THE HIGH COURT

Record No. 2014/4723

Between:

Michael McAteer, Aengus Burns and Ulster Bank Ltd.

Plaintiffs

-And-

Laszlo Fried, Laszlo Jewellers Ltd, Jaszai Ltd. and Claddagh Jewellers Ltd.

Defendants

Judgment of Ms. Justice Ní Raifeartaigh delivered on the 2nd day of May, 2018

Nature of the Case

1. This is a case which comes before the Court by way of motion on behalf of the plaintiffs to strike out certain paragraphs in the Defence and Counterclaims delivered on behalf of the defendants. The application is based upon the inherent jurisdiction of the Court to strike out pleadings, or parts thereof, on the basis that they are frivolous and vexatious and bound to fail.

2. Essentially, the disputed paragraphs of the Defences refer to the past involvement of Royal Bank of Scotland (hereinafter "RBS"), the parent bank of Ulster Bank (the third plaintiff) in criminal wrongdoing consisting of the rigging or manipulating of certain London Interbank Offered (or LIBOR) rates. It is sought by the defendants, in various ways, to link the third plaintiff Ulster Bank with this wrongdoing and to rely upon this link in their defence of the proceedings by the Bank to enforce certain loans and by the receivers to carry out their functions in connection with the properties in question. RBS is not a party to the present proceedings.

3. A brief but helpful description of the background of wrongdoing of RBS is set out at paras. 113 and 115 of *Property Alliance Group Ltd v Royal Bank of Scotland,* [2016] EWHC 3342:

> "It is well-known that between January 2006 and March 2012 there was what has been called manipulation" of LIBOR in the sense that on some and perhaps many occasions submissions were made by panel banks which did not reflect the rate at which those banks genuinely thought they could borrow funds but were rather rates which were thought to benefit the banks' trading position and/or individual traders' bonuses. Investigations were carried out by regulators in both England and the United States which revealed widespread LIBOR manipulation. In England the Financial Services Authority ("the FSA") carried out such investigations including an investigation into RBS which revealed many and substantial breaches of principles 5 and 3 of the regulatory Principles for Businesses. These breaches were set out in a Final Notice ("the Notice") of 6 February 2013 and resulted in a fine of £87.5 million which would have been £125 million if RBS had not agreed to settle at an early stage of the investigation and thus qualified for a discount…
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> The FSA made specific findings of manipulation in connection with RBS's submission of rates that formed part of the calculation of Japanese yen and Swiss franc LIBOR. United States regulators made similar findings and those manipulations are now admitted by RBS. The FSA also found that RBS inappropriately considered the impact of its LIBOR submissions on the profitability of transactions in its money market trading books as a factor when it made Japanese yen, Swiss franc and US dollar submissions. It concluded that RBS's misconduct undermined the integrity of LIBOR."

Background to the present proceedings

4. The first defendant is a Spanish businessman and the remaining defendants are corporate entities. The second and fourth defendant are tenants under leases with the first and third defendants in respect of two properties. Their involvement in this motion was minimal; essentially, they adopted the submissions made on behalf of the first and third defendants.

5. In 2009 and 2010, Ulster Bank provided certain facilities to the first and third defendants. On the 21st December, 2009, Ulster bank offered the third defendant, by way of a facility letter, a €290,000 overdraft to provide working capital, and the continuation of an existing demand loan facility in the sum of Swiss francs approximately equivalent to €7,000,000 to assist in the purchase and outlay of a jeweller's shop on Mainguard Street in Galway. A further $25,000USD in overdraft for working capital was also provided in the same agreement. The loan facility was secured on the Mainguard Street property.

6. On the 29th March, 2010 Ulster Bank offered, by way of a facility letter, the first defendant a loan in Swiss Francs approximately equivalent to €5,000,000 in order to restructure outstanding debts, and €484,000 to assist with the restructuring. This loan was secured on a property on William Street in Galway.

7. Leases were entered into as between the first and third defendants, and the second and fourth defendants; the latter two defendants occupy the two properties. While the defences include pleas of estoppel on the basis that the Bank was aware of these leases at certain material times, this aspect of the case does not arise in the present motion.

8. The plaintiff alleges that there was default by reason of non-payment of the amounts due under the facilities. On the 19th April, 2013, the first and second plaintiffs were appointed as receivers. In these proceedings, they seek orders restraining the defendants from preventing them from carrying out their functions, together with a number of related orders; for account of rents received by them since date of appointment of receivers; for declarations that leases are void and ineffective; and for damages for trespass, negligence and breach of duty. The third plaintiff seeks the sum of CHF 5,671, 045.49 (Swiss francs) and USD$318.82 dollars against the first defendant with interest since 28th April 2104.

