estoppel.

57. An aspect of the doctrine of promissory estoppel that is sometimes overlooked is the fact that the representation of forbearance giving rise to an estoppel will usually be temporary in nature. This was an aspect of matters considered by Laffoy J. in *Barge Inn, op. cit*., paras.70-72:

> *70…[Learned commentators] are…ad idem on the effect of…[promissory] estoppel: it suspends, not extinguishes, the promissor's rights…its effect is to suspend not to give up altogether a legal right, the right to resile from the promise being available where reasonable notice is given….Applying the suspensory effect of the doctrine to the various circumstances which may arise is the most difficult aspect of the application of the doctrine. In the U.K. textbooks, the terminology used to describe the effect of the doctrine tends to be to describe it as being either temporary or permanent, depending on the factual circumstances.*
>
> *71. For instance, in Spencer Bower on The Law Relating to Estoppel by Representation (4th Ed.), the editors stated (at p. 486) under the heading 'Relief':*
>
> > 'The effect of the doctrine of promissory estoppel can be either temporary or permanent depending on the terms of the promise and the detrimental reliance upon it. It is often said that the doctrine is suspensory or suspensive of rights and only exceptionally does it operate to extinguish rights altogether. But there can be an element of ambiguity in those terms….Again, where a landlord is held to have waived payment of rent in full for a specified period of time, the effect of the doctrine can be described as either temporary or permanent. It is temporary in the sense that the concession is temporary and the parties must resume their former position. But it is permanent in the sense that the landlord may have waived payment of some part of the rent forever and agreed to accept a lesser sum in satisfaction of the whole. This position can be contrasted with the situation in which a creditor agrees to permit the debtor to pay in instalments. Here the effect of the promise is truly temporary because all that the creditor agrees to give the debtor is time.'
>
> *72. In Snell's Equity (32nd Ed.) the editors deal with the effect of promissory estoppel and, in particular, the relief which can be afforded when it is established as follows (at para. 12 – 014):*
>
> > 'The effect of the doctrine of promissory estoppel can be either temporary or permanent. But it is usually temporary. Where the promise or assurance is more than a temporary concession, [the promisor] will be entitled to withdraw the concession in accordance with its terms. Even where the promise or assurance cannot be construed as a temporary concession [the promisor] will usually be entitled to withdraw the promise on giving reasonable notice and the promise will only become final and irrevocable if [the promisee] cannot resume his or her former position. In this sense the doctrine of promissory estoppel has much in common with the principle of waiver of rights which permits a party to revoke any waiver upon reasonable notice to the other party.'"

58. Given that the court considers that Dr Healy's arguments as to promissory estoppel must in any event fail for the reasons identified previously above, it does not view it to be necessary to consider the extraordinary longevity of the estoppel contended for in the within proceedings and whether such longevity can be reconciled in the circumstances presenting with the usual limitations on scope of promissory estoppel, as referenced above, beyond noting that an issue does also appear to present for Dr Healy in this regard.

VIII

Certain Torts Contended For

(i) Deceit.

59. Dr Healy contends that if the representations claimed to have been made by Mr Leech were made as a matter of fact (and the court accepts that they were), the fact of non-disclosure (presumably then or thereafter) of Ulster Bank's actual stance on the enforceability of the guarantee and its failure to inform Dr Healy of its stance and "*its decision not to inform* [Dr Healy]…*in order to induce* [Dr Healy]…*to continue to leave funds on deposit*" bring together the constituent proofs in the tort of deceit. As to the last-quoted text, there is no evidence to suggest that such decision was made or that there was any effort so to induce Dr Healy. And the elements of the tort of deceit do not otherwise present. The necessary elements of the tort of deceit are identified by Shanley J. in *Forshall and Fine Arts Collections Ltd v. Walsh* (Unreported, High Court, 18th June, 1997), as recited by this Court in its judgment in *Hill v. Wall* [2016] IEHC 367, coupled with some additional observations, thus, at paras. 5-6:

> *"5. It is as well to recite at this point the various elements of the tort of deceit…as identified by Shanley J. in Forhsall and Fine Arts Collections Ltd. v. Walsh (Unreported, High Court, Shanley J., 18th June, 1997), at 64, viz:*
>
> > *'(i) the making of a representation as to a past or existing fact by the defendant;*
> >
> > *(ii) that the representation was made knowingly, or without belief in its truth or recklessly, careless whether it be true or false;*

(iii) that it was intended by the defendant that the representation should be acted upon by the plaintiff;

(iv) that the plaintiff did act on foot of the representation; and

(v) suffered damages as a result'.

