THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 181

Record No. 2020/183

Haughton J.
Collins J.
Binchy J.

BETWEEN/

BGB PROPERTY HOLDINGS LIMITED, ARNO PROPERTIES LIMITED, TAGUS PROPERTIES LIMITED, TIBER PROPERTIES LIMITED AND DOWNBY DEVELOPMENTS LIMITED

PLAINTIFFS/RESPONDENTS

- AND -

TIFCO LIMITED

DEFENDANT/APPELLANT

JUDGMENT of the Court delivered on 24 June 2021

INTRODUCTION

1. This is the judgment of the Court to which all members have contributed.

2. The Appellant, Tifco Limited ("*Tifco*") appeals from a decision of the High Court (Reynolds J.) given on 29 May 2020, whereby she refused its application to strike out these

proceedings on the grounds that they are frivolous and vexatious and/or disclose no reasonable causes of action and/or are unsustainable and/or are bound to fail.

FACTUAL BACKGROUND

3. In the proceedings, the Plaintiffs/Respondents ("*the Plaintiffs*") seek, *inter alia*, a declaration that they are entitled to be indemnified and/or compensated by way of damages by reason of breach of contract on the part of Tifco. The background to the proceedings is somewhat unusual and requires to be set out in detail in order that the nature of the proceedings, and the basis for the application made by Tifco, can properly be understood. Very helpfully, the High Court Judge set out the relevant facts, by reference to an agreed summary provided by the parties, at paras. 4-25 of the decision under appeal, which it is convenient to reproduce here:

> *"4. Under a Development Agreement dated 31 July 2006, the fifth plaintiff ("Downby") agreed to procure the building of the Crowne Plaza Hotel at Green Park Estate, Dundalk, Co. Louth ("the Hotel"). The Hotel was to be delivered to the first to fourth plaintiffs ("the Borrowers") with the intent that it would be operated by the defendant ("Tifco").*
>
> *5. Under an Investment Facility Agreement dated 21 July 2006 ("the Facility Agreement"), Anglo Irish Bank Corporation plc (subsequently Irish Bank Resolution Corporation Limited) ("the Bank") granted a seven-year loan of €25,500,000 to the Borrowers to part finance the development of the Hotel.*

6. The Borrowers and Tifco entered into a lease of the Hotel dated 9 October 2007 for a term of 34 years and nine months ("the Lease"). Tifco's obligations under the Lease were guaranteed by Banesto Limited ("Banesto").

7. In addition, the Borrowers, Tifco and Banesto entered into a Put and Call Option Agreement dated 9 October 2007 (“the Option Agreement”) under which the Borrowers could call on Tifco to purchase the freehold in the Hotel from them, and Tifco could call on the Borrowers to sell the freehold in the Hotel to it. The option price specified in the Option Agreement was to be a sum of not less than €25,810.000 or the amount then due by the Borrowers to the Bank under the Facility Agreement ("the Option Price").

8. As security for its obligations under the Option Agreement, Tifco and the Borrowers entered into the Sinking Fund Agreement and Charge dated 9 October 2007 ("the SFAC").

9. Under the SFAC, Tifco agreed to pay €4 million into a sinking fund in a designated security account with the Bank. That sum was to be deposited by Tifco by way of five equal yearly instalments between 9 October 2010 and 9 October 2014 of €800,000 each.

10. As security for the Facility Agreement, the Bank obtained charges over the Lease, the Option Agreement and the SFAC and in addition a guarantee from Banesto in respect of Tifco's contractual obligations.

11. Further, the Bank obtained a charge over a deposit of €3,500,000 placed by the Downby with the Bank. The Bank's charge over that sum of €3,500,000 was provided for in an Account Charge between Downby and the Bank dated 9 October 2007 ("the Account Charge"),

12. Tifco failed to make the scheduled payments into the designated security account. The only payment made by Tifco to the account was €292,000 paid on 31 August 2009.

13. On 9 February 2012, the Bank called on the Borrowers to procure Tifco's compliance with the SFAC within 21 days. On 6 March 2012, the Bank again wrote to the Borrowers, notifying them that an Event of Default had occurred under the Facility Agreement. By further letter dated 23 July 2012, the Bank demanded immediate payment by the Borrowers of the amount then outstanding under the Facility Agreement, being a sum in excess of €26 million.

14. On or about 24 July 2012, the Bank enforced the Account Charge against Downby over the deposit of €3,500,000. The Bank appropriated those monies and applied them in part discharge of the Borrowers' obligations under the Facility Agreement.

15. On 23 May 2014, the Bank transferred the Facility Agreement and all related security to Beltany Property Finance DAC ("Beltany"), a company ultimately owned by the Goldman Sachs Group.

16. On 10 December 2014, Beltany issued a demand calling for the Borrowers to repay the amount then due under the Facility Agreement, which at that time was in excess of €23 million. The Borrowers failed to satisfy that demand, and on 15 December 2014, Beltany appointed Kieran Wallace as receiver over the security ("the Receiver").

17. The Receiver (acting on his own behalf and as agent of the Borrowers) entered into a Settlement Agreement dated 15 December 2014 with Beltany, Tifco and Banesto (the Settlement Agreement").

18. Under the Settlement Agreement, the Receiver acknowledged that neither Tifco nor Banesto had the means by which to pay the Option Price under the Option Agreement, and Tifco agreed to buy the Hotel for €4 million. The purchase of the Hotel by Tifco for €4 million has completed.

19. The Settlement Agreement was expressed (in clause 2.2) to be "in full and final settlement of all obligations or potential obligations of Tifco under, pursuant to or in connection with the Option Agreement." It provided (in clause 2.4.3) that on completion of the sale of the Hotel, "the Option Agreement will be terminated and all parties to the Option Agreement will be released from their obligations or potential obligations thereunder".

20. The Goldman Sachs Group took a majority interest in Tifco in December 2014.

21. The Borrowers (acting through the Receiver) and Tifco entered into a Deed of Release ("the Release") dated 22 December 2014.

22. The Release states (at Recital C) that the Borrowers "have now agreed to release the security constituted by the Security Document…". The Security Document is defined in the Release as the SFAC.

23. The operative clause of the Release (Clause 1.1) provides that the Borrowers "hereby grant, convey, assign, surrender and release unto Tifco all of its or their respective property, assets and undertaking secured by the Security Document to the intent that all the said property and assets shall henceforth be held by Tifco freed and discharged from all monies, liabilities and obligations now or at any time secured by the Security Document and from all claims and demands thereunder."

24. In 2016, Downby (through its solicitors Leman) sought a copy of the Settlement

Agreement from Beltany. Downby is not a party to the Settlement Agreement. A redacted version of the Settlement Agreement was furnished by Beltany's solicitors on 22 August 2017.

