THE HIGH COURT

COMMERCIAL

2018 876 S

BETWEEN

FENITON PROPERTY FINANCE DAC

PLAINTIFF

V.

PETER WHITE AND ALICIA WHITE

DEFENDANTS

2018 878 S

FENITON PROPERTY FINANCE DAC

PLAINTIFF

V.

DUBLIN LAND SECURITIES LIMITED, PETER WHITE AND BLUE NILE HOLDINGS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on the 18th day of July, 2019

1. The plaintiff applied for summary judgment in these proceedings in respect of the balance it claims to be owed pursuant to a series of facilities granted to fund the acquisition and refurbishment of properties at 1 and 16 Wellington Road, Dublin 4, 1 Heytesbury Lane, Dublin 4, 119 St. Stephens Green Dublin 2, and to fund certain other investments specified in the facility letters. The loans were made originally between 2006 and 2008 by Bank of Scotland (Ireland) Limited ("BOSI") whose interest was ultimately transferred to the plaintiff in November 2015.

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2. The claim in this action arises from four facilities granted to Peter White and Alicia White for sums totalling €8,419,831.57, a balance of which is now claimed in an amount of €3,015,235.98.

3. The First Facility was issued by BOSI on 18 May, 2006, (accepted by the first and second named defendants, Peter White and Alicia White, on 25 May, 2006) in a sum of €2,070,500. The purpose of the facility was the purchase of a property at 1 Heytesbury Lane Dublin 4. The initial term was for a period of twelve months. Extensions were granted from time to time and the facility expired on 3 November, 2009.

4. The facility was secured by the extension of an existing charge over the borrowers' existing property at 1 Wellington Road, and a first charge on the property at 1 Heytesbury Lane.

5. The Second Facility was issued on 18th October, 2006, (accepted by the Whites on 26 October, 2006) for an amount of €5,513,750.

6. The purpose of this facility was the purchase of a property at 16 Wellington Road, Dublin 4. The term was a period of three years and the facility was to be secured by the grant of a first legal charge on 16 Wellington Road, and extension of existing charges previously granted by the Whites to the plaintiff.

7. The Third Facility issued on 16 July, 2008, (accepted on 30 July, 2008) for a sum of €303,000. The purpose of this facility was the refurbishment of 16 Wellington Road. The term was for a period of twelve months, and the security was to be by way of extension of existing charges.

8. The Fourth Facility issued on 21 November, 2008, was accepted by the Whites on 25 November, 2008, for a sum of €595,581.57. The purpose of this facility was to "refinance an existing loan" and the term was nine months. Again this was to be secured by an extension of existing charges.

9. Each of these loans was to be repaid by a single payment at their maturity, with interest being paid quarterly during the currency of the term. The facility letters provided for the payment also of arrangement fees, legal outlays, and incorporated BOSI's standard loan conditions, which included provision that the obligations of the borrowers were joint and several.

10. On 31 December, 2010, the assets and business of BOSI including these loans and security held became vested in Bank of Scotland plc. pursuant to orders of this Court (Kelly J. 22 October, 2010) and of the Scottish Court of Session (Lord Glennie, 10 December, 2010).

11. On 29 July, 2015, Bank of Scotland plc. agreed to assign the loans and security to the plaintiff. By a Loan Purchase Deed of 20 November, 2015, the loans were assigned to the plaintiff.

12. On 26 October, 2015, Bank of Scotland plc notified the defendants of the transfer of the loans and on 23 November, 2015, the plaintiffs appointed agent Pepper Finance Corporation Ireland Limited ("Pepper").

13. The letter from Pepper of 23 November, 2015, was a standard form of notification informing the defendants that from that date forward payments on the accounts should be made to the plaintiff and it provided details of how payments should be made including bank account details and provided contact details for Pepper.

14. Between November 2015 and February 2017 the parties engaged in relation to the accounts. In affidavits, the parties give

different accounts of the engagement. In an affidavit sworn on 1 October, 2018, Mr. White characterises the plaintiff as having acted "with considerable bad faith for in excess of two years". Where relevant I shall return to this subject later. However, much of the correspondence exchanged during this period relates to communication between the parties regarding proposals and counterproposals for settlement of the accounts and regarding proposed disposal of assets by the defendants.

15. On 3 February, 2017, the plaintiff wrote to the defendants demanding immediate payment of the amount of €6,614,768.98, being the balance at that time claimed to be due and owing from the defendants on foot of the four loan facilities. By this letter the plaintiff also declared all loans advanced to the defendants to be immediately due and payable and reserved its right to exercise all of its rights against the defendants pursuant to the facility letters, at law, and any security provided pursuant to the facilities, including the power to appoint receivers over the properties charged.

16. On 10 February, 2017, the plaintiff appointed a receiver Mr. Ken Tyrrell, over the properties at 1 Heytesbury Lane, and 16 Wellington Road, and other properties held as security for other loans.

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17. By four facilities, BOSI advanced amounts totalling €6,517,500 to Dublin Land Securities.

18. The First Facility was for Loan "A" granted on 4 December, 2006, (accepted 8 December, 2006) for a sum of €251,250.

19. The purpose of the facility was to "fund the borrowers' investment in the Liberty Asset Management Flagship Fund and to capitalise the banks' arrangement fee of €1,250".

20. The term was a period of 6.5 years, to be serviced with quarterly interest payments. The security required was a debenture including a floating charge and a guarantee by Peter White.

21. The Second Facility was for "Loan B" and was also granted on 4 December, 2006, (accepted 8 December, 2006) in an identical amount of €251,250 and its purpose was to fund "managed investments and arrangement fee". The term of this facility was a period of two years, with interest to be paid quarterly and the security required was identical.

22. The Third Facility was dated 24 May, 2007, (accepted 28 May, 2007) to Dublin Land Securities Limited for a sum of €1,002,500. The loan was stated to be for the following requirements of the borrower: -

(i) To invest in the Delancey DV4 fund,

(ii) To invest in the Stenham German Property Portfolio 3, and

(iii) To invest in other managed investments to be properly identified.

The term was for a period of twelve months with interest to be paid quarterly. In April 2009, the period for repayment was extended to two years. Again, the security was an extension of the existing debenture and a guarantee by Peter White.

23. The Fourth Facility issued on 30 October, 2007, (accepted 8th November, 2007) to Dublin Land Securities Limited was for a sum of €5,012,500. Its purpose was to fund "an equity release on 119 St. Stephens Green Dublin 2". The term was a period of three years with interest to be paid quarterly.

24. The security for the fourth facility was a guarantee by Blue Nile Holdings Limited, a subsidiary of the borrower, supported by a mortgage over a property held by Blue Nile Holdings Limited at 119 St. Stephens Green.

25. The security also included a floating charge, a charge on shares held by Dublin Land Securities Limited in Blue Nile Holdings Limited, and a guarantee by Peter White supported by a charge on his shares then held in Blue Nile Holdings Limited

26. The four facilities issued to Dublin Land Securities Limited were guaranteed by two guarantees issued by Peter White, the first on 9 February, 2006, and the second on 17 December, 2007, and a guarantee issued on 17 December, 2007, by Blue Nile Holdings Limited, supported by a mortgage of that company's interest in 119 St. Stephens Green, Dublin 2.