The disputed paragraphs of the Defence which are in issue in this Motion

9. As I have noted already, the defendants seek to introduce into this case, by way of certain paragraphs in their defences, the fact that RBS was found guilty of manipulating certain LIBOR rates. This wrongdoing, described briefly above at paragraph 3, was apparently engaged in with a view to benefitting its derivatives trading books. The wrongdoing has been widely publicised and led to a settlement in February 2013 with the UK Financial Services Authority (FSA) for £87,000,000. In addition, in May 2013, RBS entered into a Deferred Prosecution Agreement under the auspices of the United States District Court, District of Connecticut with a penalty of USD$150,000,000. On the 4th December, 2013 the European Commission fined RBS and number of other international financial institutions for participation in cartels responsible for manipulating LIBOR and EURIBOR. RBS received a reduction in the amount fined for cooperating with the Commission's investigation.

10. The relevant paragraphs of the Defence and Counterclaim of the first and third defendants are as follows: -

"It is expressly pleaded that the plaintiffs have suffered no loss or damage attributable to the First and Third Defendants.

Further or in the alternative and without prejudice to the above, it is further pleaded that:

23. Throughout the lives of the facilities the subject of the within proceeding between the Third Plaintiff and the First and Third Defendants, the interest rates applied were calculated by reference to the London Interbank Offered Rate (otherwise "Libor").

24. It was an implied term of the banking relationship between the third plaintiff and the first and third defendants respectively that the third plaintiff would act at all times in its dealings with the first and third defendant respectively honestly, lawfully and in compliance with all relevant statutory and Common Law duties. This implied term persisted throughout the life of the parties' relationship and was restated with every banking transaction entered into or executed between the parties.

25. It was an implied term of the contractual arrangements between the parties that the floating rates payable under the interest instruments would be calculated by reference to Libro, i.e. the interest rate as defined by the British Bankers association ("BBA"), namely the average rate by which an individual contributor Bank would borrow funds by asking for and accepting Interbank offers in reasonable market size just prior to 11 a.m. on that date. If the third plaintiff had reason to believe that on a given date Libro represented or might represent anything other than the interest rate defined by the BBA, (i.e. the average rate at which an individual contributor Bank could borrow funds by asking for or accepting Interbank offers in a reasonable market size just prior to 11 a.m. on that date) the Third Plaintiff would not withhold or conceal that information from the First or the Third Defendants.

26. Further, it was an implied term of the contractual relationship between the parties that the Third plaintiff, or its parent Royal Bank of Scotland Plc ("RBS"), would not make false or misleading Libor representations to the BBA and/or engage in any practice of attempting to manipulate Libor such that it represents a different rate from that defined by the BBA (a rate measured at least in part by reference to choice made by panel Banks as to the rate that would best suit them in their dealings with third parties.)

27. Those terms fall to be implied since the reasonable addressee would understand such instrument to carry with them such terms. Moreover, they are terms which are obvious and/or necessary to give business efficacy to the contracts concerned.

28. During the course of the banking relationship between the Third Plaintiff and the First and Third Defendants respectively, the following representations were made, implied and/or understood to apply by the Third Plaintiff to the First and Third Defendants (otherwise "the Libor representations"):

a. Libor represented the interest rate as defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting Interbank offers in a reasonable market size just prior to 11 a.m. on that date;

b. The Third Plaintiff had no reason to believe that on any given date Libor had represented, or might in the future represent, anything other than the interest rate defined by the BBA, being the average rate at which an individual contributor panel Bank could borrow funds by asking for and accepting Interbank offers in reasonable market size just prior to 11 a.m. on that date;

c. The Third Plaintiff had not on any given date:

i. Made false or misleading submissions to the BBA; and/or

ii. Engaged in the practice of attempting to manipulate Libor such that it represented a different rate from that defined by the BBA (viz a rate measured, at least in part by reference to choices made by panel Banks as to the rate that would best suit them in their dealings with Third Parties); and/or

iii. The Third Plaintiff did not intend in future to:

1. Make false or misleading Libor submissions to the BBA; and/or

2. Engage in the practice of attempting to manipulate Libor such that it represented a different rate from that defined by the BBA (viz a rate measured, at least in part by reference to choices made by panel Banks as to the rate that would best suit them in their dealings with Third parties).

29. It is expressly pleaded that the Third Plaintiff, directly or indirectly, through its parent or other related undertakings has admitted to engaging in and/or knowingly enjoyed the benefits of the illegal manipulation of interest rates and specifically Libor.

30. It is pleaded that has the Third Plaintiff made the First or the Third Defendant aware of the adoption of unlawful practices within its group of associated and related companies including the illegal manipulation of interest rates, neither the First nor the Third Defendant would have entered into and/or continued in their respective banking relationship with the Third Plaintiff.