6. Some supplementary observations might be made:

(1) the necessary representation of fact is usually by spoken or written word, though a gesture or deed may suffice.

(2) silence and inaction will not usually suffice, but there are exceptions, e.g., where there is a duty not to be silent (e.g., where a duty of uberrimae fidei arises).

(3) a promise may be actionable in deceit…e.g., where a promise contains a undertaking with which there is a present intent not to comply when the promise is made.

(4) a distinction is typically drawn between representations of fact and those of opinion; no liability attaches to the latter.

(5) a representation of law can be a representation of fact, e.g., a man who tells an intended husband or wife that he is free to marry when he is in fact already married, so luring the deceived other into a sham marriage.

(6) honest mistake and careless statements do not suffice for liability in deceit…a plaintiff must prove that the defendant (a) knew that what he was representing was false or (b) was reckless as to whether it was true or not. (Liability for negligent misstatement may, of course, present even where liability for deceit (fraud) does not).

(7) in making a false representation, the defendant must intend (a) the plaintiff to act on same, or (b) some or all of a class of persons to whom the representation is made to so act.

(8) the false representation need not be made directly by defendant to plaintiff.

(9) reliance by the plaintiff is essential.

(10) the plaintiff must prove damage, be it pecuniary, personal injury or injury to property.

(11) the applicable measure of damages is actual damage flowing from the fraudulent inducement, together with consequential damages representing what was reasonably and necessarily expended as a result of acting on the inducement, i.e. direct consequences, not reasonable foreseeability is the test.

(12) rescission of a contract induced by a fraudulent misrepresentation may be an alternative to awarding damages."

60. It does not seem to the court that items (ii) or (v) as identified by Shanley J. are satisfied on the facts of the within case when it comes to Mr Leech's representation of 1st August, 2007. As to whether Mr Leech's failure, in the months after the representation of 1st August, 2007, to apprise Dr Healy that Ulster Bank took a different view of matters to that represented by Mr Leech on 1st August, 2007, the court has already indicated above that the evidence does not establish that this was done "*in order to induce* [Dr Healy]…*to continue to leave funds on deposit*". In any event, such further representation were it to have arisen would not in any event yield a liability in deceit as it seems to the court that when it comes to such further representation (which is not considered by the court to present) items (iii)-(v) (inclusive), as identified by Shanley J. would not be satisfied. The court is mindful too in this regard that, as McMahon and Binchy observe in Law of Torts, 4th ed., 1379, "*Normally silence and inaction will not involve the defendant in liability*", nor do any of the traditional exceptions to the foregoing arise on the facts presenting. So, for example, post-1st August, 2007, there was no ongoing continuation of negotiations, there was no misrepresentation through the active suppression of truth, and there was no obligation to volunteer information.

61. As to the suggestion that alleged failure by Ulster Bank to respond to correspondence amounts to deceit on behalf of Ulster Bank, there is no indication in the pleadings that Dr Healy intended to allege that the failure to respond to correspondence amounted to deceit. There are numerous authorities to the effect that a Plaintiff claiming fraud (and deceit is a species of fraud) must plead his case with precision and specificity. (See, for example, *Superwood Holdings plc & Ors v. Sun Alliance & London Insurance plc & Ors* [1995] 3 IR 303). There are no particulars in the pleadings that relate to the alleged failure to respond to correspondence. To this extent, Dr Healy's submissions in respect of deceit fall, respectfully, to be disregarded.

(ii) Negligence.