27. All of these loans, guarantees and securities were assigned to the plaintiff on 20 November, 2015, and formal notice of the transfer was given to the borrower on 23 November, 2015.

28. Following prolonged engagement, again the subject of different accounts in the affidavits, on 3 February2017, the plaintiff notified the borrower and the guarantors that the loan was in default, declared all amounts payable and demanded payment for the balance then due in respect of these facilities in the amount of €4,549,412.95 and served demands also on Peter White and Blue Nile Holdings Limited

29. On 16 February, 2017, the plaintiff appointed a receiver, Mr. Ken Tyrrell, over the property at 119 St. Stephens Green.

Settlement Agreement 30 May 2017
30. Following the appointment of the receivers, further engagement took place between the borrowers and the plaintiff. Mr. White describes this as a period when the defendants "redoubled" their efforts to resolve matters. This engagement resulted in the negotiation and execution of a Settlement Agreement on 30 May, 2017 "(The Settlement"). The Settlement is made between the plaintiff and each of the defendants in these proceedings together with Trevor White, son of Peter and Alicia White. Its terms are important in the determination of this application.

31. The parties to the Settlement Agreement are the plaintiff, Peter White, Alicia White, Trevor White, Blue Nile Holdings Limited, and Dublin Land Securities Limited

32. In the Settlement Agreement, Peter White and Alicia White are referred to as the "Personal Obligors" and Blue Nile Holdings Limited and Dublin Land Securities Limited are referred to as the "Corporate Obligors".

33. At the time of making the Settlement, Peter White and Alicia White, were obligors, not only in respect of the facilities the subject of these proceedings but also together with their son Trevor White, in respect of a separate facility advanced to them as trustees holding a property known as 17 Mount Pleasant Square, Dublin 6.

34. The Settlement provided in Sections 3.5 and 3.6, for the payment by the Personal Obligors of a total sum of €7,137,000 and by the Corporate Obligors of €4,293,000. The Sum of €7,137,000 payable by the Personal Obligors was to be paid as to €1m on signing the Settlement as to €4m by 28 September 2017 and as to the balance by 31 December 2017. The sum of €4,293,000 payable by the Corporate Obligors was payable by 31 December 2017 (with a provision for advance payments of €20,000 monthly commencing on the date of the Settlement). The plaintiff says that this total of €11,430,000 represented a discount of just over €1m. The Settlement provides that if the amount were discharged, and certain other conditions fulfilled, the obligors would all be released from their loans, guarantees and securities. In the events which transpired, only the first €1m of the payment was made by the due date.

35. Although certain asset disposals were provided for in the Settlement the payment obligations in Section 3.5 and 3.6 were absolute and not stated to be conditional on the achievement of sales.

36. A number of other provisions of the Settlement are important.

37. All of the borrowers and obligors acknowledged their liabilities to the plaintiff under the relevant Loan and Security Documents, which are recited in the schedule to the Settlement.

38. Section 2.4 provided as follows: -

> *"For the avoidance of doubt in the event of termination of this Agreement each Obligor hereby agrees and acknowledges that any payments or other remittances made by him/her/it to Feniton pursuant to this Agreement shall be applied in full by Feniton against the liability of the relevant Obligor under the Loan and Security Documents in such order and with such priority as Feniton deems fit, and the Loan and Security Documents shall remain in full force and effect and may be enforced by Feniton whether by way of legal proceedings or otherwise".*

39. Section 3.1 required that the obligors would deliver to Feniton the following: -

> (a) A signed independent legal advice form (signed by a solicitor giving advice);
>
> (b) A signed letter of undertaking acknowledging the debt and the Settlement and undertaking that in the event of default of payment they would not object to any proceedings for recovery of the debt and confirming haven taken independent legal advice;
>
> (c) A signed power of attorney.

40. The forms of these letters were appended to the Settlement.

41. The Settlement also provided for the Personal Obligors to deliver to Feniton a certain "Letter of Invite" in respect of the property at 16 Wellington Road. This was a letter inviting the plaintiff to appoint a receiver over the property, and confirming they were not consumers and that none of the provisions of the Consumer Relations Act, 1995 or of the Code of Conduct on Mortgage Arrears apply to any of the security documents or enforcement thereof.

42. The Settlement provided that the relevant letters of undertaking invite and powers of attorney would be held in escrow and not acted upon by Feniton pending the occurrence of a "Settlement Default". On the occurrence of a settlement default, those letters would be released from escrow and the plaintiff would be entitled to act and rely on their respective terms for the purpose of exercising all rights under the Loan and Security Documents and the Settlement.

43. A letter of undertaking was signed by each of Peter White, Alicia White and Trevor White and executed also by Blue Nile Holdings Limited and Dublin Land Securities Limited in the following terms: -

> *"I refer to the Security Documents (being all of the relevant facilities and securities).*
>
> *I acknowledge and confirm that I am indebted to Feniton for all amounts due and payable by me under the Security Documents including for the avoidance of doubt all principal, costs and interests thereunder (the "Liabilities"). Notwithstanding the entitlement of Feniton to take such action against me for the recovery of the liabilities, I understand that Feniton has reserved all rights that it has against me pursuant to the security documents and of law for the purposes of inter alia recovering the full amount of the liabilities.*
>
> *Feniton have entered into a Settlement Agreement ("the Settlement Agreement") with me on the terms agreed as of todays' date and subject to my performance of the obligations by me therein contained, I will be released from all obligations under the Security Documents.*
>
> *In the event that I fail to discharge my obligations under the Settlement Agreement and/or all of the Liabilities when demanded of me, and in the event that Feniton takes proceedings against me for judgment, then I irrevocably and unconditionally confirm and undertake not to object to those proceedings or otherwise resist or defend or obstruct those proceedings in any way.*
>
> *Notwithstanding anything agreed between me and Feniton, I fully acknowledge that this letter may be produced to a Court and any application arising therefrom.*
>
> *I confirm that this letter is also intended to be addressed to and relied upon by Feniton and its successors and assigns including any party who may acquire the interest of Feniton in the Security Documents whether by loan, sale or otherwise.*
>
> *I confirm that I have received independent legal advice before signing this letter. Dated 30 May 2007".*

44. In the case of each of Blue Nile Holdings Limited and Dublin Land Securities Limited, there was exhibited minutes of a meeting of the board of directors held on 30 May, 2017, and attended by Peter White, Alicia White and Trevor White, being all of the board members of the relevant companies authorising the company to enter into the Settlement and to execute any further documentation related to or arising from the Settlement.

45. Also on 30 May, 2017, each of Peter White, Alicia White and Trevor White signed letters, witnessed by Mr. Daire Murphy, solicitor

of Messrs. Kenny & Co. in the following terms: -

> *"I refer to the Settlement Agreement.*
>
> *I confirm that prior to the execution of the Settlement Agreement by me I was advised by Feniton to obtain independent legal advice on the content of the Settlement Agreement insofar as it related to obligations and acknowledgements on my part contained therein.*
>
> *I further confirm that I was afforded due opportunity by Feniton to obtain independent legal advice on the content of the Settlement Agreement.*
>
> *I confirm that I am waiving my right to obtain independent legal advice on the content of the Settlement Agreement.*
>
> *I confirm for the benefit of Feniton that I am now willing to be legally bound by the terms of the Settlement Agreement and that I have executed the Settlement Agreement without any duress or undue influence being placed on me by Feniton".*

46. Section 3.7 provided for the payment in the event of a default of a sum of €25,000 per month "*by way of liquidated and ascertained damages". It also provided that the parties agreed that this amount was a "genuine pre – estimate of loss and is not a payment in the nature of a fine or penalty*".