31. It is pleaded that the Libor representations were false and can be particularised at the moment as follows:

a. The Third Plaintiff's conduct in relation to the fixing of Libor was such as to prompt it to report its own conduct to the Financial Services Authority ("The FSA") and other authorities;

b. The Third Plaintiff's conduct in relation to the fixing of Libor rates was such as to make it the subject, together with other banks, of investigations by the Financial Services Authorities, the European Commission and other Authorities into possible collusion and to the extent to which Libor rates were the subject of manipulation and/or improper attempts at manipulation;

c. RBS, the parent company of the Third Plaintiff, accepted and acknowledged, or otherwise offered and/or entered into settlement agreements with Regulators who made findings of Libor fixing in:

i. The FSA Final Notice dated 6 February, 2013, as a result of which the FSA imposed a financial penalty of £87,500,000 on RBS. The Final Notice found at least 21 RBS individuals were involved in the misconduct including Derivate traders, Money Market Traders and a Manager and that the misconduct took a number of forms including the manipulation of RBS' own submissions and collusion with other panel Banks and Broker firms;

ii. An agreement with the European Commission announced on 4 December, 2013 and as a result of which the Commission fined RBS a total of £39,000,0000 for the rigging of Libor and other interest rates;

iii. The United States Department of Justice deferred the Prosecution Agreement dated 5 February, 2013; and

iv.The Commodity Future Trading Commission Order dated 6 February, 2013, as a result of which RBS was required inter alia to pay a $325,000,000 civil monetary penalty.

d. RBS, the Third Plaintiff's parent company's conduct in relation to the finding of Libor rates, together with that of other Banks, has been the subject of considerable adverse press comment and widespread concern including concern as to the reliability of reported Libor rates.

e. RBS, the parent company of the Third Plaintiff, is reported to have dismissed a number of employees in connection with investigations into the manipulation of Libor rates including Tan Chi Min and Neil Danziger. Tan Chi Min has stated that it was common practice among senior TBS employees to make requests to the Bank's rate setters as to the appropriate Libor rate.

f. RBS, the parent company of the Third Plaintiff, was submitting Libor rates which appeared to show that it could borrow on the interbank market at lower rates than other, financially more stable Banks, in circumstances where (as detailed more fully in the FSA report "the failure of the Royal Bank of Scotland" dated December, 2011):

i. By end December, 2007 (if not before) it has a vulnerable liquidity position;

ii. It was perceived by the market to be and was relatively poorly positioned in capital, liquidity or asset quality such that it became subject to a self-fulfilling downward spiral of market confidence which that funding sources were increasingly closed to it. Market confidence in RBS was deteriorating, such deterioration intensified from Summer, 2008 and became catastrophic after September, 2008;

iii. In the three weeks which followed the collapse of Lehman Brothers, RBS liquidity run reached extreme proportions; and

iv. By 7 October, 2008 RBS wholesale counter parties (and to a lesser extent retail depositors) were simply not prepared to meet its funding needs. In other words, RBS could not borrow at all from the Interbank market and from that date was left reliant on emergency liquidity assistance from the Bank of England.

32. The Third Plaintiff was careless and/or negligent in making the Libor representations and has no reasonable grounds for believing that the Libor representations were true. In particular, the Third Plaintiff was proposing to customers that they enter into financial transactions containing obligations measured by reference to Libor such that it knew the Libor representations were being made, or might be made, to such customers and therefore ought to have taken care to ensure that such representations were no false.

33. Further, if and insofar as necessary, the First and Third Defendants will contend that individuals within the Third Plaintiff could have prevented the false Libor representations from being made had they made the facts which rendered the Libor representations false more widely known and/or had a duty, power or responsibility to see that false Libor representations were not made to persons such as the First or Third Defendants."

Relevant Evidence

11. The head of Transaction Delivery Markets in Ulster Bank Ireland DAC, Mr. Robert Skelly, swore an affidavit dated the 28th November, 2017, stating that at no material time was Ulster Bank a member of any panel of Banks involved in setting Libor or Euribor rates for the relevant currencies, that no link had been identified between the Libor manipulation engaged in by RBS and any loss suffered by the defendants, that the manipulation engaged in took place prior to the commencement of the Jaszai and Lazlo Fries Facilities, that there was no basis for conflating the actions of RBS employees with those of its subsidiary Ulster Bank, and that the Bank did not make any representations in relation to Libor such as those contended by the defendants.

12. The first named defendant, Mr. Lazlo Fried, filed a replying affidavit on the 29th January, 2018. Mr. Fried averred that the loan facilities were continuations of loan facilities which commenced in 2006, and therefore were affected by Libor manipulation in terms of the dates. He took issue with how Mr. Skelly's affidavit had described the wrongdoing of RBS and the subsequent arrangements with the European Commission, the Financial Services Authority, the Commodity Futures Trading Commission and the District Court in Connecticut and went on to set out the history of RBS and the Libor scandal in further detail.