25. In November 2017, Leman Solicitors wrote to Tifco on behalf of Downby and the Borrowers calling for confirmation that Tifco was liable to Downby and the Borrowers in respect of the €3,500,000 appropriated by the Bank under the Account Charge. Tifco's solicitors replied on 4 December 2017 to indicate that any liability Tifco might have had to the Borrowers had been compromised under the Settlement Agreement. Leman Solicitors sought a copy of the Settlement Agreement and other information relating to the Settlement on 13 December 2017 and again on 24 January 2018. In circumstances where the information was not forthcoming, and when this was not provided, Downby and the Borrowers commenced these proceedings by Plenary Summons on 8 March 2018. A copy of the Settlement Agreement was ultimately supplied (together with a copy of the Release) on 16 July 2018, subject to an agreement that those documents would be covered by the implied undertaking applicable to discovery."

We will adopt the same nomenclature used by the High Court Judge.

THE PROCEEDINGS

4. In an Amended Statement of Claim delivered on 23 July 2018, the Plaintiffs plead:

1) That Tifco, in breach of its obligations under the SFAC failed to make the required payments thereunder (para. 29), causing the Borrowers to be in breach of their obligations to the Bank under the Facility Agreement (para. 31);

2) That (as a result) the Bank exercised its rights under the Account Charge and appropriated the deposit account monies in the sum of €3,500,000 (para. 45) and that, as a result, the Borrowers became subject to a legal obligation to indemnify Downby in respect of its loss of €3,500,000 (para. 48). It is pleaded that, at all material times, Tifco was aware that, once the Bank exercised its rights pursuant to the Account Charge, this would give rise to a liability from the Borrowers to Downby (para. 50), and that the Borrowers have agreed with Downby that it should be a party to the proceedings against Tifco in respect of the losses of the Borrowers (para. 51).

5. Accordingly, arising from the above, the Borrowers and Downby seek a declaration that they are entitled to be indemnified and/or compensated by way of damages for breach of contract by Tifco in respect of the appropriation, on or about 24 July 2012 by the Bank of the sum of €3,500,000, which appropriation (it is claimed) was caused and occasioned by reason of the breach by Tifco of its obligations pursuant to the SFAC. The Borrowers and Downby further seek, *inter alia*, an order directing Tifco to indemnify and/or pay compensation in damages to them pursuant to the declaration sought.

6. This is the sole substantive claim made in the proceedings. The Plaintiffs do not challenge the sale of the Hotel to Tifco or the price paid by Tifco. No complaint is made regarding the involvement of Goldman Sachs on both sides of the transaction.

7. In its Defence delivered on 22 November 2018, Tifco comprehensively traverses the Plaintiffs' claim. For present purposes, it is sufficient to note that, at para. 26, Tifco denies any obligation to indemnify the Borrowers against any liability that they would have to Downby in respect of the loss of the deposit account monies and it is further pleaded that if Tifco did have such an obligation, then such obligation was compromised pursuant to the terms of the Settlement Agreement and/or the Release. Paragraphs 53 and 54 of the Defence are also significant, pleading that the Release and the Settlement Agreement expressly released Tifco from all liabilities and obligations under the SFAC and from all claims and demands thereunder, and further expressly released Tifco from all obligations and potential obligations under, pursuant to or in connection with the Option Agreement.

8. A Reply to Defence was delivered on behalf of the Plaintiffs on 13 February 2019. *Inter alia*, it denies that the Settlement Agreement and/or the Release have the effect contended for by Tifco.

9. As is apparent from all of the above, Downby was required to provide security to the Bank in the sum of €3.5m by way of a charge over a deposit in that amount held by Downby with the Bank. When that security was forfeited by Downby to the Bank, the Borrowers became liable to reimburse that amount to Downby, or at least such is the contention of the Borrowers. It is further the contention of the Borrowers that that liability arose from the failure on the part of Tifco to discharge its obligations under the SFAC. The Borrowers claim that this liability could not have and did not form any part of the Settlement Agreement entered into between the Receiver (as agent of the Borrowers) and Tifco and, accordingly, this claim is not subject to the terms of the Settlement Agreement and nor is it subject to the

Release. That being the case, the Borrowers and Downby claim that they are not precluded by either or both of the Settlement Agreement or the Release from seeking recovery from Tifco of the €3.5m for which the Borrowers are indebted to Downby.

10. This issue – whether or not the claims made in these proceedings are within the scope of the Settlement Agreement and/or the Release lies at the heart of this application. In simple terms, Tifco contends that when the Receiver, as agent of the Borrowers, entered into the Settlement Agreement and the Release with Tifco, he compromised all claims that the Borrowers might have against Tifco, including the claims made in these proceedings.

11. Tifco argues that the damages which the Borrowers seek by way of indemnity in these proceedings are damages that could only be payable by reason of Tifco's failure to comply with the terms of the SFAC, which in turn are obligations arising under, pursuant to or in connection with the Option Agreement, because the SFAC existed only as a form of security for the performance by Tifco of its obligations under the Option Agreement. It follows (Tifco says) that the claim of the Borrowers has already been compromised by the Receiver, as their agent, pursuant to the terms of the Settlement Agreement. Alternatively, Tifco says that the Borrowers' claim in these proceedings is captured, and thereby excluded, by the release executed on their behalf by the Receiver, specifically by clause 1.1 of the Release.

12. For these reasons, Tifco argues that the Plaintiffs' claim is bound to fail. The Plaintiffs, on the other hand, argue that the claim made by them in these proceedings falls outside the scope of both the Settlement Agreement and the Release on a plain reading of each of those documents.

13. In the course of hearing this appeal, in response to questions from the Court, counsel for the Plaintiffs confirmed that it was part of their case that the authority of the Receiver to compromise actions on their behalf did not extend to compromising proceedings such as these, which are personal to the Borrowers. However, counsel could not point to any specific pleading clearly raising this issue and it was not, we understand, the subject of argument before the High Court and certainly was not addressed in the written submissions on appeal. This issue is considered further at the conclusion of this judgment.

THE APPLICATION TO DISMISS

14. By Notice of Motion dated 24 May 2019, Tifco brought the application with which this judgment is concerned, whereby it sought an order pursuant to the inherent jurisdiction of the High Court striking out the proceedings on the grounds that they are frivolous and vexatious and/or disclose no reasonable causes of action and/or are unsustainable and are bound to fail. The motion was grounded upon the affidavit of Mr. Jonathan Lynch, solicitor of Eugene F. Collins. Mr. Lynch exhibits to his affidavit all of the critical documentation associated with the original transaction relating to the development and financing of the Hotel (i.e. the Facility Agreement, the Lease, the Option Agreement, the SFAC and the Account Charge) as well as the Settlement Agreement and the Release. Messrs. Eugene F. Collins did not act on behalf of Tifco in connection with any of these matters originally. Nor, for that matter, did the solicitors now acting on behalf of the Plaintiffs. The grounding affidavit of Mr. Lynch gave rise to a replying affidavit on behalf of the Plaintiffs sworn by Mr. Ronan McGoldrick of Leman Solicitors, on 19 June 2019, and there were then two further affidavits exchanged by each of those deponents. While these affidavits are lengthy, it is unnecessary for the purposes of this judgment to explore them in any great detail. This

is so as because the essential facts are largely agreed, and matters of law are in any case addressed in the submissions of the parties as summarised below.