47. Settlement 3.12 provided that in the event that any sums payable by the obligors to Feniton under the Settlement had not been paid by 31 March, 2018, then *"this Agreement shall be at an end and the obligors hereby acknowledge and agree that they shall be liable to Feniton for the full amount of the indebtedness due under the Loan and Security Documents and that Feniton shall be entitled to enforce the Loan and Security Documents against the Obligors in accordance with their respective terms".*

48. Section 4 contained provisions relating to security enforcement and the appointment of a receiver, including a statement of acknowledgment that the receiver had been duly and validly appointed by Feniton under the Loan and Security Documents;

49. Section 4.2 provided as follows: -

> *"The obligors shall:*
>
> > *(a) In respect of all Properties (save for the property at 1 Wellington Road Dublin 4 but subject in this respect at Clause 4.3) following the occurrence of a Settlement Default, immediately deliver to Feniton or to Pepper (as agent for Feniton) or to any receiver (i) vacant possession of the Properties or any of them and (ii) All keys, title documentation, licences and/or lease documentation relation to the occupation of the Properties by tenants as is in their possession or under their control as may be required by Feniton and/or Pepper and/or any receiver and;*
> >
> > *(b) In good faith cooperate fully with Feniton and/or Pepper and/or any receiver to ensure a consensual and/or early sale of the Properties."*

50. Section 4.3 provided as follows: -

> *"The Personal Obligors acknowledge and agree that notwithstanding the terms of clause 4.2, Feniton shall be entitled to have recourse in the case of a Settlement Default to the property at 1 Wellington Road, Dublin 4 pursuant to the Personal Loan and Security Documents in accordance with the provisions of the Code of Conduct on Mortgage Arrears".*

51. The properties are defined as meaning the following: -

> (i) 1, Heytesbury Lane, Ballsbridge Dublin 4;
>
> (ii) 16 Wellington Road, Ballsbridge Dublin 4;
>
> (iii) 27 Mount Pleasant Square, Ranelagh Dublin 6;
>
> (iv) 119 St. Stephens Green Dublin 2;
>
> (v) 1 Wellington Road Dublin 4.

52. Section 5 contained a special provision concerning the sale of no. 16 Wellington Road. In Section 5.1 the Personal Obligors agreed that they would with effect from the date of the Settlement Agreement place this Wellington Road property on the market for sale. They agreed to manage the process for sale of that property and maximise the price realised *"so as to ensure that the net sales proceeds are remitted to Feniton in cleared funds by 28 September 2017".*

53. The obligors agreed to appoint Simon Ensor of Sherry Fitzgerald as selling agent, subject to the prior written consent of Pepper, and that they would not without the prior written consent of Pepper amend or waive the terms of appointment of the selling agent or terminate the appointment of the selling agent. They agreed to keep Pepper appraised of the status of the marketing and sale of the property including details of offers received, the withdrawal of offers and the reasons for such withdrawals.

54. Section 5 also contained a range of provisions conferring on Pepper a veto in respect of any responses to offers, the terms of any draft contract for sale, and control and monitoring of costs relating to the marketing and sale of the property. Section 5.11 provided that the Personal Obligors *"shall keep Pepper appraised of progress towards completion of the sale of the Wellington Road property pursuant to the terms of the contract for sale and shall procure that the net sales proceeds are received by Feniton in cleared funds on or prior to 28 September 2017*".

55. Section 8.1 governed default by obligors: -

> *"8.1 In the event that a Settlement Default occurs then: -*
>
> > *(a) The obligations on the part of Feniton in this Agreement shall immediately cease and no longer be binding on*

Feniton. Each Obligor acknowledges and confirms that the obligations on his/her/its part shall enure for the benefit of Feniton notwithstanding the fact that Feniton is relieved of all obligations on its part.

(b) All amounts payable by the relevant Obligors under the Loan and Security Documents and this agreement shall become immediately due and payable by that Obligor.

(c) Feniton will have full recourse to all its rights under the Loan and Security Documents and this agreement and all other rights or remedies which Feniton may have against the relevant obligors."

56. Section 9 dealt with releases and provided as follows: -

(i) On receipt of the first payment of €1,000,000 provided for in Clause 3.5 (a) Feniton would release its charge over the property at 1 Heytesbury Lane. This payment having been made, that charge was released.

(ii) On receipt by Feniton of all payments under the Settlement, and subject to there being no Settlement Default, then Feniton would release the Obligors from all loans and securities.

57. Section 10 acknowledges that nothing in the Settlement would exclude or restrict any legal liability or duty of care which Feniton has under "applicable law" or under the 2015 Consumer Protection Code or relevant Central Bank regulations. It continued by providing as follows: -

"10.2 Having regard to the: -

(a) The overall liability of the Obligors to Feniton pursuant to the Loan and Security Documents.

(b) The overall personal and financial circumstances of the Obligors and their respective needs and objectives as disclosed to Feniton and/or Pepper.

(c) The fact that this Agreement and the terms contained herein have been requested by the Obligors in an effort to effect a final settlement with Feniton of their respective liabilities pursuant to the Loan and Security Documents.

the parties confirm that they each believe that the terms of Agreement are suitable and the Obligors further confirm and agree that no provisions of this Agreement are unreasonable or penal in nature."

58. 10.3 provides as follows: -

"To the extent applicable: -

(a) The Personal Obligors and Trevor White acknowledge that Feniton has complied with the provisions of the 2015 Consumer Protection Code and

(b) The Corporate Obligors acknowledge that Feniton has complied with the provisions of the Central Bank (Supervision and Enforcement) Act 2013 (s. 48) (Lending to Small and Medium Sized Enterprises) Regulations 2015."

59. The obligors agreed to discharge the legal fees and expenses incurred by Feniton in connection with the negotiation of the Settlement in the amount of €22,100 plus VAT.

60. The total amount provided to be paid under the Settlement by 31 December 2017 was €11,430,000. It was said by the plaintiffs that at the time of the entering into the Settlement the balance due at that time was €12,452,968.95, thereby granting to a write off of just over €1,000,000 if the terms were performed. A point was made by the defendant that they could not be certain that this was the true amount of the discount and they claimed that they had not always received clear statements and interest calculations. This does not appear to have been raised when the Settlement was made, in that the Settlement contains no reservation or qualification in this regard, and the Settlement is clear as to the amounts agreed to be paid thereunder.

Termination of Settlement Agreement

61. The first €1,000,000 was paid under the Settlement at the time of the signing. The second payment of €4m was due by 28 September 2017 but was not made. On 17 October 2017, the plaintiff wrote to the defendants terminating the Settlement Agreement and notifying them that the full overdue balance on all the facilities was now payable.

62. On 19 December 2017 the receiver sold 119 St. Stephens Green for €4,851,000 and a net sum for this, €3,426,294.27 was applied to the account of Dublin Land Securities Limited

63. On 21 May 2018 the receiver sold 16 Wellington Road for €2,900,000, and a net sum of €2,746,426 was applied to the liabilities of Peter White and Alicia White.