13. Importantly for present purposes, Mr. Fried also averred that he had retained the services of an expert in financial risk services, a Mr. Abhiskek Sachdev. The views of this expert were set down by Mr. Fried at paras. 25 to 30 of his affidavit and were relied upon by counsel on behalf of the first and third defendants in order to establish a link between Ulster Bank and RBS, and to justify the

disputed paragraphs in the Defence. It may be noted that the expert report itself was not the subject of an exhibit or an affidavit. In brief, Mr. Friend averred that the expert's view was that Ulster Bank would have had to hedge out their exposure on the loans due to the bank being unable "to run the CHF interest rate foreign exchange risk" and that the nature of this hedge was would have been too complex for Ulster Bank's "very small capital markets dealing room" and that all the interest rate risk must have been passed to RBS. Further, according to this expert, RBS systems or employees must have been used to do this and the terms of the loan would have been set when the swap hedge was executed. Mr. Fried called this process "white labelling", by which he meant that RBS would have used the brand of Ulster Bank as an intermediary for itself as an undisclosed principal when transacting its products with borrowers. Moreover, he averred that due to the tightly coordinated practice of the RBS Group to which Ulster Bank and RBS belong, which involves movement of capital, the development of group wide polies, and the management of risk, this gave rise to an agency relationship between Ulster Bank and RBS or vice versa, and that they ought to be viewed as one single, economic entity in these circumstances. There was then an averment that as a result of this "agency", the wrongdoing of RBS "tainted" the contract between Ulster Bank and the defendants such that benchmark figures used to calculate the interest payable under the loans were affected.

14. Finally, Mr. Fried averred that the defendants suffered direct loss since the Libor manipulation would have increased the interest payments under the loans but went on to say that that the exact effect could not be determined until disclosure was sought from RBS during the discovery stage of proceedings.

15. Mr. Skelly swore a further affidavit on the 8th of February, 2018. He averred that it was expressly stated in both the Jaszai and Lazlo Fried Facilities that all prior agreements between the parties were superseded and that Mr. Fried's averments that the facilities were affected by the Libor manipulation of RBS were "misconceived". In relation to Mr. Fried's expert advice, Mr. Skelly stated, *inter alia*, that he had made inquiries with the Treasury department of Ulster Bank and had been informed that the loans were hedged on a portfolio basis and that the transactions had not in fact been entered into in the manner described by Mr. Fried. He said that insofar as RBS was involved in relation to managing the risk exposure, it was on an arm's length basis and would have been paid the commercial margin for those transactions. Finally, Mr. Skelly averred that Mr. Fried, while speculating that Jaszai may have suffered loss as a result of high interest rates, produced no actual evidence from Mr. Fried that this was the case.

Submissions of counsel for plaintiffs

First group of submissions: RBS cannot be treated as equivalent to Ulster Bank and related submissions
16. Counsel on behalf of the plaintiffs made a large number of different submissions and I propose to group them loosely into two categories. The first group of submissions has at its core that RBS and Ulster Bank cannot be treated as a single entity. Counsel submitted that as Ulster Bank is a subsidiary of RBS and a separate corporate entity from it, it follows that any wrongdoing of RBS cannot be attributed to Ulster Bank and that there is no basis in law for treating it as an "agent" of RBS. In making this submission, Counsel relied upon what I might call the *EPF cases* [2015] IEHC 425, and [2016] IEHC 58, (two decisions of Costello J) and *Property Alliance Group Ltd v. RBS* [2016] EWHC 3342. I will return to these decisions in further detail as both directly concern the Libor issue and RBS. I was also referred to a discussion by the Supreme Court regarding the piercing of the corporate veil in *AIB Coal Supplies v. Powell Dufflyn International Fuels ltd*. [1998] 2 IR 519, and *O'Donnell v Bank of Ireland & Others* [2013] IEHC 375, a case which refers to *Prest v. Petrodel Resources Ltd*. [2013] 3 WLR 1, a decision of the UK Supreme Court which discusses when the corporate veil will be disregarded.

17. Counsel for the plaintiffs further submitted that it had not been pleaded that Ulster Bank was acting as an agent for RBS, and that in fact all the pleadings in the case related to Ulster Bank itself and not RBS. I have checked the pleadings and it is correct to say that agency was not pleaded. The assertion of agency was made in Mr. Fried's affidavit but is not contained in the Defence and Counterclaim.

18. More particularly, counsel submitted that in any event this was not a matter that could be cured by amendment the pleadings i.e. that on no view of matters, based on the facts before the Court, could Ulster Bank be seen as an agent of RBS.

19. Counsel further submitted that the defendants' pleading that Ulster Bank was aware of RBS' wrongdoing was simply not supported by facts. Moreover, by pleading that Ulster Bank should have told the borrowers because it knew what was happening, fraud has been implicitly alleged at paras. 30, 33 and 37 of the Defence. Counsel submitted that as the facts did not support an allegation of fraud, it should not have been pleaded. In support of this submission I was referred to a number of authorities, such as *Keaney v. Sullivan* [2015] IESC 75, where Dunne J. stated: "[T]hus in the case of fraud, it is not sufficient that a statement of claim or other pleading makes a bare assertion of fraud against another party. The facts, matters and circumstances said to give rise to the alleged fraud must be expressly pleaded". In *Bergin v. Walsh* [2015] IEHC 594, the Court held at pp 71-73 that the burden of proof rests on the party who alleges fraud. Also, O. 19, r. 5(2) of the Rules of the Superior Courts states that "in all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence…particulars (with dates and items if necessary) shall be set out in the pleadings".