62. Counsel for Dr Healy, in written submissions, makes the following contentions:

"It is trite law to suggest that in circumstances of the concession of the creation of a banker/client relationship and the creation of a relationship of adviser and broker that the first named Defendant was constituted as a fiduciary with regard to the Plaintiff. The first named Defendant's duty extended to advising and protecting the interests of the Plaintiff in the fact of information that the first named Defendant had and/or the belief of the first named Defendant as to the persisting nature of the Plaintiff's exposure and/or indebtedness to the first named Defendant when at the inception of the relationship it was or ought to have been aware that the Plaintiff had been advised different. In the premises the first named Defendant was at the very least reckless as to the nature of the Plaintiff's understanding of the position if not guilty of deliberate concealment. Subject to establishment of the representations and establishment of deliberate or reckless non-disclosure of the bank's opposing position it must flow that the first named Defendant is guilty of breach of fiduciary duty and negligence.

…The Plaintiff further contends that such was the relationship as adviser and broker (in addition to banker) that the funds furnished in the context of that relationship were not amenable to any banker's set off against the ordinary debts and liabilities of the Plaintiff to the first named Defendant."

63. This aspect of matters was not pursued in any detail at the hearing of the within proceedings and no case-law is referenced in the above-quoted text. What appears to be contended is that Mr Leech's representation of 1st August, 2007, enticed Dr Healy to engage thereafter with the wealth management division of Ulster Bank, and that a breach of fiduciary duty and also negligence presents in the fact that Dr Healy was not advised as to the divergence of opinion that arose within Ulster Bank, post-1st August 2007, as to whether Dr Healy continued to have a CPHL-related liability (the credit department considered that Dr Healy had such a liability; Mr Leech and indeed Ms Finnegan appear to have persisted in the view that Dr Healy did not). A few points might perhaps usefully be made in this regard:

– first, to the extent that the just-quoted text might be read to suggest that the usual relationship between banker and customer is a fiduciary relationship, this is not accepted by the court. As noted in Breslin, J., Banking Law, 3rd ed., 198:

> *"The bank's primary relationship with its customers is as debtor (in the case of deposits) and creditor (in the case of its loan business), and as agent in respect of payment instructions….If a bank's activities go beyond acting as debtor or creditor it exposes itself to the risk, like any other service provider, that it might incur liability in the tort of negligence if its service is provided carelessly, thereby causing loss to the customer."*

– second, even if Ulster Bank, in its provision of wealth management services to Dr Healy had strayed into a fiduciary role in that context, (i) the court does not consider that this would have infused its relationship as a whole with Dr Healy, and (ii) even if it did so infuse that relationship, and again the court does not consider that it did, when one has regard to the core liabilities of a fiduciary, as identified by Millett L.J. in *Bristol and West Building Society v. Mothew* [1998] Ch. 1, 18, quoted with approval, *e.g.*, by Fennelly J. in *McMullen v. McGinley* [2005] IESC 10, there is nothing in the evidence before the court which suggests that there would have been (or was) a breach by Ulster Bank of any such relationship; thus there is no evidence that at any time Ulster Bank acted other than in good faith, or that it made some improper profit, placed itself in a position where its duty and interest conflicted, or acted for its own benefit or the benefit of a third person without the informed consent of Dr Healy.

– third, as regards negligence, what appears to be contended for in this regard is that a bank is under a duty of care to advise a customer when a divergence of views arises within the bank as to whether that customer remains liable to the bank under certain documentation, in circumstances where it has previously (mistakenly, as it happens) been represented to that customer by a bank official that that customer does not remain liable under the said documentation. The difficulty that Dr Healy encounters in this regard is that even if Ulster Bank was subject to a duty of care (and the court does not need to make any finding in this regard because of the finding it is about to reach as to absence of loss), he has suffered no loss. Thus, as touched upon by the court previously above, insofar as the placing of the monies on deposit per se is concerned, Dr Healy does not contend that he would otherwise have been able to obtain better deposit or foreign exchange rates in relation to the transactions entered into by him. Moreover, although during the course of the evidence and, more particularly in cross examination of Ulster Bank's witnesses, reference was made to the proposition that Dr Healy would have conducted his affairs differently had it been made clear to him that he remained liable to Ulster Bank, there is no pleaded case or evidence referable to this suggestion. In substance therefore, the alleged loss relied upon is that the placing of the monies on deposit facilitated collection by Ulster Bank of Dr Healy's admitted liabilities. But how can this be a loss? Had Dr Healy not placed the monies on deposit with Ulster Bank or had Ulster Bank given Dr Healy notice that it was withdrawing its forbearance, in what respect would Dr Healy's position be different? He would have had or, more accurately, perhaps he would have had, the monies on deposit with another bank, but that would not have impacted upon Dr Healy's legal position: he would still have been liable to repay the full amount of the partnership liabilities and the associated guarantee to Ulster Bank or its successor in title. It is a fundamental predicate of negligence that there must have been actual loss or damage to the interests of the alleged victim of the claimed negligence; the tort of negligence, unlike trespass, is not actionable per se. Here there is no loss established, and so the claim in negligence must fail.