64. On 11 May, 2018, the defendants' solicitors, Messrs. Kenny, wrote to the plaintiff, to Pepper, and to the receiver asserting that no detailed accounts had ever been furnished to their clients to demonstrate how the plaintiff's figures had been calculated. They said that their clients had procured alternative finance and intended to discharge their outstanding indebtedness to the plaintiff in full providing comprehensive, detailed and accurate accounts were furnished to them. They also warned that unless certain confirmations to desist from a sale of 16 Wellington Road were furnished, they had instructions to commence actions, "including but not limited to injunction proceedings". They also stated that in the alternative their clients were prepared to pay the sum of €6m in full and final settlement of all the outstanding indebtedness to the plaintiff.

65. On 14 May 2018, then plaintiff's then solicitors, Ivor Fitzpatrick replied by referring to the Settlement and the termination thereof. This led to another exchange of correspondence, including further demands by Messrs. Kenny for redemption figures and detailed supporting information and a repeat of the threat of legal proceedings.

66. On 12 June 2018, Maples and Calder wrote to Kenny informing them that they had been instructed by the plaintiff in this matter.

They referred to the history of the matter and enclosed further information concerning the indebtedness, including copies of all facility letters and amendments and loan account statements. They then confirmed that as of 11 June 2018 the balance due and owing by Dublin Land Securities Limited was €1,358,026.48, and by Peter and Alicia White (on account no. 395084) was €2,985,797.21. In the case of Dublin Land Securities this balance included "Default Interest" of €487,149.44. Maples and Calder also rejected the various claims and allegations made by Messrs. Kenny and warned that the plaintiff would defend any proceedings instituted against it. No proceedings were issued by the defendants, whether to restrain the sales by the receiver or otherwise.

67. On 27 June 2018, the plaintiff's solicitors, Maples and Calder wrote a series of letters to the defendants' solicitors, Kenny, each headed "Formal Letter Before Action". These letters referred to the demands of 3 February 2017, the Settlement, the letter of 17 October 2017 terminating the Settlement, and informing them of their intention to commence summary judgment proceedings. They stated that the balance due at that time by Peter and Alicia White in respect of Account Number 395084 was €2,985,797.21 and the balance due at that time by Dublin Land Securities Limited in respect of Account Number 236650/109 was €1,358,026.48.

68. On 13 July 2017, Maples and Calder wrote again to Kenny noting that they had received no response to their letter of 27 June 2018 and requesting confirmation that Messrs. Kenny had authority to accept service of proceedings on behalf of their clients.

69. On 16 July 2018 Messrs Kenny wrote to Maples and Calder. In this letter they recited again their clients' protest in the manner in which the plaintiff had conducted itself towards them. They stated that their clients were not seeking to challenge the loans or "deny the debt", but that their clients were "entitled to test the eligibility of what your clients claim are its rights; they are entitled to challenge incorrect accounting or unlawful interest charges; they are entitled to accounts relating to receiverships, and they are entitled to challenge your client's policies on debt collection to ensure that they were not singled out for extraordinary treatment". Messrs Kenny also stated that they would resist any application to enter the proceedings in the Commercial List. No reference was made to the enclosures they had received by letter dated 12 June 2018 which comprised inter alia copies of all the facility letters and amendments and loan account statements.

The proceedings
70. These proceedings were commenced by Summary Summons issued on 20 July 2018 and on the same day the plaintiff issued a Notice of Motion returnable before the Commercial Court for 30 July 2018 seeking orders entering the proceedings in the Commercial List and summary judgment against the defendants.

71. The applications were grounded on affidavits sworn on 19 July 2018 Mr. Donal O'Sullivan, a director of the plaintiff.

72. The affidavit of Mr. O'Sullivan in each of the proceedings exhibits the relevant facility letters and amendments, and statements of account showing the balances claimed at the time of the commencement of the proceedings. In the case of the proceedings against the guarantors, he exhibits also the guarantees entered into by Peter White and Blue Nile Holdings Limited

Amounts claimed and consent
73. At the time of the submitting of the applications for summary judgment, the amounts claimed by the plaintiff against Peter and Alicia White were €2,990,319.97 plus interest and the balance claimed against Dublin Land Securities Limited was €1,364,159.85 plus interest, being a total of €4,354,479 plus interest.

74. In an affidavit sworn on 19 November 2018, Mr. Peter White stated he would consent to judgment in an amount of €4,500,000. This was stated to be calculated by reference to certain deductions which he believed ought to be applied arising from issues he says ought to be remitted to plenary hearing. I shall return to those matters later. However, the "consent" amount of €4,500,000 included consent in respect of claims against the Whites and their son Trevor White as trustees of Mount Pleasant Trust" for the sum of €1,301,930.15, which are the subject of different but related proceedings. Therefore, it could be said that his "consent" attaches, as far as the present proceedings are concerned, to a sum of €3,198,869.85, leaving a disputed balance of circa €1.2m

75. The plaintiff has confirmed that in the proceedings the claim includes an amount stated at 1 April 2019 to be €532,342.65 for "default" interest. This amount was applied to the account of Dublin Land Securities Limited. The plaintiff agrees that this element of the claim should be remitted to plenary hearing and accordingly, the defendants will have leave to defend for that amount. When this amount is deducted from the other deductions for claims disputed by Mr. White in his affidavit of 19 November 2018, this leaves in contention sums totalling circa €700,000, and I shall return later to the appropriate treatment of those claims.

Summary judgments
76. In replying affidavits, the defendants have introduced a number of complaints and allegations concerning the manner in which the plaintiff and receivers appointed by it have conducted themselves since the plaintiff acquired the loans and facilities in November 2015. Before turning to the content of those allegations it is appropriate to refer to the fundamental principles which apply on an application for summary judgment and which have been stated in numerous other cases.

77. In *Aer Rianta cpt v. Ryanair Limited*, Hardiman J. commented on the jurisdiction to grant summary judgment granted by Order 37, Rule 7, and stated that: -

> "Since the order provides for alternative, more searching and elaborate, methods of resolving the issues, the Plaintiff's entitlement must appear clearly enough to render these unnecessary".

He continued: -

> "In my view, the fundamental question to be posed on an application such as this remains: is it "very clear" that the Defendant has no case? is there either no issue to be tried or only issues which are simple and easily determined? do the Defendant's affidavits fail to disclose even an arguable defence?"

78. In the same case, McGuinness J. cited with approval the judgment of Murphy J. in *First National Commercial Bank plc. v. Anglin* [1996] 1 IR 75, where he stated: -

> "For the Court to grant summary judgment to a Plaintiff and to refuse leave to defend it is not sufficient that the Court should have reason to doubt the *bona fide* of the Defendant or to doubt whether the Defendant has a genuine cause of action (see *Irish Dunlop Company Limited v Ralph* (1958) 95 ILTR 70). In my view the test to be applied is that laid down in *Banque de Paris v de Naray* [1984] 1 Lloyd's Law Rep 21, which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v Daniel* [1993] 1 WLR1453. The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms: - "*The mere assertion in an affidavit*

of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the Defendant had satisfied the Court that there was a fair or reasonable probability of the Defendant's having a real or bona fide defence."