Second group of submissions: the alleged wrongdoing could not in any event be relied upon to resist repayment of the loans
20. The second group of submissions relied upon a variety of other matters to suggest that the relevant paragraphs of the Defence put forward a case which was "bound to fail". Counsel submitted that even if the wrongdoing of RBS could be attributed to Ulster Bank as regards the interest rates in respect of the loans, this would not in any event entitle the defendants to refuse to pay back the entirety of the loan and that no authority had been put before the Court in support of such a far-reaching proposition. In support of this submission I was referred to the decision of *IBRC v. Cambourne* [2014] 4 IR 54 in support of the principle that, in general, unless the behaviour of the parties showed that they intended a different bargain, monies lent on overdraft were repayable on demand.

21. It was further submitted that the dates of the wrongdoing of RBS as established by the evidence put before the Court did not correspond with the dates of the loans to the first and third defendants. According to the statement of facts set out in the deferred prosecution agreement from the Connecticut District Court, the manipulation of Libor rates relating to Swiss francs ended in 2009, and according to the record of the proceedings before the U.S. Commodities Future Trading Commission, the last manipulation of Swiss francs appears to have occurred on the 14th May, 2009. Counsel submitted that the loans the subject-matter of this case therefore post-dated the wrongdoing, since the Jaszai facility was offered by the bank on the 21st December, 2009, and the Fried Facility on the 29th March, 2010.

22. Counsel further submitted that it had not been pleaded that the defendants suffered a loss because of what RBS was doing. I have checked the pleadings in this regard and this also appears to me to be correct. Furthermore, insofar as evidence as to the effect of the interest rate manipulation has been put forward in Mr. Fried's affidavit, the thrust of the evidence is that the application of the (manipulated) rates would have led to undercharging rather than overcharging and would not therefore have led to a loss.

Submissions of counsel on behalf of the borrowers
23. Counsel for the defendants referred me to *Moylist Construction Ltd. v Doheny, Deloitte & Touche, Ulster Bank Ltd and O'Carroll* [2016] 2 IR 283, a decision of the Supreme Court on the Court's inherent jurisdiction to strike out proceedings as being bound to fail. Clarke J examined the authorities in this area, stating that the inherent jurisdiction of the court has been recognised at least since the judgment of Costello J. in *Barry v. Buckley* [1981] IR 306. He noted the distinction made between the inherent jurisdiction of the court to strike out and the power of the court to strike out under O. 19 r. 28 RSC. Clarke J. stated that *Buckley* establishes that inherent jurisdiction applies to cases where it can be shown that there is no arguable basis in law and in fact for the claim made and not merely where the case as pleaded does not disclose a cause of action. He emphasised that it is essentially a mechanism to prevent abuse of process, that the jurisdiction should be sparingly exercised, that it should be reserved only for cases which are, as he described it, a "slam dunk" in terms of being "bound to fail". At para. 18 of the judgment, Clarke J. made a distinction between, on the one hand, cases involving factual disputes where it would be clearly inappropriate to exercise the court's inherent jurisdiction, and, on the other, those cases where there is no factual dispute but there are complex legal issues which require a full trial and where the court should also refuse to exercise its inherent jurisdiction: -

> "It seems to me to follow from that analysis that there are cases which are just not suitable for an application to dismiss under the inherent jurisdiction. Clearly, cases involving factual disputes (save to the very limited extent to which it is appropriate to engage with the facts as identified in *Keohane v. Hynes* [2014] IESC 66 , (Unreported, Supreme Court, 20 November 2014)) have already been held to fall into that category. However, it seems to me that there are also limitations on the extent to which cases which involve issues of law or construction can properly be the subject of an application to dismiss under the inherent jurisdiction. The limitation is similar to that which was identified in *McGrath v. O'Driscoll* [2006] IEHC 195 , [2007] 1 I.L.R.M. 203 as applying in the context of summary judgment motions. A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and such as would require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored."

24. Counsel complained that there had been no advance warning, complaint or request from the plaintiffs for particulars prior to the issue of motion, notwithstanding that there had been substantial interaction between the parties by correspondence with regard to the adding of the entity Promontoria as a co-plaintiff by order of the Court. In particular, complaint was made that there was no mention of inadequate particulars of fraud until counsel for the plaintiffs was on his feet addressing the Court.