– fourth, a similar basic difficulty likewise presents insofar as the reference to negligence in the above-quoted submissions is intended to embrace liability for any mis-statement of fact. As McMahon and Binchy observe in Law of Torts, 4th ed., 333, "[F]or the representation to be actionable the defendant must have negligently made an incorrect representation whose incorrectness led the plaintiff to detriment." Here, for the reasons stated immediately above (and in the consideration, previously above, by the court, of the question of detriment in the context of promissory estoppel) there is no detriment.

IX

Breach of Contract

64. Under the heading "*Breach of Contract*" it is contended by counsel for Dr Healy in their written submissions that "*It is the Plaintiff's case that he entered into the Contract for Wealth Management Services in reliance upon a representation that the funds deposited by him would not be susceptible to set off and that he was not otherwise indebted to the First Defendant.*" That is the entirety of the submissions made in this regard; however, the evidence does not bear out the version of events contended for in the just-quoted text. Dr Healy placed his funds on deposit with Ulster Bank on 1st August, 2007. The terms of the deposit were confirmed on 8th August, 2007. Though the letter confirming the deposit is claimed to be a letter of advices, it patently is not. Dr Healy subsequently met with Ulster Bank for the purpose of receiving financial planning advice in relation to his pension arrangements. Following that meeting, on 15th October, 2007, Ulster Bank wrote to Dr Healy recommending that he take out a pension through Irish Life with a premium of €25,000 per annum. The conditions referred to in that letter were solely referable to that advice. The contents of the 'fact find' prepared in advance of the recommendation make it clear that the only advice sought by Dr Healy and given by the Bank was in relation to his pension. The claim by Dr Healy that he entered into a commercial contract with the Bank and that the letter of 15 October 2007 set out the terms of that contract is without foundation.

X

Promontoria's Counterclaim

(i) Transfer.

65. In *LSREF III Stone Investments Limited v Morrisey [2015] IEHC 603* Costello J. identified the requirements for a valid legal assignment in the following terms, at paras.23-24:

> *"23. The plaintiff…relies upon s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 which provides as follows:-*
>
> > '[a]ny absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…'
>
> *24. In O'Rourke v. Considine [2011] IEHC 191, Finlay Geoghegan J. identified, at para. 18, the four conditions to be met for an assignment to be valid under s. 28(6) as follows:-*
>
> > *'(a) The assignment was of a debt or other legal chose in action.*
> >
> > *(b) The assignment was absolute and was not by way of charge only.*
> >
> > *(c) It was in writing under the hand of the assignor.*
> >
> > *(d) Express notice in writing thereof was given to the debtors.'*

66. The court understands it to be common case, and the court in any event finds, that express notice of the assignment was given to Dr Healy in circumstances where those notices were exhibited to an affidavit sworn by Dr Healy's solicitor on 21st July 2015 as documents received by the Plaintiff. Mr Bourke gave uncontroverted oral evidence that Promontoria, being a company of which he is director, acquired the five loans associated with the Coole Property Holdings connection and that the assignment was in writing. In that regard, he referred to the documents exhibited to his witness statement being the Mortgage Sale Deed, the Deed of Novation and the Global Deed of Transfer. Mr. Bourke's evidence that Promontoria had acquired the loans was not challenged, nor was there challenge to his evidence that the documents referred to by him were the documents by means of which the acquisition and transfer was affected. Nor was it suggested that Ulster Bank did not have the right to assign the loans.