79. In *Harrisrange Limited v. Duncan* [2003] 4 IR 81, McKechnie J. summarised the present position: -

> *"(i) The power to grant summary judgment should be exercised with discernible caution,*
>
> *(ii) In deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done,*
>
> *(iii) In so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence,*
>
> *(iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use,*
>
> *(v) Where however, there are issues of fact which in themselves are material to success or failure, then their resolution is unsuitable for this procedure,*
>
> *(vi) Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues,*
>
> *(vii) The test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "Is what the defendant says credible?", - which latter phrase I would take as having as against the former an equivalence of both meaning and result,*
>
> *(viii) This test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence,*
>
> *(ix) Leave to defend should be granted unless it is very clear that there is no defence,*
>
> *(x) Leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action,*
>
> *(xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally,*
>
> *(xii) The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be".*

80. In Danske Bank AS, trading as *Danske Bank v. Gillic & Ors* [2015] IEHC 375, McDermott J. considered an argument made by borrowers that the appointment of a receiver in that case was unlawful and should not have occurred at the time when it occurred. The borrower sought to rely on those matters in opposition to a claim for summary judgment in respect of the underlying debt. The court found that the issue of the appointment of a receiver was entirely irrelevant to the issues in that particular case. *Inter alia*, McDermott J. said: -

> *"If the second defendant wished to challenge the appointment of a receiver he had ample opportunity to do so but did not. If he has any grievance in relation to the appointment or actions of the receiver or the decisions taken by him or any failure of duty on his part, he should properly pursue that matter with the receiver... I am satisfied that this ground does not give rise to an arguable defence".*

81. The question which falls to be considered in this case is whether the matters complained of by the defendant, both in relation to the receiverships and other matters concerning the conduct of the plaintiff truly go to the matter of the validity of loans and the accuracy of the balance claimed by the plaintiff or otherwise can affect the plaintiff's claim for summary judgment in respect of the balance claimed. In doing so, I must avoid the fault of adjudicating on potentially substantive claims and counterclaims made only on affidavit but determine whether the defendants have disclosed an arguable case such that they should be granted leave to defend the claims for recovery of loan balances.

Affidavits of Peter White

82. In action 2018/876, the first affidavit sworn by Mr. White on 1 October 2018 was sworn principally in opposition to the entry of these proceedings in the Commercial List. This comprised largely a series of complaints about the manner in which the plaintiff had conducted itself since acquiring the loan in November 2015. He claimed that he and his family had been pursued by the plaintiffs "with considerable bad faith for in excess of two years". He then argued that there was no commercial aspect to the action, that there was culpable delay on the part of the plaintiff, that the "plaintiff's accounts are suspect", and that there was no urgency to the matter. Apart from general complaints about the manner in which he and his family had been treated by the plaintiffs, the most substantive point made by Mr. White in an affidavit sworn by him on 27 September 2018 in 2018 / 878 S, he said that default interest in an amount of €487,292.21 had been claimed on a balance of debt which was only €868,506.66. The plaintiff has indicated that it is willing to remit to plenary hearing its claim for default interest.

83. Mr. White swore a substantive replying affidavit on 19 November 2018 on his own behalf and on behalf of the other defendants. Mr. White makes the following points: -

> (i) That he sought to cooperate with the plaintiff at all times after it acquired the loans the subject matter of the proceedings.
>
> (ii) That it was obvious to the plaintiff from the time of the acquisition of the loans that any default in relation to the terms of such loans was due to the state of the property market and the dramatic fall in property values from their height

in 2007 and not from any deliberate or calculated act on his part.

(iii) That being aware that what he described as "vulture funds such as the plaintiff" purchase loans at a discount, he sought to reach agreement with the plaintiff or its agent on an orderly sale of the majority of his assets to pay off the loans at a reasonable discount.

(iv) That the plaintiff was at all times aware that the charged assets were the only assets available to sell or raise security upon to discharge the debt to the plaintiff.

(v) That throughout 2016, the defendants worked with the plaintiff in exchanging information and formulating proposals and that he sought to progress a certain refinancing plan which had previously been discussed with BOSI.

(vi) Mr. White then complains about the manner in which the engagement progressed. He says the plaintiff persistently pressing for improved offers without ever committing to a deal. He says that in August 2016 when no. 16 Wellington Road became vacant, and negotiations with the plaintiff were ongoing, he sought to re – let that property but the plaintiff refused to allow him to do so.

(vii) That when the plaintiff appointed receivers over various properties in February 2017, the defendants felt vulnerable and "redoubled our efforts to come to an agreement with the plaintiff to dispose of assets and discharge our debts". He then says that the Settlement Agreement was entered into in this context. Mr. White does not say that the Settlement itself is invalid. He says that it was at all times "*clearly agreed and understood and (and patently) obvious that except for an initial payment of €1,000,000 the payments envisaged by the Settlement Agreement would be made from sales of properties and residual re – financing."* When entering the Settlement in May 2017 he believed that the proceeds of sales of 16 Wellington Road and of 119 St. Stephens Green, anticipated at that time at net figures of €4,000,000 and €4,293,000 respectively, would be realised in sufficient time to enable the defendants to meet the terms of the Settlement. He says that in the events that occurred the market for such properties stalled and it became clear that the house at Wellington Road could not be sold for anything other than an unacceptably reduced price.

(viii) Mr. White then criticised the manner in which the properties were actually sold by the receiver.

(ix) In relation to the sale of the property at 119 St. Stephens Green, Mr. White complains that although representatives of Pepper had initially indicated that full cooperation would be given to a tax efficient sale, the receiver did not so cooperate and incurred capital gains tax amounting to some €1,270,776 on that sale. He says that if the sale had been structured differently, the tax cost associated with this could have been reduced by as much as €500,000. Mr. White said that he had been advised to this effect by his accountants Messrs Crowe Ireland. No affidavit was sworn by Messrs Crowe but instead an affidavit was sworn on 6 February 2019 by Mr. Eugene Dolan, a chartered certified accountant and a tax consultant. Mr. Dolan says that he believed that a sale of the shares in Blue Nile Holdings Limited, the company which directly owned the property at 119 St. Stephens Green, instead of a straight disposal of the property itself would have resulted in a capital gains tax saving of in excess of €500,000. Mr. Dolan also stated that a stamp duty saving could have been achieved by a sale of the shareholding. In fact, the purchaser was exempt from stamp duty by reason of its charitable status.

84. Mr. White disputes the costs incurred in the receivership in terms of professional fees, marketing expenses, legal expenses, insurance, and that in total a sum of €129,381.12 was incurred in the receivership sale which should otherwise have been avoided.

85. Mr. White complains that a sum of €58,236.22 was retained by the receiver as a contingency fund in respect of any legal challenge commenced by the defendants. The plaintiffs have since applied that amount against the loan balances.

86. In relation to 16 Wellington Road, Mr. White again claims that excessive fees were incurred by the receiver with agent and marketing costs, and in conveyancing fees where he could otherwise have negotiated lower fees and that a deduction should be made from the claim in the amount of €71,839.50 in respect of these expenses incurred.

87. Finally, in relation to 16 Wellington Road, Mr. White complains that the receiver retained a sum of €10,000 from the sale also as a contingency fund in respect of any legal challenge commenced by the defendants. The plaintiff has since applied that amount against the loan balances.

88. Having identified these adjustments required Mr. White states that although there may be further reductions required he is willing to consent to judgment in the sum of €4,500,000 to include amounts claimed in different proceedings but observes that in order to discharge the judgment sum it will be necessary to sell property and he refers again to the various charged properties.