JUDGMENT OF THE HIGH COURT

15. The Trial Judge considered the principles governing applications to strike out pursuant to the inherent jurisdiction of the court. She noted that "*It is well settled law that this jurisdiction should be 'exercised sparingly and only in clear cases'*", per Costello J. in *Barry v. Buckley* [1981] IR 306.

16. She referred to the decision of Clarke J. (as he then was) in *Lopes v. Minister for Justice Equality and Law Reform* [2014] 2 IR 301, and in particular the following passage:

> *"In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings."*

17. She further noted the view expressed by Clarke J. that certain types of cases are more amenable to an assessment of the facts at an early stage than others, in particular where the case is solely or significantly dependent on documents, and she cited the following passage:

> *"Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important*

to keep in mind the distinction, which I sought to analyse in Salthill Properties Ltd. v Royal Bank of Scotland plc [2009] IEHC 207, (unreported, High Court, Clarke J., 30 April 2009) between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well."

18. Tifco placed reliance on this authority in the High Court, and submitted that the issue raised by these proceedings is one of contractual interpretation and is quintessentially amenable to determination on an application to strike out.

19. Tifco submitted to the High Court that the purpose of the SFAC is clear and was entered into by the Borrowers and Tifco to secure the performance of Tifco's obligations as set out in the Option Agreement. That being the case, the SFAC had no real existence independent of the Option Agreement, and once Tifco was released from its obligations under the Option Agreement (as Tifco says is the clear effect of both the Settlement Agreement and the Release) there could be no question of Tifco having any liability by reason of it having breached any of the conditions of the SFAC.

20. The Borrowers on the other hand submitted that the non-payment of monies that were payable by Tifco under the SFAC constituted a breach of contract which not only gave rise to a liability on the part of Tifco to the Borrowers, but also triggered the calling in by the Bank of the total amount due by the Borrowers to the Bank under the Facility Agreement. This in turn led to the Bank executing its entitlements under the Account Charge, and seizing the €3.5m in that account. The Borrowers relied upon the recent decision of Simons J. in *Clarington Developments Limited v. HCC International Insurance Company plc* [2019]

IEHC 630, a case also involving an application to strike out the proceedings, in which the interpretation of documents was at issue. The High Court Judge referred to this decision at para. 50 of her judgment:

> *"Having considered the relevant jurisprudence, Simons J. held that the court may be able to resolve straightforward cases of contractual interpretation on a summary application without the risk of injustice to parties, subject to a number of provisos as follows:*
>
> > *'First, there must be no factual dispute as to the validity of the contractual documents. Secondly, it must be accepted that the contractual documents represent the entire agreement between the parties. If, for example, one of the parties alleges that the interpretation of the contract must be informed by oral representations or that a collateral contract exists between the parties, then these are issues which can normally only be properly resolved by a plenary hearing on oral evidence. Thirdly, the contractual documentation must be capable of interpretation on its own terms, i.e. without resort to extrinsic evidence. Finally, the legal issues must be straightforward.'"*

21. The Borrowers argued in the High Court that in this case there is a factual dispute between the parties as to the validity of the contractual documents in circumstances where the Borrowers were strangers to those documents and had no knowledge as to how they came into existence. The Borrowers further argued that it is far from clear that the contractual documents represent the entire agreement between the parties in circumstances where it is apparent that the Settlement Agreement required a number of transactions to take place, as

well as the generation of additional documentation not all of which may have been disclosed. For example, the Release (although disclosed) is not mentioned at all in the Settlement Agreement. It was also the Borrowers' case that the proper construction of the Settlement Agreement and the Release required the factual matrix surrounding the 2014 transactions, and all documentation completed at the time, to be examined for that purpose.

22. The Borrowers further submitted to the High Court that words of release are to be construed with, and, if necessary, "*read down*" to meet, the reasonable expectations of the parties and should not, unless absolutely necessitated by both the choice of words used, and the context in which the words are used, be extended generally to release claims of which the parties were not aware. In this regard the Borrowers relied upon the decision of the House of Lords in *BCCI v. Ali* [2001] 1 All ER 961, at 965, para. 9 where Lord Bingham stated:

> *"But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."*

23. The Judge concluded that:

> *"[I]t is readily apparent that the factual dispute surrounding the contractual documents and the issue of any supporting documentation together with the legal issues which have been raised by the Plaintiffs take the within application outside of the scope of the 'clear cases' that are amendable to resolution on summary application. The application must therefore fail".*

In arriving at this conclusion, the Trial Judge made it clear that she felt that the court did not have sufficient evidence regarding the factual matrix surrounding the execution of the documents that were available to the court, and that the Borrowers had presented a "*credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings*", as per Clarke J. in *Lopes.*

ARGUMENTS ON APPEAL

Submissions of Tifco

24. Counsel for Tifco submits that there is no factual dispute between the parties concerning the validity of the Settlement Agreement or any Deed of Release. Nor is there any dispute between the parties (on the pleadings, at least) about the circumstances in which those documents came into existence. The sole issue between the parties concerning these documents relates to their interpretation, and specifically whether or not they have the effect of absolving Tifco of any liability arising by reason of its alleged breach of the SFAC.

25. Tifco submits that the meaning of clause 2.2 of the Settlement Agreement and of clause 1.1 of the Release is clear and unambiguous and neither requires to be interpreted by reference to any factual matrix that is not already known. In particular, Tifco says that the parties to the Settlement Agreement and the Release would have known that Downby had suffered the loss of €3.5 million to the Bank on account of the default of Tifco making the payments required by the SFAC, and they must therefore have known that the Borrowers were liable to Downby for this loss, and had an exposure to such a claim being advanced by Downby (although it may be observed that this is formally denied in Tifco's Defence). In those circumstances, it would be inconceivable that the Receiver, who was appointed by Beltany – a company owned by Goldman Sachs – would agree to sell the Hotel for the sum of €4m to Tifco, but at the same time leave Tifco – a company also owned or controlled by Goldman Sachs – exposed to a claim in the sum of €3.5m from the Borrowers. Since the Receiver and Tifco would have been aware of Tifco's potential exposure to a claim such as is made in these proceedings, the decision in *BCCI v. Ali* did not provide any support for the

Plaintiffs' contention that such a claim was outside the scope of the Settlement Agreement and/or the Release.

26. In response to a question from the Court, counsel for Tifco acknowledged that there is no evidence to this effect in the affidavits sworn on Tifco's behalf. However, he submitted that the Court should consider what a reasonable person, in the circumstances of the Receiver, would reasonably be assumed to have known at the time that he entered into the Settlement Agreement and the Release. In his submission, the Receiver would have known of the default of Tifco (which gave rise to the appointment of the Receiver) and the consequences, or potential consequences of that default.

27. Counsel for Tifco submitted that the Judge did not identify any ambiguity or uncertainty in the wording of the Settlement Agreement or the Release that might require clarification by reference to the factual matrix. Nor had the Plaintiffs identified any material which might have a bearing on the interpretation of the documents or any other reason to look behind the words of the documents. It is submitted that the assertions of the Plaintiffs that more information is required regarding the factual matrix surrounding the genesis of the documents is mere speculation.

