THE HIGH COURT

[2016 No. 2445 P]

BETWEEN

MICHAEL HARRINGTON AND

ANTHONY (O/W TONY) HARRINGTON

PLAINTIFFS

AND

GULLAND PROPERTY FINANCE LIMITED AND

STEPHEN TENNANT

DEFENDANTS

No. 2

JUDGMENT of Ms. Justice Baker delivered on the 25th day of July, 2018.

1. This judgment is given in respect of the plaintiff's claim for damages for breach of contract against the first defendant, and for trespass against both defendants in relation to the appointment of a receiver and the alleged unlawful call in of two loan facilities by the first defendant, and in respect of the counterclaim of the first defendant for monies due on foot of those loan facilities, interest and costs.

2. In my previous judgment on this matter, *Harrington v. Gulland Property Finance Ltd.* [2016] IEHC 447, the second defendant was restrained from acting as receiver pending the determination of these proceedings, on the basis that the power to appoint a receiver was not vested in the first defendant at the date of the deed of appointment.

Material uncontroverted facts

3. The plaintiffs, retired bakers and confectioners, are brothers ("the Harringtons") and shareholders in a company, Harrington Confectioners Limited ("the Company"), which ran a successful business in Cork City until 1999. The Company had been founded by the father of the Harringtons and, in turn, his two sons took over the business and became directors. The Company owed the factory premises and surrounding lands ultimately developed into industrial units after the business closed.

4. Tony Harrington, the second plaintiff, described the difficult times after the business closed and said that he and his brother worked hard to discharge all debts of the Company, which they succeeded in doing. The buildings from which the Company traded, commercial units and lands at Churchfield Industrial Estate, comprised in Folio 118347F and Folio 152304F, Co. Cork, were purchased by the brothers as tenants-in-common from the Company and developed into light industrial units to provide an income and to make pension provision for each of them.

5. The purchase of the units and land from the Company was financed by a loan in the amount of IR£600,000 (€761,842) agreed to be advanced pursuant to an agreement entered into between Anglo Irish Bank Corporation Plc. ("Anglo") and the plaintiffs made on 18 October 2000 ("the first facility"), and secured by way of first legal charge of 17 October 2000 registered as a burden on the respective Folios in favour of Anglo.

6. The purpose of the loan outlined in clause 2 of the facility letter was "the restructure of finances along with development funds to construct seven warehouse units at Churchfield".

7. At the time of that loan, by facility letter dated 18 October 2000, the Company borrowed the sum of IR£400,000 on terms which were materially different and which provided for an interest only payment for an initial two years. On 16 February 2016 the Company debt was redeemed in full and the evidence is that the last payment was made close to the time the personal loans the subject matter of this judgment were called in.

8. By later facility letter dated 27 November 2003 ("the second facility"), the further amount of €465,797 was advanced to the brothers, and secured over the Folio lands as a "continuing security for all the obligations of the Borrower to the Bank". The purpose of the loan outlined in clause 2 of the facility letter was to purchase land and buildings from the Company.

9. The first facility provided for repayment on an interest only basis. "Without prejudice to the demand nature of the Facility", it was to be cleared "within two years from full sale proceeds of sale of each warehouse unit as they are released from [Anglo's] charge." In 2005 one unit, "Unit 2", was sold and Anglo agreed to unconditionally release its security. The net proceeds of sale were approximately €385,000.00, and were used by the brothers as income for the following years. A deed of partial discharge, bearing the date 4 April 2008 was provided by Anglo. No other units have been sold.

10. The second facility was "made in addition to and not in substitution of" the plaintiffs' existing facilities, and was an interest only facility up to May 2004, when principal and interest repayments were due to commence. From a memo dated 22 June 2004 obtained from Anglo by the plaintiffs under a Data Protection Act request, an extension of further 12 months of the interest only repayment regime was granted to the plaintiffs by Anglo. Further extensions were agreed informally thereafter.