89. Finally, Mr. White states that he wishes to

(i) Challenge the sum sought in the amount of €1,376,606.28 by way of deductions, which includes the "surcharge interest" then stated by him at €487,1149.44;

(ii) Reserves the right to challenge any aspect of the appointment of the receiver or any acts of the receiver or the plaintiff;

(iii) Obtain expert advice as to any loss of value of 16 Wellington Road and/or 119 St. Stephens Green by virtue of the appointment of the receiver.

90. Nowhere in the affidavits of Mr. White does he assert there is a basis for a challenge to the validity of the appointment of the receiver. His complaints concern the timing of the receivership appointments and the conduct of the plaintiff and of the receiver in relation to the disposal of the relevant assets.

91. As regards the claim that the plaintiff refused to permit the defendants to let the house 116 Wellington Road, it is clear that the plaintiff was under no obligation to permit such a letting, and in circumstances where its objective was to secure a sale of the property, with vacant possession the plaintiff cannot be faulted for such a refusal. The plaintiff refers to an inconsistency in the defendants' position on this issue, in that the defendant had already stated their desire and willingness to sell that property rather than let it, or alternatively that they themselves would move to live in it.

92. As regards the expenses incurred by the receiver himself, it can never be said that a receiver, being agent of the borrower, is immune from complaint as to the expenses he incurs or the manner in which he effects realisations of assets. However, the fundamental position is that by the creation of the security under which a receiver is appointed a borrower confers on the lender the power in certain circumstance such as a default, to appoint a receiver who in turn will have the very extensive powers and discretions conferred on him by the relevant security.

93. In replying affidavits, the plaintiffs have addressed the question of the fees and expenses incurred by the receivers and pointed out that they constituted a very small percentage of the realisations by the receiver and accordingly are not to be regarded as excessive. The defendants claim that the they could have negotiated lower legal and ongoing fees than the receiver incurred. They are entitled to hold that opinion, but this does not establish that the receiver acted improperly.

94. In applying the established principles governing applications for summary judgment I have to consider whether the matters deposed to on affidavit by Mr. White and submissions made on his behalf demonstrate that he has an arguable defence to the claim for judgment in the proceedings.

95. In *Governor & Company of the Bank of Ireland v. Keehan* [2013] IEHC 631, and *Ulster Bank Ireland Limited v. O'Brien* [2015] 2 IR 656, consideration was given to the basic proofs required in an application by a bank for summary judgment. Those cases centred on some discussion as to whether the claims could be defeated by reason of the absence of specific averments under the Bankers Books Evidence Act 1879, as amended. However, they contain informative analysis of the basic proofs required in applications for summary judgment.

96. In *Bank of Ireland v. Keehan*, Ryan J. considered the proofs advanced by the bank comprising details of the accounts giving rise to the liability, the relevant credit agreement, the loan account statement and the demands. These were exhibited by the relevant official of the bank who swore an affidavit that he was doing so: -

> *"from facts within my own knowledge and from a perusal of the plaintiffs' books and records, save as where otherwise appears and where so otherwise appearing I feel the same to be true and accurate."*

97. Ryan J. continued: -

> *"The judgments of Clarke J. (in Mooreview Developments & Ors. v. First Active plc & Ors) and Finlay Geoghegan J. (in Bank of Scotland v. Fergus) reflect an acknowledgment that courts have to take judicial notice of the obvious and commonplace facts and circumstances of ordinary life. Companies maintain computer records that are cited and exhibited in summary proceedings as evidence of debt. Similarly, with banks. The records are prima facie evidence that the defendant owes the money to the plaintiff. If the defendant contests the liability in whole or in part, the evidence required to prove the case depends on the issues raised . . ..*
>
> *Although the evidence of the contents of the bank's records does not conform to the formal specifications in the 1879 Act, as amended, in a number of respects, it is nevertheless apparent as a matter of legitimate inference that the evidence of the defendant's liability emanates from the bank's books and records and that the statements are printed from its computer records. The point, however, is that the case is not about the 1879 Act and a copy of a bank book but about a liability arising on a contract entered into by the defendant by written agreement signed by him and witnessed by his solicitor and an overdrawn current account. The bank is proving its case that the defendant defaulted on a loan and has not discharged his overdrawn account. It has to establish a sufficient prima facie case that will result in judgment being given unless the defendant raises some basis of defence".*

98. In this case, Mr. O'Sullivan has exhibited all of the relevant facility letters, statements and demands. It is clear from the judgment of Ryan J. that these are the basic proofs from which it is open to the court to conclude that the balance claimed is due and to enter summary judgment.

99. This being the case, the question is whether the items and complaints made by Mr. White justify referring the disputed elements of the claim to plenary hearing. Apart from general objections made by the defendants, particularly Alicia White, to whose position I shall return, the particular complaints relate to the manner in which the defendants were treated, the timing of appointments of receivers, the sales made by the receivers, and costs incurred in the receivership sales of 16 Wellington Road and 119 St. Stephens Green. Before addressing these matters, it is appropriate to consider the contention made by the defendants that the appointment of receivers was wholly unnecessary. In this regard it is relevant to note: -

> (i) The fact of the defaults having occurred is not in dispute in that the repayment dates of all of the relevant facilities, even as extended, had passed even before the plaintiff acquired the loans in November 2015;
>
> (ii) No point has been made by the defendants as to the validity of the execution of the appointments of the receiver;
>
> (iii) The Settlement Agreement expressly acknowledges that the appointments of the receiver were valid.

100. Complaints by borrowers concerning the fact of the appointment of receivers and the conduct and cost of receiverships are not unusual. No claim has been made or proceedings commenced against the receivers in relation to these matters. In submissions, the defendant went so far as to suggest that these complaints are made not about the conduct of the receiver but against the plaintiff for appointing the receiver, when same was "unnecessary" in order to complete sales which the defendants say were "in train" and that the receivers then achieved prices less than would have been achievable had the purchasers not been aware that they were forced sales.

101. The fundamental effect of the various mortgages and charges over the assets referred to is that the borrower, as a term of the loan, confers on the lender the right to make receivership appointments on the occurrence of a default. Provided the necessary events giving rise to the entitlement to appoint the receiver have arisen – which is not denied in this case - the borrower has contracted with the lender to confer on the lender the right to exercise its own judgment as to the timing of such appointments, and the appointments thereby confer on the receiver the right to exercise his own professional judgment in relation to the realisation of the charged assets.

102. Receiver's powers include the power to appoint advisers and to incur expenditure on security and other costs associated with the realisation. Such receivers act as agent of the borrower and if the borrower seeks to invoke remedies against the receiver arising from the manner or timing of his actions, such a claim should be made against the receiver and does not lie against the lender. These

are proceedings by the plaintiff for recovery of the loans advanced by its predecessor. None of the submissions made by or on behalf of Mr. White go to the question of the indebtedness resulting from these loans or defeat the right of the lender or its successors to demand repayment and ultimately obtain judgment for balances due.

103. In relation to 119 St. Stephens Green, a particular complaint has been made by Mr. White to the effect that apart from the effect of the timing of the appointment of the receiver on a sale of the property, that the defendant believed that the receiver's appointment was only a tactical appointment and was then followed by negotiations which led to the Settlement Agreement. Even if it was a "tactical appointment" this would not invalidate it, and the defendants acknowledge the validity of the appointment in the Settlement Agreement.