67. Promontoria has therefore established that it has acquired Ulster Bank's interest in the Coole Property Holdings loans. In issue is whether or not Ulster Bank has assigned the guarantee. Promontoria accepts that the guarantee is not listed in the schedule to the Global Deed of Transfer. (The loan agreement between Ulster Bank and Coole Property Holdings Limited, and between Ulster Bank and Dr Healy and Dr Cullen in their own names are listed in the schedule.) Insofar as the guarantee is concerned, Promontoria rightly contends that there is no requirement to list the guarantee separately in circumstances where it is clearly (and it is included) in the assets transferred under the Global Deed of Transfer. There is, therefore, no basis for Dr Healy's claim that the only assets assigned were the loans and securities listed in the schedule. The current amounts owing have been established, *inter alia*, by way of the evidence of Mr Cotter, an Associate Director with the Specialised Lending Services of Ulster Bank Ireland Limited.

(ii) Stamp Duty.

68. It was belatedly submitted by counsel for Dr Healy that the Ulster Bank to Promontoria transfer documentation, which in the version furnished in evidence appeared to be un-stamped, is not admissible in evidence in accordance with the provisions of s.127 of the Stamp Duties Consolidation Act, 1999, as amended, which provides, inter alia, at sub-section (4) that "*Except as provided for in this section, an instrument executed in any part of the State, or relating, wherever executed, to any property situated, or to any matter or thing done or to be done, in any part of the State, shall not, except in criminal proceedings or in civil proceedings by the Commissioners to recover stamp duty, be given in evidence, or be available for any purpose, unless it is not chargeable with duty or it is duly stamped in accordance with the law in force at the time when it was first executed.*" However, it appears to the court that the ostensible difficulty which presents for Promontoria in this regard is met by s.90(2) of the Act of 1999 which provides that stamp duty is not chargeable on a "*debt factoring agreement*" (defined in s.90(1) as "*an agreement for the sale, or a transfer on sale of a debt or part of a debt where such sale occurs in the ordinary course of the business of the vendor or the purchaser*" which would appear to cover arrangements of the type in issue, *i.e.* the Ulster Bank to Promontoria transfer documentation. For the sake of completeness, the court notes that although s.90(1) refers to "*debt*" in the singular, s.18(a) of the Interpretation Act 2005 has the effect that, inter alia, "[a] *word importing the singular shall be read as also importing the plural*", so an assignment of a plurality of debts is also covered by s.90 of the Act of 1999.

(iii) Demand.

69. Dr Healy contends that even if Promontoria can satisfy the court (and it has satisfied the court) as to its title to any facilities relating to Dr Healy, it cannot obtain judgment as it has not called any evidence to show that the loans were validly demanded. There is no substance to this contention. By letter of demand of 26th September, 2008, (exhibited before the court) formal demand was made by Ulster Bank on CPHL. By letter of demand of 29th September, 2008, (exhibited before the court) formal demand was made by Ulster Bank on Dr Healy as guarantor. By letter of demand of 24th November, 2008, (exhibited before the court) formal demand was made by Ulster Bank on Dr Healy in respect of certain partnership borrowings, being the loan account and the overdraft account.

XI

Conclusion

70. The court accepts that the representations which Dr Healy claims were made by Mr Leech at the meeting of 1st August, 2007, were made by Mr Leech. The court does not accept that those representations have the legal consequences contended for by Dr Healy.

71. The court accepts on the evidence before it that Promontoria (Aran) Limited is the successor in title to the Ulster Bank loan and guarantee documentation by reference to which the counterclaim in the within proceedings is brought. The court, for the reasons identified in the previous pages, will grant judgment to Promontoria (Aran) Limited in the amount sought at items (1) and (3) of its counterclaim of 22nd November, 2016, plus interest.

72. The court will hear the parties as to the issue of costs.