28. Moreover, the court was not being asked to consider the documents in a vacuum. There was correspondence from the solicitors who had acted for both Beltany and the Receiver, setting out the circumstances leading up to the execution of the Settlement Agreement and the Release, and confirming the understanding of those parties as to the effect of the documents (being the same as the position adopted by Tifco in these proceedings). In response to a question from the Court however, counsel accepted that any statements of

subjective understanding and/or intent were not admissible and he said that he was happy to rely on the terms of the documents, which he submits are clear and unambiguous.

29. In its written submissions, Tifco referred to several authorities on the interpretation of settlement agreements, including *Danske Bank A/S v. Hegarty* [2012] IESC 30, *Point Village Development v. Dunnes Stores* [2019] IECA 233 and *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 IR 274. It was not in dispute in these proceedings that the principles governing the interpretation of settlement agreements are no different to those governing the interpretation of contracts generally, and so it is unnecessary to consider those authorities in any detail here. Nor was it in dispute that the Court must adopt an objective approach rather than a subjective approach as is made clear in the following passage taken from the decision of Laffoy J. in *UPM v. BWG* [1999] IEHC 178, relied upon by Tifco, wherein she stated at para. 61:

> *"[T]he basic rules of construction which the Court must apply in interpreting the documents which contain the parties' agreement are not in dispute. The Court's task is to ascertain the intention of the parties and that intention must be ascertained from the language they have used considered in the light of the surrounding circumstances and the object of the contract. Moreover, in attempting to ascertain the presumed intention of the parties, the Court should adopt an objective, rather than a subjective approach, and should consider what would have been the intention of reasonable persons in the position of the parties."*

30. As to the meaning of the documents in this case, counsel submitted that the Settlement Agreement was entered into in full and final settlement of "*all obligations and potential*

obligations of Tifco under, pursuant to or in connection with the Option Agreement". It is submitted that the obligations of Tifco under the SFAC were obligations "*in connection with*" the Option Agreement, because the SFAC was put in place in order to secure obligations under the Option Agreement, and once the Option Agreement ceased, so too did the SFAC and all obligations thereunder.

31. It was put to counsel in argument that the claim in the instant proceedings is not a claim for payment of monies due by Tifco under the SFAC, and therefore it may make sense (as counsel for the Plaintiffs argued) that the Release was put in place in order to ensure that Tifco would take back such monies as it had paid pursuant to the SFAC, which amounted to €292,000, without any other party being entitled to assert a claim thereto. Counsel observed in response that the Plaintiffs' claim arises exclusively because of the failure by Tifco to make the payments it was required to make under the SFAC. If there was an intention on the part of the parties to the Settlement Agreement or the Release to preserve an "*in personam*" claim (for the Borrowers), as suggested, it would have to have been provided for in the documents.

32. Tifco also relies upon clause 2.4.1 of the Settlement Agreement which provides that upon completion of the sale of the Property (i.e. the Hotel): "*the Borrowers will be released from all further liability to Beltany in connection with the Facility Letter, and the Security will be released by Beltany*". The definition of "*Security*" includes the SFAC.

33. If there is any doubt about the interpretation of the Settlement Agreement however, it was said on Tifco's behalf that the matter is placed beyond any doubt by clause 1.1 of the Release. That, it will be recalled provides:

"The Releasing Parties [i.e. the Borrowers], *by the direction of the Receiver, hereby grant, convey, assign, surrender and release unto Tifco all of its or their respective property, assets and undertakings secured by the Security Document to the intent that the said property and assets shall henceforth be held by Tifco freed and discharged from all monies, liabilities and obligations now or at any time secured by the Security Document and from all claims and demands thereunder."*

34. The reference to "*Security Document*" in clause 1.1 of the Release is a reference to the SFAC. Under clause 4 of the SFAC, Tifco charged all payments made by it pursuant to the provisions of that agreement to the Borrowers.

35. In summary, Tifco's case is that the provisions of the Settlement Agreement and the Release upon which they rely are clear and unambiguous and their effect is to release Tifco from ALL its obligations under the SFAC. Any reasonable person would so interpret the documents as there would be no commercial logic in leaving Tifco facing any potential liability to the Borrowers or Downby for a claim such as that now advanced by the Plaintiffs.

Submissions of the Plaintiffs

36. Counsel for the Plaintiffs argued that none of the provisions of the Settlement Agreement or the Release relied on by Tifco can be interpreted as releasing Tifco from the claim advanced in these proceedings. In order to interpret the provisions in the manner contended for by Tifco, the Court would be required to read into those provisions an intention on the part of the parties to those documents that is broader than the expressed intention. In

the submission of counsel, it is significant that there is no reference in the provisions relied upon by Tifco to any claim that the Borrowers might have against Tifco still less any language indicating any intention to release Tifco from such a claim.

37. So far as clause 2 of the Settlement Agreement is concerned, this expressly refers to the full and final settlement of the obligations of Tifco "*under, pursuant to or in connection with the Option Agreement*" but makes no reference at all to the SFAC. Had it been intended that the settlement was to apply to any claims arising under the SFAC, then this should have been expressly stated. As far as the words "*in connection with*" are concerned, counsel suggested that this could only refer to a matter referred to in the Option Agreement, and there is no reference at all in the Option Agreement to the SFAC.

38. Furthermore, clause 2.4 of the Settlement Agreement provides that, upon completion of the sale of the Hotel the Borrowers shall be released from all further liability to Beltany in connection with the Facility Agreement, and the Security will be released by Beltany, and Tifco will be released from all past, present and future obligations to the Borrowers pursuant to or in connection with the Lease. Clause 2.4.3 provides that the Option Agreement will be terminated upon completion, and all parties are released from their obligations thereunder. However, there is no reference at all to the SFAC or the release of Tifco from its obligations thereunder, which the Plaintiffs say is significant.

39. Moreover, the Settlement Agreement (which is dated 15 December 2014) makes no reference at all to the Release, and it is far from clear if the completion of the Release (which is dated 22 December 2014) was contemplated at the time of the Settlement Agreement. Nor do the Recitals in the Release suggest that the latter is being completed or for the purposes

of implementing the Settlement Agreement. It is, it was suggested unclear why the Release was generated at all.

40. So far as the interpretation of clause 1.1 of the Release is concerned, counsel submitted that it does no more than release back to Tifco the Security it provided for its obligations, i.e. the monies that it had lodged to the deposit account pursuant to its obligations under the SFAC. He further submits that the words "*freed and discharged from all monies, liabilities and obligations now or at any time secured by Security Document and from all claims and demands thereunder*" refer to the "*Property and Assets*" secured by the SFAC, i.e. the monies lodged by Tifco to the account opened for that purpose, as required by the SFAC. Accordingly, the release in clause 1.1 of the Release is not a general release from all claims. Here again, counsel submits that it is not open to the Court to read anything more into this clause than appears therein, at least without more information as to the factual matrix surrounding the transaction.