104. As regards the complaint that capital gains tax could have been avoided, again these are matters of differing professional opinions and it does not follow, even from the evidence of Mr. Dolan, that the receiver was under an obligation instead to sell the shares in the holding company.

105. The plaintiff has not proffered expert evidence to contradict the affidavit of Mr. Dolan concerning capital gains tax on 119 St. Stephens Green. However, it states that it believes that a sale by way of share sale of Blue Nile Holdings Limited would have been unrealistic as it involved a transfer of assets and liabilities of that company. Whilst transactions by way of share sales by receivers are not unusual in very particular circumstances, this was a decision the receiver was entitled to take, and does not go to the matter of the underlying debt.

Affidavit of Alicia White sworn 19 November 2018
106. Alicia White makes a number of points and submissions which do not feature in the submissions or affidavit of Peter White. In some cases, no reference is made to them in the submissions delivered on behalf of the defendants, but I have considered them.

Statute of Limitations
107. Mrs. White refers to the facility letters and the mortgages granted and states that it is over six years since she signed any facility letter and over twelve years since she signed any mortgage document. She continues: -

> *"I believe that I have never acknowledged to the plaintiffs or their predecessors in title any liability on my part in relation to the claims of the plaintiffs. I therefore believe that all claims against me, given their vintage, are statute barred and that accordingly I am not indebted in any way to the plaintiffs and any securities which the plaintiffs hold from me are unenforceable. The documents in question are listed at Part 2 and Part 3 of Schedule 1 of the Settlement Agreement".*

108. Alicia White is the only defendant to invoke the Statute of Limitations. By the Settlement Agreement, Alicia White expressly acknowledged her liability and obligations, under the "Loan and Security Documents" defined to mean those referred to in Schedule 1 of the Settlement Agreement. Part 2 of Schedule 1 of the Settlement Agreement refers to the facility letters issued by BOSI to Peter White and Alicia White on various dates between 18 May, 2006, and 21 November, 2008. It refers also to deeds of mortgage executed on 2 May, 2001, over property at 1 Wellington Road, Ballsbridge Dublin 4 and on 10 July, 2006, in respect of property at 1 Heytesbury Lane and on 20 December, 2006, over property at 16 Wellington Road.

109. The replying affidavit of Mr. O'Sullivan refers firstly to the Settlement Agreement which contains acknowledgements of the indebtedness of the parties to the plaintiff in respect of the facilities referred to in the schedule. I shall return later to complaints made by Mrs. White in relation to the Settlement Agreement itself.

110. Mr. O'Sullivan also refers to the fact that all of the loan documentation comprising facility letters, acknowledgment of facility letters and associated correspondence including such items as notifications to insurers, are signed by both Peter White and Alicia White.

111. The facility letters describe Peter White and Alicia White as joint borrowers and the conditions of the loan appended to the facility letter expressly provide that the obligations of the borrowers are joint and several.

112. Mr. O'Sullivan in his affidavit of 21 December, 2018, recites payments made in respect of these facilities from dates ranging between December 2015 and June 2017.

113. S. 68.4 (a) of the Statute of Limitations 1957 provides as follows: -

> *"A payment made in respect of any debt shall, subject to paragraph (b) of this subsection (which refers to debts already statute barred), bind all persons liable in respect thereof".*

114. In circumstances where the liability of Alicia White was joint and several with Peter White, the payments made since November, 2015 clearly have the effect provided for in s. 68 (4) and the argument based on the Statute is fundamentally flawed.

Settlement Agreement 30 May 2017
115. Mrs. White makes a number of points in relation to the Settlement Agreement as follows: -

> (a) That she was coerced into completing it; and
>
> (b) It is in effect "at an end" and cannot be relied as against her.

Coercion
116. Mrs. White states as follows: -

> *"Under threat of losing my family home and while I was very seriously ill and for the most part not in a position to make a rational decision, I was coerced into completing the Settlement Agreement dated 30 May 2017 which is exhibited at Exhibit DOSC 15 of the affidavit of Donal O'Sullivan sworn on 19 July 2018. I understood that if I was not to be dispossessed of my family home I had no option other than to complete the Settlement Agreement. I understand that the Feniton plaintiff was fully aware of this but nevertheless chose to take advantage of my situation".*

117. She continues: -

"I am unaware whether I completed any of the documents referred to at Clause 3.1 or 3.2 of the Settlement Agreement"

118. Mrs. White does not say that the signature on the documents and letters exhibited are not hers, or that they are forgeries. It is clear on the face of the Settlement Agreement that Mrs. White signed it in three separate places, viz, as one of the Personal Obligors, and separately in her capacity as a director of each of Blue Nile Holdings Limited and Dublin Land Securities Limited. There has also been exhibited meetings of the directors of those companies attended by Mrs. White authorising entry into the Settlement Agreement. Mrs. White also signed letters of confirmation to the effect that prior to execution of the Settlement Agreement, she was advised by Feniton to obtain independent legal advice on its contents and she confirms that she was afforded due opportunity by Feniton to obtain independent legal advice on its contents. That letter is witnessed by Daire Murphy, solicitor, of Messrs Kenny solicitors.

119. Nowhere in the affidavit of Mrs. White does she advance any detail of the allegation of coercion. It is unclear whether she alleges that the coercion was perpetrated by the plaintiff or by her own family members. Such a serious allegation can only be treated as stateable if it is supported by evidence of who perpetrated the coercion and a description of the circumstances. Instead, Alice White simply refers to her own illness and an "understanding" that she could lose her family home. I consider that the allegation of coercion is a classic instance of a bald assertion unsubstantiated by any evidence. Furthermore, it is contradicted by the several documents signed by Mrs. White at the time of the entry into the Settlement Agreement.

Termination of the Settlement Agreement
120. Mrs. White states that the effect of the letter terminating the Settlement Agreement issued by the plaintiff on 17 October, 2007, is to bring that Agreement to an end, and therefore that it cannot be relied on as against her and is not relevant. She says "*is not reckonable for the purpose of calculating the appropriate limitation periods".*

121. The letter of 17 October, 2017, which was issued to Mrs. White and to all the parties to the Settlement Agreement states as follows: -

"Dear Madam,

We refer to the Agreement under which you are one of the Obligors.

Terms defined in the Agreement shall have the same meaning in this letter.

The Agreement has been breached in that the payment due to Feniton under Clause 3.5 (b) of the agreement (being the sum of €4,000,000 which was due by 28 September 2017) has not been discharged by the Personal Obligors.

A settlement default has occurred under the Agreement.

The purpose of this letter is to terminate the Agreement as a result of the occurrence of a Settlement Default.

Please note that under Clause 8.1 (a) of the Agreement, all amounts owing by the Obligors under the Loan and Security Documents are now immediately due and payable".

122. It is necessary to consider the provisions of the Settlement Agreement relied on by Mrs. White in this regard. In particular, she appears to be relying on clause 3.12 which states as follows: -

"Notwithstanding the provisions of Clause 3.9 in the event that any sums payable by the obligors to Feniton under Clause 3.5, and/or Clause 3.6 have not been paid by 31 March 2018, then this Agreement shall be at an end and the Obligors hereby acknowledge and agree that they shall be liable to Feniton for the full amount of indebtedness to you under the Loan and Security Documents and that Feniton shall be entitled to enforce the Loan and Security Documents against the Obligors in accordance with their respective terms".