25. Counsel submitted that it was relevant that the pleadings are not closed; in this regard, it appears that by reason of the adding of Promontoria as a co-plaintiff, further amended pleadings are to be delivered. He relied heavily upon paras.25-30 of the affidavit of Mr. Fried, as described above to suggest that there was a link between RBS and Ulster Bank amounting to agency. Counsel acknowledged that that averment was replied to by Mr. Skelly, who said that the transaction had not in fact taken place as theorized by Mr. Fried's expert but submitted that the fact that a further affidavit was not sworn in response to Mr. Skelly's reply affidavit did not mean the latter's version of events was accepted. Counsel submitted that there was therefore a conflict of fact relating to whether there was agency between Ulster Bank and RBS and that this was a matter which should be left to the trial of the action.

26. Counsel also relied upon the decision of *IBRC v. Quinn* [2016] 1 IR 1, the Supreme Court decision on contracts tainted or coloured by illegality, for the proposition that in certain circumstances a contract may be set aside in its entirety by reason of its connection with illegality on the part of one of the parties to the contract. This was by way of reply to the submission that a dispute over the interest rate could never justify the non-repayment of the principal sum of the loan. Counsel said that this also was a matter for the trial of the action and therefore it was not simply a question of whether there was a discrete loss by reason of wrong interest rate being applied, but rather a question as to whether a contract tainted by illegality should be enforced by the courts.

Replying submission by counsel for the plaintiff
27. In relation to the issue of an alleged agency between Ulster Bank and RBS, Counsel for the plaintiffs replied that this was effectively an argument that Ulster Bank acted as an agent for an 'undisclosed principal" and referred the Court to the decision of the UK Supreme Court in *VTB Capital v Nutritek* [2013] UKSC 5, where the court described the role of undisclosed principals in the law of agency as an "anomaly" which the courts should be slow to extend.

Key authorities; EPF, and Property Alliance decisions

The EPF cases
28. In *EPF and Laurelmore v. Ulster Bank, and Viera v. Ulster Bank,* [2015] IEHC 425, the defendant, Ulster Bank, sought to strike out portions of the plaintiffs' claims which related to various loan facilities and interest rate swaps connected with the purchase of properties in England known as the "the Belgrave Road" property and the "Old Jewry". The claims, *inter alia*, asserted that Ulster Bank had misled and misrepresented matters to the plaintiffs at the time the transactions were entered into. Costello J. struck out all of the claims of the plaintiff Laurelmore and dismissed all of the EPF claims except those relating to the alleged coercion and intimidation of EPF in connection with the sale of the properties together with a claim for damages arising out of the alleged delay in closing out the EPF Facility and the Old Jewry derivative.

29. In the course of her judgment, Costello J. discussed the authorities concerning the inherent jurisdiction of the Court to strike out claims. She also discussed the pleas of fraud in the case, describing them as "very vague" and "remarkably nebulous". She quoted from *National Education Welfare Board v. Ryan* [2008] 2 IR 816, saying that the court should be vigilant to ensure that an order to strike out should not be made so as to permit the perpetrator of a fraud to escape from the claims sought to be advanced against it, but equally not to give latitude to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged the fraud took place and what the consequences are said to be. Costello J. struck out the pleas based on the fraud in the case before her. She granted the plaintiff liberty to bring a motion to amend its statement of claim in light of the various rulings made by her.

30. In the second EPF case, *EPF v. Ulster Bank* [2016] IEHC 58, the plaintiff brought a motion to amend its statement of claim as had been envisaged by Costello J. in the first set of proceedings. The proposed amendments were extensive; the plaintiff now sought to add a number of new causes of action to the case. Significantly, for present purposes, one of these new claims was based upon the rigging of Libor by the defendant and/or its parent, RBS, and misrepresentations as to the interest chargeable pursuant to the EPF facility and a wrongful overcharging of interest as a result of this manipulation.

31. At para. 37 of her judgment, Costello J. referred to certain paragraphs of the proposed amended statement of claim which set out the facts of a UK report by Mr. Lawrence Tomlinson concerning the practices of RBS and said: -

> "RBS is not a party to these proceedings. The defendant is a subsidiary of RBS. There is no plea that the findings by Mr.

> Tomlinson in relation to RBS relate also to the defendant. The pleas therefore as they stand are not relevant to the case advanced by the plaintiff against the defendant and accordingly I refuse leave to amend the statement of claim by including paras 53-55".

32. She went on to refer, at para. 41 of her judgment, to a number of additional proposed paragraphs in the amended statement of claim in which it was sought to plead that the defendant made certain false representations to the plaintiff and that the defendant's conduct was such as to cause it to report its own conduct to the FSA. She continued: -

> "…the plea in fact refers to the defendant's parent, RBS, and therefore cannot amount to a particular of a false representation by the defendant to the plaintiff. Paragraphs [she listed the relevant paragraph numbers of the proposed amended statement of claim] all relate to the actions of RBS, the parent company of the defendant and its employees. The pleadings do not link these alleged wrongdoings of RBS to the representations allegedly made by the defendants to the plaintiff, which representations in turn allegedly resulted in unlawfully increased interest break costs or break penalties incurred at the time of the sale of the Belgrave Road property and the old Jewry property. On that basis, these pleadings are not in fact advancing the case of the plaintiff against the defendant".