41. Counsel for the Plaintiffs placed significant reliance upon the decision of the House of Lords in *BCCI v. Ali*, and also various other cases reviewed by the House of Lords in that decision and also cases in which that decision has been considered and applied. For present purposes however, it is sufficient to refer to just two passages from *BCCI v. Ali*, those being at paras. 27 and 28 of the judgment of Lord Nicholls:

> *"27. The wording of a general release in the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When,*

therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of release and consistently with the purpose for which the release was given, the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. …

28. This approach, however, should not be pressed too far. It does not mean that once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the circumstances in which it arises and whatever the subject matter may be. However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release should only apply to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed."

42. In this case, it is submitted that there is no evidence available to suggest that the parties to the Settlement Agreement or the Release had adverted to the possibility of a damages claim being brought by the Borrowers or Downby of the kind advanced by these proceedings. Accordingly (so counsel said), it is necessary to examine the context and provenance of the Settlement Agreement and the Release in order to establish whether the person responsible for drafting these documents was aware of the possibility of such claims being brought, and if not, such a fact could be relied upon by the Plaintiffs in support of a submission that if there is any ambiguity, the documents should be construed so as not to effect a release of such claims.

43. Counsel for the Plaintiffs submit that the SFAC was unusual in that while it imposed obligations on Tifco to pay monies into a deposit account, Tifco's breach of its contractual obligations gave rise to a separate liability to the Plaintiffs. Accordingly, a release of the Security constituted by the SFAC over the assets secured i.e. the monies in the deposit account would not, the Plaintiffs argue, necessarily release Tifco from any pre-existing causes of action arising out of its contractual breach. In this case, neither the Settlement Agreement nor the Release (the Plaintiffs submit) released Tifco from its liability for that pre-existing cause of action.

44. Moreover, the Plaintiffs argue, while Tifco submits (correctly) that the SFAC falls within the definition of "*the Security*" in the Release, Tifco "*misses the point*" that the release of the Security, and with it the SFAC, was a release back to the Borrowers, and not to Tifco. Thus, it is argued, the release of the Security by Beltany carried with it the release to the Borrowers of the right to sue Tifco for breach of its obligations to the Borrowers in relation to the SFAC.

45. Finally, the Court was informed that there is an application for discovery (brought by the Plaintiffs) pending (awaiting the determination of this application), and there may well be other documents, yet to be discovered that will throw light on the context in which the Settlement Agreement and the Release were executed, and which will assist the Court in construing the intention of the parties in entering into those documents. For example, there may be heads of terms, instructions to those who drafted the documents, or other documents drafted to give effect to the Settlement Agreement such as other deeds of release to give effect to clauses 2.4.2. or 2.4.3 of the Settlement Agreement. The Plaintiffs argue that Tifco wishes to have the Settlement Agreement and the Release construed in a vacuum, and that

Tifco would have the Court hold that the Settlement Agreement and the Release capture the Plaintiffs' claim, despite the absence of any express wording to this effect in the documents concerned. It may well be that the complete factual matrix will show that these proceedings were not contemplated by the parties at the time that the Settlement Agreement and the Release were executed.

DISCUSSION AND DECISION

Principles applicable on applications to dismiss

46. There was no material dispute between the parties as to the principles applicable to an application to dismiss, though there was sharp disagreement as to how those principles applied and what outcome followed from their proper application.

47. The appropriate starting point is to recall that the jurisdiction invoked by Tifco is to be "*exercised sparingly and only in clear cases*" (per Costello J. in *Barry v. Buckley* [1981] IR 306) and only "*when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law*" (per Clarke J. (as he was then) (*nem diss*) in *Keohane v. Hynes* [2014] IESC 66, at para 6.6).

48. It is often said that the *Barry v. Buckley* jurisdiction is particularly appropriate for claims that are dependent on documents and in that context Tifco here places much reliance on the observations of Clarke J. (*nem diss*) in *Lopes v. Minister for Justice and Equality* [2014] IESC 21, [2014] 2 IR 301:

> *"[20] At the same time, it is clear that certain types of cases are more amenable to an assessment of the facts at an early stage than others. Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important to keep in mind the distinction, which I sought to analyse in Salthill Properties Ltd. v. Royal Bank of Scotland plc [2009] IEHC 207, (Unreported, High Court, Clarke J., 30th April,*

2009), between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well."

49. However, the fact that a claim may be document-dependent does not alter the character of the jurisdiction being exercised. It is not a jurisdiction to determine preliminary issues of law nor it is a form of summary disposal of actions. Accordingly, it is not an appropriate procedure for the determination of complex issues of law, including issues of contractual interpretation. So much is clear from two further decisions of the Supreme Court, *Moylist Construction Ltd. v. Doheny* [2016] IESC 9, [2016] 2 IR 283 and *Jeffrey v. Minister for Justice, Equality and Defence* [2019] IESC 27, [2020] 1 ILRM 67 in each of which the sole judgment was given by the current Chief Justice.

50. In *Moylist Construction Ltd. v. Doheny,* Clarke J. cautioned that 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.*" (at para. 18). It was also noted that, for the reasons identified in the judgment of Murray J. in *Jodifern v. Fitzgerald* [2000] 3 IR 321, "*a motion to dismiss should not be used as a means of obtaining a summary disposal of the case in circumstances where the issues which will need to be addressed in deciding whether the proceedings are bound to fail are themselves complex.*" (at para. 23).

51. Clarke C.J. returned to the same theme in *Jeffrey v. Minister for Justice*:

> *"7.4. It is now well settled that, in the context of a summary judgment motion in which a plaintiff seeks judgment in summary proceedings, a court can resolve straightforward issues of law or the interpretation of documents, where there is no real risk that attempting to resolve those issues within the limited confines of a summary judgment motion might lead to an injustice. By analogy, I would not rule out the possibility, without so deciding, that it may be possible to resolve a simple and straightforward issue of law within the confines of a Barry v. Buckley application. However, even if that should be possible, it could only be appropriate where the issue was very straightforward and where there was no risk of injustice by adopting that course of action."*

The particular issue in *Jeffrey* was the extent of the immunity of a Garda in relation to (inaccurate) statements made by him about the plaintiff's criminal record at a sentencing hearing in the District Court. While the Chief Justice considered there were "*strong arguments to suggest that immunity does arise*" in his view the *Barry v. Buckley* jurisdiction could not be used to dismiss a case "*simply because it might be said that there is a strong defence.*" Rather, "*such applications can only be used in cases where it is clear that the claim is bound to fail.*"

52. *Keohane v. Hynes*, *Lopes* and *Jeffrey* were considered by the High Court (Simons J.) in *Clarington Developments Limited v. HCC International Insurance Company plc* [2019] IEHC 630, a decision on which Tifco place considerable emphasis. Simons J. usefully summarised the effect of these decisions as follows:

"31. It appears from the case law discussed above that the approach to be taken to an application to strike out or to dismiss proceedings will differ slightly in circumstances where the underlying proceedings turn on the interpretation of (agreed) contractual documents. More specifically, the court may be able to resolve straightforward issues of contractual interpretation on a summary application without the risk of injustice to the parties. This is subject to a number of provisos as follows. First, there must be no factual dispute as to the validity of the contractual documents. Secondly, it must be accepted that the contractual documents represent the entire agreement between the parties. If, for example, one of the parties alleges that the interpretation of the contract must be informed by oral representations or that a collateral contract exists between the parties, then these are issues which can normally only be properly resolved by a plenary hearing on oral evidence. Thirdly, the contractual documentation must be capable of interpretation on its own terms, i.e. without resort to extrinsic evidence. Finally, the legal issues must be straightforward.