11. The second facility was stated to be repayable in full "on or before July 2012".

12. At that stage the brothers' income was as follows: Income from the rentals, and directors' salary from the Company, the income of which derived wholly from rents and the total joint income before tax was somewhere short of €200,000 a year. The evidence is that the brothers enjoyed a "comfortable living", but no more than that.

The transfer of the loans and of the securities

13. Anglo was nationalised in 2009 and merged into Irish Bank Resolution Corp. ("IBRC") in 2011.

14. In February 2013 IBRC went into special liquidation.

15. By agreement made on 17 December 2014 the special liquidators of IBRC, as successor in title of Anglo, sold to the first defendant, Gulland Property Finance Ltd. ("Gulland"), the benefit of the loan facilities of the plaintiffs.

16. Gulland notified the plaintiffs of the transfer of the loans through its agent, Pepper Finance Corp. (Ireland), trading as Pepper Asset Servicing, by their "hello" letter dated 16 February 2015, IBRC having written a "goodbye" letter on 6 February 2015.

17. No argument is made that the transfer of the debt was not effective, nor that the charge was not effective to create a security in favour of Anglo and, as noted above, the charge was registered as a burden on each of the Folios. The assurance of the security interest is, however, an issue in the case.

18. The securities were transferred by "Irish Law Deed of Transfer – Form 56 (Registered Property)" of 6 October 2016, and as will be apparent Gulland had purported to appoint a receiver in February 2016 before it had taken the benefit of the security interest by which it was entitled to so appoint.

19. After Anglo was wound-up, the Harringtons continued to pay the interest only amount to IBRC and, after it purchased the loans from the special liquidators, to Gulland. The loans were repaid by direct debit, and the undisputed evidence is that there had been a small overpayment in 2017. At the date of the hearing, the payments on an interest only basis were up to date to the end of the current quarter.

The issues in the case
20. The primary issues for determination on the claim relate to the appointment of a receiver by Gulland in February 2016, and whether Gulland was entitled to call in the loans. If no valid demand was made, the counterclaim fails.

Interlocutory proceedings
21. Proceedings were commenced by plenary summons on 18 March 2016. On that date, having regard to the fact that the application was heard on the last day of term before the Easter vacation, an interim injunction was granted *ex parte*, by which the receiver was restrained, until after 11 April 2016 or further order, from acting as receiver over the relevant assets. Because the order was made *ex parte*, a further order was made that any rent collected in respect of the properties would be retained by the solicitor for the plaintiffs until further order. That arrangement continued to operate until the matters herein complained of.

22. An interlocutory injunction was made in similar terms on 29 July 2016 and was finally vacated on 6 February 2017 after Mr. Tennant was formerly discharged as receiver over the assets comprised in the two folios on 13 December 2016. The deed discharging Mr. Tennant as receiver is undated, but the evidence is that it was executed at 15.30 on 13 December 2016 and Mr. Tennant was discharged as receiver from that time.

23. Contrary to what was understood by all parties at the hearing of the interlocutory application to remove Mr. Tennant as receiver it transpired that, at the time of the purported appointment, Gulland had not, in fact, taken the interest in the charges from the special liquidators of IBRC, and that the deed of transfer of 6 February 2015 by which the charge was purported to be assured was not effective and did not include the Harrington lands in the parcels clause. This error occurred as a result of the very heavy redactions in the copy of the deed of transfer of 6 February 2015 from IBRC to Gulland on foot of which Gulland had instructed the making of the appointment of the receiver. The error came to light when Gulland took steps to register its title.

24. Following discovery of the error, a new deed dated 6 October 2016 did assure to Gulland the interest of IBRC in the relevant charges registered on the Harrington folios. Gulland was eventually registered as owner of the charges on the relevant folios on 7 October 2016.