33. Accordingly, Costello J. refused this amendment. Again, at para. 51 she referred to the one of the proposed prayers, a prayer for damages for fraudulent misrepresentation "with respect to the deliberate and conceded behaviour of the defendant in fixing Libor". She said that the pleas all related to the actions for RBS and its employees and no basis for the attribution of liability to the plaintiff for these alleged actions had been advanced, other than that Ulster Bank was a subsidiary of RBS; she commented that this was "clearly contrary to the fundamental principles of company law". She referred to evidence led before the Joint Committee on the Banking Crisis to demonstrate that the RBS group operated as an integrated group and exercised a high level of control over the Group which included Ulster Bank. She that there was nothing remarkable about this and nothing in it to show why the defaults of the parent should be attributed to the subsidiary. The decision in the second EPF case is obviously an important one in the present context, and one which presents a considerable obstacle for the defendants to overcome in the present case.

34. I have also considered the (English) Court of Appeal decision in *Property Alliance Group Ltd v. RBS* [2016] EWHC 3342, which proceedings involved RBS itself. This was a case involving interest rate swaps (and indeed a complicated form of swap), unlike the straightforward loan facilities in the case before me. The plaintiff, PAG, sought to rely upon the wrongdoing of RBS in the manipulation of certain Libor rates in support of its claim for rescission of the swaps and/or damages. PAG alleged that if it had realized that Libor had been manipulated, it would never have agreed the swaps in the first place, and that the swaps should be rescinded and payments made by PAG to RBS should be repaid by RBS. It alleged that certain representations should be implied from RBS' conduct in proposing that PAG enter the swap contracts. The Court of Appeal upheld the decision of the High Court that the claim should fail. There was a detailed discussion of the suggested representations as pleaded. I note that the only implied representation which the Court ultimately considered "feasible" was that, as of date of swap agreement entered into, RBS were not manipulating and would not into the future manipulate libor i.e. that which corresponds to para. 28 (c) of Defence in the present case. However, the Court in any event, and for reasons that are not relevant to the present application, dismissed the plaintiff's claim notwithstanding its finding on this aspect of the case.

Decision

35. This is an application to strike out or dismiss pursuant to the inherent jurisdiction of the Court. Therefore, the issue is whether the plaintiff can show that there is no arguable basis in law and in fact for the claim made by the defendants. The parameters of such an application have been set out in *Moylist* case, described above. To an extent, this means that the issues are not entirely governed by the case as pleaded to date, and I am entitled to have regard to the material put before the Court on affidavit in the present application. Nonetheless, the facts demonstrated by this material present a considerable obstacle to the defendants in standing over the disputed paragraphs of the Defence.

36. The facts put before the Court in the Defence and on affidavit, particularly the exhibits showing the various investigations and their outcomes, show that RBS was engaged in wrongdoing consisting of the manipulation of certain Libor rates, including the rates relating to Swiss francs, between certain dates; but there is no suggestion at all that Ulster Bank was involved in this wrongdoing or that it knew about it. The Defence pleads, *inter alia*, that Ulster Bank had itself engaged in wrongdoing e.g. para 29 of the Defence of the first and third defendants. That is unsustainable on the facts, and that was accepted by counsel. Similarly, the Defence pleads, *inter alia*, that Ulster Bank had knowingly misled the borrowers; in my view this is implicit in certain paragraphs of the defence which are premised on the view that that Ulster Bank had knowledge of the wrongdoing. Again, this is unsustainable on the facts, and that was also accepted by counsel. Essentially, counsel for the first and third defendants accepts that insofar as the Defence pleads that there was wrongdoing, this refers to the conduct of RBS and not Ulster Bank.

37. The question is then whether the defendants can rely upon the wrongdoing of a parent company in defence of a subsidiary's claim against them. Counsel for the plaintiffs stressed that RBS is not the same as Ulster Bank and relies on the second *EPF* judgment to emphasise this. However, counsel for the borrowers seeks to draw RBS into the case (and in doing so, implicitly to distinguish the second EPF case) on the basis of an expert opinion, conveyed in a hearsay manner by the first defendant in his affidavit, as described above. This expert view described a process known as "white labelling", by which the acts of Ulster Bank could be identified as those of RBS. As I understand it, the nub of the submission of counsel on behalf of the first and third defendants was that this amounted to sufficient evidence before the Court as to show that there is a fair issue to be tried as to whether the RBS/Ulster Bank connection was such that can be considered an agency of some kind, and therefore as to whether Ulster Bank had a sufficient connection with RBS such that RBS' wrongdoing may provide a defence to the plaintiffs' claim in the various ways pleaded in the Defence. I do not accept this argument. I am not satisfied, having examined the two affidavits, that there is any basis for believing that there is an issue to be tried as to whether Ulster Bank was acting as agent for RBS. The theory put forward by the first defendant in his affidavit, even if correct, would in my view still not amount to an agency. But it is any event merely a theory, based on speculation by a witness who did not swear an affidavit and whose opinions were related in a hearsay manner without the Court having the benefit of a full report from the witness in question. In contrast, the Affidavit of Mr. Skelly described what had in fact taken place within the Bank as regards the hedging of the loans. I am not satisfied, in view of the evidence put before me, that there is a question to be tried as to whether Ulster Bank was an agent for RBS: a proposition which was, tellingly, not pleaded in the Defence.