32. In cases where these provisos are fulfilled, it may be legitimate for the court to consider the terms of the contractual documentation. If the court concludes that no reasonable interpretation of the contractual documentation could give rise to a claim on the part of a plaintiff—even assuming that all of the facts alleged by the plaintiff would be established at trial—then the proceedings can be dismissed as an abuse of process."

The issue in *Clarington Developments Limited v. HCC International Insurance Company plc* related to the interpretation of a bond guaranteeing the obligations of a contractor to an

employer under a building contract, that issue being whether it was a condition precedent for any action by the employer to enforce the bond that damages should have been previously ascertained by way of conciliation or arbitration between the employer and the contractor under the building agreement or whether the High Court could assess such damages in the enforcement proceedings. Simons J. characterised that issue as "*a straightforward issue of contractual interpretation which admits of an obvious answer*." (at para. 76).

The relevant contractual provisions

53. At the risk of repetition, it may be convenient at this juncture to set out in full, and in one place, those clauses of the Settlement Agreement and the Release relied upon by the parties:

(1) The Settlement Agreement

"2.2 The Receiver acknowledges that neither Tifco nor Banesto have the means by which to pay the Option Price and has satisfied himself as to the market value of the Property. Accordingly the Parties agree the following, <u>which agreement is agreement is in full and final settlement of all obligations or potential obligations of Tifco under, pursuant to or in connection with the Option Agreement</u>.

...

2.4 Upon completion of the sale of the Property in accordance with the terms of clauses 2.2.1 and 2.3:

2.4.1 the Borrowers will be released from all further liability to Beltany in connection with the Facility Letter, and the Security will be released by Beltany;

2.4.2 Tifco will be released from all past, present and future obligations to the Borrowers under, pursuant to or in connection with the Lease; and

2.4.3 the Option Agreement will be terminated and all parties to the Option Agreement will be released from their obligations or potential obligations thereunder." (our emphasis)

(2) The Release

"1.1 The releasing parties, by the direction of the Receiver, hereby grant, convey, assign, surrender and release unto Tifco all of its or their respective property, assets and undertaking secured by the Security Document to the intent that all the said property and assets shall henceforth be held by Tifco freed and discharged from all monies, liabilities and obligations now or at any time secured by the Security Document and from all claims and demands thereunder." (again, our emphasis)

Is it very clear that the claims made by the Plaintiffs against Tifco have been released?

54. Tifco does not suggest that the claims made by the Plaintiffs are frivolous or vexatious or are otherwise bound to fail on their merits. The sole issue is whether those claims are excluded by the Settlement Agreement and/or the Release. Tifco says that they clearly are and that, accordingly, the Plaintiffs' action is bound to fail.

55. The Plaintiffs had no involvement in the negotiation or conclusion of these documents. They were negotiated and executed on their behalf by the Receiver. While there is an issue as to whether the Receiver had authority to release the claims made in these proceedings (which is addressed further below), the authority, in principle, of the Receiver to enter into agreements of this kind on behalf of the Plaintiffs is not challenged.

56. The Plaintiffs are undoubtedly at something of a disadvantage having regard to the particular circumstances in which the Settlement Agreement and the Release came to be executed. In particular, the Plaintiffs observe that they are wholly unaware of the circumstances in which the Release was agreed and executed. It does not appear to be a document contemplated by the Settlement Agreement. Counsel for the Plaintiffs suggested that it had "*come out of the clear blue sky*". While he accepted that it appeared to have been executed as a deed and that it followed that there was no requirement for consideration, he nonetheless queried how it came about. As he went on to observe, however, the fact that the Release had been executed subsequent to the Settlement Agreement appeared to suggest that there was a concern that any release effected by the Settlement Agreement might be inadequate.

57. A full copy of the Settlement Agreement was only provided to the Plaintiffs subsequent to the commencement of these proceedings. According to counsel for the Plaintiffs, it is likely that there were other documents executed by the parties on or after 15 December 2014 (including documents giving effect to the provisions of clause 2.4 of the Settlement Agreement) as part of the same overall transaction. These, he says, may be relevant to the interpretation of the Settlement Agreement and the Release. The Plaintiffs are seeking such documents on discovery but they are not yet available to them. That is a factor to be borne in mind in the exercise of the *Barry v. Buckley* jurisdiction and is one which weighs against the dismissal of the proceedings at this stage.

Clause 2.2 of the Settlement Agreement

58. As of the date of execution of the Settlement Agreement, the Bank had enforced the Account Charge against Downby and appropriated the €3.5 million that had been deposited with it by Downby. On the Plaintiffs' case, therefore, they had already accrued a liability to Downby and, in consequence, had a claim for indemnity against Tifco, whose failure to make the payments provided for in the SFAC had triggered the Bank's enforcement action.

59. Tifco says that this claim was settled by clause 2.2 of the Settlement Agreement. Specifically, it argues that Tifco's alleged liability to the Plaintiffs fell into the category of "*obligations or potential obligations … under, pursuant to or in connection with the Option Agreement*" which the parties to the Settlement Agreement agreed to settle, fully and finally.

60. In our view, while that argument may prevail at trial, it is not so clearly correct that it would be appropriate to exercise the *Barry v. Buckley* jurisdiction. The construction issue presented here is not "*very straightforward*" and there would be a real risk of injustice were the Court to proceed to strike out the Plaintiffs' claim *in limine* on the basis of clause 2.2 of the Settlement Agreement. In contrast to the position in *Clarington Developments,* clause 2.2 does not present "*a straightforward issue of contractual interpretation which admits of an obvious answer*."

61. It would not be appropriate to express any view on the merits of the respective arguments made by the parties as that might be thought to interfere with the proper role of the judge who will now have to hear this case. However, we should explain briefly why we are not persuaded that clause 2.2 clearly has the effect contended for by Tifco:

1) Clause 2.2 makes no reference to the SFAC or to Tifco's obligations under it.

2) Clause 2.2 refers to *obligations*, rather than *liabilities*, of Tifco. The obligations that it refers to arguably do not include past obligations (past obligations are expressly included in clause 2.4.2 but not in clause 2.2).

3) Clause 2.2 does not refer, at least expressly, to the waiver of existing claims against Tifco by the Plaintiffs or any of them arising from a past breach of the SFAC by Tifco. Arguably, if the parties intended to settle such claims, they ought to have used clear words to that effect.