123. Mrs. White's selective extract of the words "this Agreement shall be at an end" without regard to the remaining terms of the Agreement including the balance of Section 3.12 itself, is unstateable and I see no reason why the express terms of the Settlement Agreement would not still apply as against all the defendants. Section 8.1 states that on the occurrence of a "Settlement Default", the obligations on the part of Feniton immediately cease and are no longer binding on Feniton. Section 8.1 (b) states that in such event "*all amounts payable by the relevant Obligor under the Loan and Security Documents and under this Agreement shall become immediately due and payable by that Obligor".*

124. I am not persuaded that a proper construction of the Settlement Agreement permits of the argument that it is "at an end" by virtue of the letters of 17 October, 2017, and no construction of the agreement to that effect is tenable.

125. If an argument could be made that the Settlement Agreement is "at an end", the court would have to consider the effect of such "an end", which would be to reinstate the full indebtedness of the defendants, which is the plaintiff's claim. The effect of the Settlement Agreement was to agree the terms on which the plaintiff was willing to limit the defendant's repayment obligations to the amount provided therein thereby conferring the discount of €1m. If Alicia White's contention succeeded, she would not be in a position to avail of the benefit of the discount.

Benefit
126. Mrs. White claims that none of the monies which are the subject of the plaintiffs' claims were ever paid to her and that she got no benefit from them.

127. This again is a bald assertion which ignores the fact that she signed the facilities as a co-borrower with joint and several liability. The purpose of the facilities was to fund, refinance and refurbish the assets comprising Nos.1 and 16 Wellington Road, and 1 Heytesbury Lane. Mrs White was a co-mortgagor and co-owner of those properties, has lived at least in 1 Wellington Road and it has been stated that her intention had been to move to live in 1 Heytesbury Lane. She continues by stating that "against my wishes I provided a mortgage over my interest in my family home". She clearly had an interest in the properties whose acquisition and refurbishment had been funded by the relevant facilities.

Validity of the Security
128. Mrs. White states: -

> *"In such circumstances I wish to challenge the entitlement of a financial institution to take security over a family home for any purpose, in particular to secure commercial loans as happened in this case, other than to secure borrowings connected with the acquisition or improvement of such family home".*

129. The proposition that it would never be lawful to take security over a family home to secure borrowings other than those directly connected with the acquisition or improvement of the family home, is a novel one and no authority or precedent has been referred to for such a proposition.

130. These are not proceedings for enforcement of security. Enforcement has already occurred and these proceedings are for summary judgment on the balance of debt resulting from advances to the defendants under the facility letters.

Conclusion

131. It has been suggested that in circumstances where Mr. Peter White has indicated a willingness to consent to judgment for an undisputed amount, the disputed amount becomes the sole focus of the proceedings. The consent is informative, but Peter White is the only deponent unequivocally consenting to judgment for any amount.

132. The first question with which this Court must be concerned is whether the basic proofs advanced by the plaintiff illustrate whether the amounts claimed are *prima facie* owing and if so, to then apply to the submissions of the defendants the tests identified in the cases already referred to. I have already concluded that the basic proofs advanced by the plaintiff substantiate its claim for the balances overdue. I then return to the question of whether the defendants have made out an arguable case in respect of any of the debt, such that any part of the claim should be remitted to plenary hearing.

133. The court is mindful of the statement of Clarke J. (as he then was) in *McGrath v. O'Driscoll* [2006] IEHC 195, where he stated as follows: -

> *"So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment".*

134. In *IBRC v. McCaughey* [2014] 1 IR 749, Clarke J. said: -

> *"Insofar as facts are put forward, then, subject to a very narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances".*

135. Central to the submissions made by the defendants is a claim that the plaintiff has been unduly aggressive since it acquired the loans in November 2015. The defendants portray the plaintiff as taking unfair advantage of its position having regard to their – not contradicted – assumption that the loans were likely to have been purchased by the plaintiff at a discount. That belief appears to have informed the defendant in an expectation that a significant discount would be available to them. When a discount was agreed in the context of the settlement of 30 May, 2017, it was agreed on express terms which were comprehensively stated. Even if it can be said that the Settlement contained more "protections" for the plaintiff than the defendants, these were the price for the discount. The agreement was a negotiated agreement, the obligors confirmed that they had had the opportunity to take legal advice and the agreement was witnessed by their solicitor, Daire Murphy.

136. With the exception of the default interest, which the plaintiff has agreed to remit to plenary hearing, the defendants do not offer evidence that would challenge the following propositions: -

(i) That the facilities were granted on the terms exhibited, including the granting of certain guarantees and securities;

(ii) That the amounts on the statements exhibited by the plaintiff were actually advanced;

(iii) That the loans were past their due dates for repayment;

(iv) That in November 2015 the plaintiff became entitled to the interest in the loans and security originally operated and held by Bank of Scotland Ireland and transferred to Bank of Scotland plc;

(v) That the loans are in default.

(vi) That the Settlement Agreement payment terms were not met by the defendants.

137. Mr. White has stated his consent to judgment for the balances claimed, less the claim for "default interest" and less the deductions he claims should be made for excessive costs incurred in the receivership sales, and for "lost rent on 16 Wellington Road."

138. The complaints raised in the replying affidavits relate centrally to two matters. Firstly, the general aggressive nature of the engagement between the parties following the acquisition of the loans by the plaintiff in November 2015. Secondly, they complain about the fact of the appointments of receivers, by which the plaintiff invoked powers conferred on them by the relevant security, and the manner in which the receivers undertook the realisation of assets, including matters concerning the costs associated with the performance of their functions.

139. In correspondence, complaints have been made from time to time by certain of the defendants as to the absence of accurate statements of interest charges. Apart from the objection regarding default interest, they do not in their affidavits advance any evidence or basis for claiming that they have been overcharged, or that the statements provided by Pepper before these proceedings commenced are inaccurate. Therefore, no arguable defence has been shown on this subject.

140. Complaints were also made about certain investments which had been made by some of the defendants in wealth management funds promoted by BOSI, which caused losses to the defendants. Although reference was made to the possibility of litigation by the

defendants arising from losses on these investments, the basis of such claims have not been detailed and they have not been pursued. I am not persuaded that the mere reference to such possible claims can form the basis of an arguable defence to these proceedings.

141. Reference was also made in one instance to certain arrangements or understandings which the defendants had with representatives of BOSI prior to the transfer of the loans to the plaintiff. These aspects of the case are rooted in a measure of disappointment on the part of some or all of the defendants that indulgences or extensions which they may have been accustomed to enjoying with BOSI were not being continued or extended by the plaintiff. Nowhere has it been suggested that the plaintiff was under any binding legal obligation to continue such extensions or accommodations.

142. None of these are unusual complaints, but they do not go to the validity of the claim for repayment of the overdue balances and cannot form the basis of an arguable defence. Therefore, apart from the claim for default interest, I shall enter judgment in the amounts claimed in these proceedings. The most up to date information available to the court for this purpose is contained in the affidavit of Donal O'Sullivan dated 1 April 2019 and, subject to any submissions regarding the calculation of relevant amounts, including any necessary corrections of the amounts referred to in this judgment, I shall enter judgment for those amounts.