38. Therefore, in my view it does not matter whether the pleadings are still "open" and to what extent the defendants are still entitled to formulate their defences because I do not see any factual basis for allowing any amendment of the pleadings based on agency, which amendment was, it may be noted, not sought from me on behalf of the defendants. Indeed, the reality is that the case would be transformed into a case against RBS, a defendant who is not even in the case.

39. Quite separately, the dates of the wrongdoing of RBS simply do not appear to match the dates of the loan contracts with Ulster Bank in the present case. The wrongdoing of RBS, described in the various reports put before the Court, appears to have come to an

end by the time the relevant loan contracts came into force and the relevant Libor rates started to be applied to the relevant loans of the first and third defendants.

40. I now come to the plaintiffs' arguments that the defendants cannot resist repayment of a loan based on a dispute over the interest rate of the loan, and the defendants' response that *IBRC v Quinn* [2016] 1 IR 1 establishes that illegality may taint a contract in certain cases so as to render the contract entirely unenforceable. I appreciate that when a contract will be so "tainted" and when it becomes unenforceable can be a difficult matter to determine, and that there is a detailed discussion in the *Quinn* case of the factors to be taken into account when a Court is making such a determination. I can see how an argument relating to "tainted" contracts might apply in a case involving (a) RBS itself, in which case it might argued that RBS made implicit representations, along the lines of *Property Alliance Group v RBS* i.e. .that it was not and would not be making false submissions re Libor and/or (b) in the case of an interest rate swap, where the interest rate is absolutely central to the whole deal above and beyond its role in a typical mortgage loan, and/or (c) where it is alleged by the borrower in a "typical mortgage loan case" that the interest rate charged had some causal connection with the borrower's default in repayments. In a case involving some configuration of the above, it might need to be left to be determined at trial whether or not the illegal behaviour of one of the parties to the contract rendered the entire contract unenforceable: but we are very far from that situation here. There is no suggestion that the interest rates which were actually applied had any bearing on why the defendants defaulted; and the argument does not, in my view, gain any traction at all when the borrower was not even dealing with the same corporate entity as that which engaged in the wrongdoing.

41. As regards the pleadings in relation to fraud, I agree that fraud was implicitly pleaded, and therefore should have been particularised; on the other hand, it is true that the plaintiffs could have asked for particulars or corresponded about the matter and did not, before issuing a motion. However, I think the more fundamental point is that RBS and Ulster Bank cannot be treated as a single entity and the reality is that no replies to particulars on fraud would ever have satisfied the plaintiff, given this fundamental objection on their part.

42. As regards the defendants' complaint that there was no relevant correspondence from the plaintiffs prior to the issuance of the present motion, it seems to me that this might in some cases be a matter which goes to the question of costs. Again, however, it seems to me that there is little substance to the complaint since it is highly unlikely that the defendants would have agreed to strike out large portions of their defence simply because they had been asked to do so in a letter. Events have proved this to be true; the defendants did in fact fight the application to strike out the relevant paragraphs. In this sense therefore, it does not really matter whether or not correspondence preceded the motion, although it may have been more courteous to give some forewarning of the motion. I cannot see in reality how it would make any practical difference to how events ultimately played out.

43. Finally, I should perhaps make some comment in response to the repeated statements by counsel on behalf of the first and third defendants that they had not admitted receiving the loan in their Defence, and the response of the counsel on behalf of the plaintiffs that the decision in *Ulster Bank v. O'Brien* [2015] IESC 96 applies. It seems to me that this issue does not arise on this particular motion. However, I think it is doubtful that the decision in *Ulster Bank v. O'Brien* is confined in its application to motions for summary judgment, as was submitted to me. Having regard to the reasoning set out in the judgments, it seems to me to be of broader application to proceedings involving a bank seeking to recover loans, in circumstances where the Bank sets out a good deal of documentary evidence to show that the loan was authorized, accepted and subsequently drawn down, and where there is no actual denial by the defendant that he drew down the loan.

44. In conclusion, and for the reasons set out above, I accede to the application to strike out aspects of the Defence of the first and third defendants.

45. I have not set out the particular paragraphs of the Defence of the second and fourth defendants in this judgment. However, it follows that I should also strike out the equivalent paragraphs in the Defence of those defendants also.