4) The claim made by the Plaintiffs is arguably not one for the performance of any obligation of Tifco "*under*" or "*pursuant to*" the Option Agreement.

5) While the phrase "*in connection with*" is one of potentially wide import, it is not obvious that it extends to the claim made here, which arises from the SFAC rather than the Option Agreement. On Tifco's case, a liability of Tifco arising from its past breach of the SFAC is properly to be characterised as an obligation "*in connection with the Option Agreement*." That may well be so but it is certainly not self-evidently or unarguably so.

6) While much emphasis was placed by Tifco on the argument that it would be contrary to commercial common sense for it to enter into an agreement that left it liable to a claim such as that made here, the very fact that Tifco felt compelled to have recourse to such a principle of construction might be considered to imply a lack of certainty in the language of the Settlement Agreement.

Clause 1.1 of the Release

62. We have reached a similar view as regards clause 1.1 of the Release. Again, it is not enough for Tifco to persuade us that its construction of clause 1.1 is the more plausible or is likely to succeed at trial. Rather, Tifco must persuade us that its interpretation is the only plausible interpretation. If the Court considers that any other interpretation is arguable, Tifco's application fails.

63. It is in our view *arguable* that clause 1.1 does not operate to release any existing claims that the Plaintiffs may have had against Tifco arising from Tifco's prior breaches of the SFAC. *Arguably*, the Release generally, and clause 1.1 specifically, is concerned to address a different issue, namely the release back to Tifco of the "*property assets and undertaking*" which had been secured by the SFAC and to ensure that such "*property and assets*" would be held by Tifco free from the SFAC. It appears that, at the time that the Release was executed, there was still a sum of money (some €292,000) sitting in the security account set up on foot of the SFAC. That money had been paid by Tifco and it was subject to a charge in favour of the Borrowers. Clause 1.1 can be read as releasing that money to Tifco, free of such charge and free of any other obligations or liabilities that had been secured by the SFAC. The alleged liability of Tifco to the Plaintiffs is not such a liability (it was never secured by the SFAC) nor is the claim made by the Plaintiffs a claim or demand against such "*property and assets*" arising under the SFAC.

64. Such a reading is incorrect on Tifco's submission and, it says, leads to absurdity. Again, we need to be careful not to trespass on the High Court who will ultimately have to determine the correct construction of the Release. Tifco's arguments may well prevail at trial but, in our view, the issue as to the correct construction of clause 1.1 is not straightforward or obvious or one which could, without any risk of injustice, be determined within the confines of a strike out application.

The power of the Receiver to settle the claim

65. A further issue of concern to the Court is whether the power to release Tifco from the claim made in these proceedings was ever vested in the Bank, and thereafter Beltany or the

Receiver, such that the Receiver had the power to settle the claim, or release Tifco from all liabilities or obligations in respect of such claim.

66. While it is said by Tifco that this issue is not raised in the pleadings – a subject that is addressed later in this judgment – it was raised by Mr. McGoldrick in his first affidavit in the following terms:

> *"35. In addition, I say and believe and am advised that the cause of action giving rise to these proceedings was personal to the Plaintiffs and does not appear to have been charged to the Bank and accordingly did not fall within the Security which the Receiver was either entitled to deploy, or release. For this reason also neither the Settlement Agreement nor the Release have the effect contended for by Mr. Lynch."*

67. Mr. Lynch, solicitor on behalf of Tifco responds to this in his second affidavit:

> *"18. Mr. McGoldrick also asserts, at paragraph 35, that the Receiver's security did not extend to the alleged cause of action giving rise to these proceedings, which was 'personal to the Plaintiffs'. However, by Deed of Mortgage Charge and Assignment dated 9 October 2007, the Borrowers assigned to the Bank (and latterly Beltany) the full benefit of the Option Agreement and the SFAC* [exhibited]. *The Receiver was appointed by Deed of Appointment dated 15 December 2014 under (inter alia) that Deed of Mortgage Charge and Assignment over all of the assets referred to therein* [exhibited]. *Accordingly, I say and believe that any claim under the SFAC (including a claim for a breach of its terms and conditions) clearly fell within the security over which the Receiver was appointed."*

68. Mr. Lynch exhibits the Deed of Mortgage Charge and Assignment dated 9 October 2007 ("*the 2007 Mortgage*") and the Deed of Appointment of the Receiver. It is clear on the face of the appointment, which recites the 2007 Mortgage as one of the "*Security Documents*", that it appoints the Receiver –

> *"to be Receiver of all the assets referred to and comprised in and charged by the Security Documents and to enter upon and take possession of the same in the manner as specified in the Security Documents and the Receiver shall as such receiver have and be entitled to exercise the powers conferred on him by the Security Documents and by law."*

The issue is therefore whether the 2007 Mortgage was effective in securing to the Bank the right to bring an action such as that pursued by the Plaintiffs in these proceedings.

69. In the 2007 Mortgage clause 1.1 defines "*Assigned Rights*" to mean –

> *"... all present and future rights and benefits whatsoever, provision for the assignment of which is made by Clauses 3.1(d), 3.1(e), 3.1(f) and 3.1(g)".*

"*Secured Property*" is defined to mean –

> *"... all assets, rights and property of the Mortgagors the subject of any security created or expressed or intended to be created by or pursuant to this Deed".*

The Borrowers' right in question – the cause of action the subject of these proceedings – did not exist at the date of the 2007 Mortgage. It may not have come within the definition of "*Secured Property*", but, arguably, may have come within the "*future rights and benefits*" the assignment of which is provided for in clause 3.

70. Turning to clause 3, this is headed "*Limited Recourse Liability*", and is a provision that provides that the Bank's recourse to the Mortgagors (i.e. the Borrowers) is limited to the Mortgagors' interests in the Secured Property. It is clear that the references to clause 3 in the definitional section, quoted above, are incorrect, and in order to make sense need to be read as a reference to clause 4.1, sub-paras. (d), (e), (f) and (g), because this is the provision under which the Mortgagors as beneficial owners charge certain property to the Bank. Assuming for present purposes that that is indeed the case, the relevant sub-clause is 4.1(d) which provides:

> *"The Mortgagors, as beneficial owners as continuing security for the payment, performance and discharge of the Secured Obligations hereby:*
>
> *...*
>
> *(d) assign unto the Bank the full benefit of the Lease, First Put and Call Option Agreement, the Second Put and Call Option Agreement, the Sinking Fund Agreement and Charge, the Development Agreement, the Co-Ownership Agreement and the Collateral Warranties provided that nothing herein shall prevent the exercise of options contained in the First Put and Call Option Agreement or the termination of the Development Agreement by the Mortgagors;"*

It is the construction of the relevant quoted definitions in combination with this sub-clause, and in particular the words "*full benefit*", that is at the heart of this issue.

71. Counsel for Tifco argued that the Borrowers assigned "*the full benefit*" of all their present and future rights and benefits under the Option Agreement, and the SFAC, to the Bank, and that this must include any future right of action of the Borrowers against Tifco in respect of breach of those agreements. This, it was argued, would include all damages or rights to indemnity to which the Borrowers might be entitled arising out of their obligations, at common law or otherwise, to Downby, consequent upon the appropriation by the Bank of the €3.5m held on deposit and subject to the Account Charge. These "*monetary consequences*" of breach of the SFAC became vested in Beltany, and in due course the Receiver as agent of the Borrowers under clause 12.5 of the 2007 Mortgage.

72. Counsel for the Plaintiffs argued in response that the definition of "*Secured Property*" extended only to assets, rights and property of the Mortgagors existing at the time of the 2007 Mortgage, and that no provision of the 2007 Mortgage extends it to the Plaintiffs' claim against Tifco in these proceedings, which was a "*personal*" right of action that only arose in 2012. It was argued that sub-clause 4.1(d) could not have been intended, and should not be construed to include, a future possible right of action that did not exist in 2007, and that the word "*benefit*" refers to the contractual benefit arising under the documents listed, including the SFAC, which was an entitlement to have Tifco contribute stage payments of €800,000 each amounting to a total of €4m, into a security account. It was argued that the effect of the 2007 Mortgage was to charge the monies paid into that account in favour of the Bank, but no more than that.

73. In support of this argument counsel suggested that the construction contended for by Tifco would lead to the following absurdity: it would mean, in theory, that the Bank/Beltany/the Receiver could subrogate for the Borrowers and sue Tifco for €3.5m as damages for breach of the SFAC, notwithstanding that the Bank (IBRC) had already appropriated €3.5m, being the Downby deposit security, in 2012; this would potentially represent double recovery.

74. In response counsel for Tifco submitted that, while in theory this might be so, were the Bank, Beltany, or the Receiver to have brought such proceedings against Tifco and recovered €3.5m, that sum would be then held on trust for the party entitled thereto. The question of what consequences might follow from such recovery should not (it was said) be confused with the issue of construction of clause 4.1(d) in which "*full benefit*" must include any right of action that might accrue to the Borrowers arising out of breach of the SFAC.

75. Subject to what follows, on the basis of the limited argument heard by the Court on this issue, we consider that the issue warrants fuller argument at trial and cannot at this stage be said to be an issue that is bound to fail.

76. While this issue is raised on affidavit, very little (if anything) is said about it in the pleadings, it was not addressed in written or oral submissions in the High Court or in the Judge's judgment, and it did not feature in the written submissions before this Court.

77. As to the pleadings, the defence in paras. 4 – 7 pleads that by reason of the Settlement Agreement and/or the Release the Plaintiffs are precluded from maintaining the proceedings. The following further pleas appear in the defence:

> *"53. It is denied that the Release had no effect on obligations that had already accrued under the SFAC which had not been fulfilled as at that date, whether as alleged or at all. The Release expressly released all liabilities and obligations then or at any time secured by the SFAC and from all claims and demands thereunder. Furthermore, the Settlement Agreement released and/or absolved the Defendant in respect of 'all obligations or potential obligations of [the Defendant] under, pursuant to or in connection with' the Put and Call Option, which included all obligations (whether accrued or otherwise) and all potential obligations under the SFAC.*
>
> *54. It is denied that the Settlement Agreement did not release the Defendant from its liability to the Plaintiffs the subject matter of these proceedings. The Settlement Agreement expressly released the Defendant from all obligations and potential obligations under, pursuant to or in connection with the Option Agreement. The purpose of the SFAC was to secure the Defendant's performance of the Option Agreement. Accordingly, the Settlement Agreement necessarily had the effect of releasing the Defendant from its obligations under the SFAC."*

78. In the light of these pleas, counsel for the Plaintiffs relied on para. 18 of their Reply to Defence as sufficiently raising the issue as to the Receiver's powers:

"18. By way of special reply to Paragraphs 53, 54 and 57 of the Defence, it is denied that the Release and/or Settlement Agreement had the effect contended for by the Defendant and they did not release the Defendant from its obligations as pleaded by the Plaintiffs. The Plaintiffs deny the particulars and assertions pleaded therein as if the same were herein set forth in full and denied seriatim. The Plaintiffs will refer to the full terms of the Settlement Agreement and the Release and to their proper construction and meaning at the hearing and in their legal submissions to be made to the Court in due course, which they will contend afford the Defendant no defence against the Plaintiffs' claims herein."

79. In the view of the Court, this reply plea is focused on the Release and the Settlement Agreement, and does not directly raise any issue as to the construction or effect of relevant provisions in the 2007 Mortgage.

80. In fairness to the parties and their counsel it was the Court's particular concern with this issue that led to it being debated at the hearing. It is hardly surprising in the circumstances that neither counsel was in a position to refer the Court to any authorities that might have a specific bearing on the construction of clause 4.1(d), although counsel referred appropriately to accepted authorities that were before the Court related to the construction of documents, some of which are referred to earlier in this judgment. In these circumstances the matter was not fully argued.

81. The Court is not satisfied that this issue has been properly pleaded. Were this the only live issue before the Court, such that the decision on this issue would be determinative, the Court would have been minded to consider exercising the well-established inherent

jurisdiction to permit an amendment of pleadings "*to save the action*". In *Sun Fat Chan v. Osseous Limited* [1992] 1 IR 425, at p. 428 McCarthy J. expressed the view that "*if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed*", a proposition that was accepted by Fennelly J. in *Lawlor v. Ross* [2001] IESC 110 at para. 35, and one that would undoubtedly extend to the amendment of a reply. However, in the circumstances where the Court is satisfied on other grounds that this appeal should not succeed, it is not *necessary* and therefore not appropriate for the Court on this appeal to exercise its inherent jurisdiction to allow any expansion of the pleaded claim or reply to defence. It will be a matter for the Plaintiffs, if they wish to pursue this issue, to apply in the normal way under the Rules of the Superior Courts to amend their pleadings.

82. Accordingly, it is sufficient to conclude on this issue that, on the basis of the limited argument before the Court, it is one upon which it could not be said that the Plaintiffs would be bound to fail, but of course the Court is careful not to express any definite view at this stage in the proceedings and particularly in circumstances where this issue is not properly raised on the pleadings.

CONCLUSIONS AND ORDERS

83. It follows that Tifco's appeal will be dismissed.

84. As is normal in cases where judgment is delivered electronically the Court will give its provisional view on the costs of the appeal. As the Plaintiffs were entirely successful the normal rule should apply, and the Plaintiffs appear to be entitled to their costs from Tifco, to be adjudicated by a legal costs adjudicator in default of agreement. However, as the consequence of the failure of the motion to strike out is that the Plaintiffs' action will proceed to trial, and one possible outcome is that ultimately there could be costs orders in favour of Tifco, it is appropriate that there should be a stay on adjudication and execution of the costs order pending the determination of the proceedings. Should either party wish to dispute the proposed costs order or stay they should so inform the Court of Appeal Office within 14 days of electronic delivery of this judgment, and a short costs hearing will be arranged, but any party requesting such a hearing will, if unsuccessful, be at risk of incurring costs.