25. Ms. Anne O'Dwyer was appointed as receiver over the plaintiffs' property by deed of appointment of receiver dated 24 February 2017. In the reply to defence and counterclaim, the plaintiffs denied that the first defendant was entitled to appoint a replacement receiver, however, no further steps have been taken to restrain Ms. O'Dwyer from acting as a receiver over the plaintiff's property.

26. The interlocutory injunction was vacated by order of 17 May 2017 and costs awarded to the Harringtons against Gulland.

The appointment of Mr. Tennant as receiver
27. The plaintiffs seek a *declaration* that Gulland was not entitled to appoint Mr. Tennant as receiver by the deed of appointment made on the 10 February 2016 or at all.

28. It is abundantly clear and requires no complex analysis that Gulland had no entitlement to appoint a receiver over the folio lands when it purported to do so on 10 February 2016: Gulland had no title to the charge at the time Mr Tennant was appointed receiver, it did not have the benefit of any security over the Harrington lands, and therefore, had no entitlement to appoint a receiver.

29. This has the consequence that the appointment of a receiver in February 2016 was invalid, and that Mr. Tennant had no authority to act as a receiver at any time.

30. The plaintiffs say that the counterclaim should be struck out for abuse of process and that in the affidavit evidence at the time of the application for an injunction Mr. Tennant committed perjury and Gulland engaged in fraud.

31. Mr. Tennant explains the error was not noticed when he was appointed, and in a later affidavit and in oral evidence at the trial he apologised to the court for the error and said that there was no intention to mislead the court and that the error occurred in circumstances where a significant number of charges on registered lands were transferred from IBRC to Gulland, and that the deeds were redacted because of the commercially sensitive nature of some of the information contained therein.

32. Nonetheless the letter of demand of 29 November 2016, served after the error was identified, stated that it was intended to vacate the appointment of Mr. Tennant, but "without prejudice to the validity of his appointment".

33. Counsel for the Harringtons strongly asserts that the apology of Mr. Tennant is not sufficient to relieve Gulland of liability arising from the wrongful appointment of a receiver over their lands. He points to the fact that no credible explanation is provided for the error, and that Mr. Tennant was a trespasser.

34. I accept the evidence of the Harringtons that they sought a clean, or at least legible, copy of the deed of transfer of the charges of 6 February 2015, and that one had not been furnished at the time the interlocutory application was heard. They bear no blame for the error.

35. Accordingly, the Harringtons are entitled to the relief they seek in the statement of claim, namely a declaration that Gulland had no entitlement to appoint Mr. Tennant as receiver over any of its assets by the deed of 10 February 2016 or at any time up to when Gulland took a transfer of the charge on 6 October 2016.

Should the defence and counterclaim be struck out for abuse of process?
36. The issue of the validity of the transfer was raised after the interlocutory hearing and in the course of the motion brought by the Harringtons on 24 February 2017 that the defence and counterclaim of Mr. Tennant be struck out for abuse of process having regard to the fact that he was never properly appointed.

37. The Harringtons argue that Mr. Tennant has been guilty of perjury in the course of swearing the affidavit evidence by which he sought to defend his appointment as receiver in the interlocutory hearing.

38. I am guided in the correct approach to counsel's argument by the judgment of O'Malley J. in *Allied Irish Banks Plc. v. Honohan* [2015] IEHC 247, at para. 155, where she identified an essential element of the crime of perjury as involving "a sworn statement that the maker knows to be false".

39. I accept the evidence of Mr. Tennant that he did not know that the deed of charge which supported his appointment as receiver was wholly redacted and not, as he had previously thought, partially redacted. I also accept that he did not discover this until October 2016, presumably when Gulland moved to register the transfer of its ownership of the charge on the Folio. He accepted that he had not read or considered the deed.

40. I am satisfied on the evidence that Mr. Tennant did not know that his averment that he was properly appointed receiver over the Harrington lands was false at the time he swore his affidavits in this matter. I accept his explanation that it was the heavily redacted nature of the deeds which had been furnished to him, and on which the deed of appointment was grounded, not been scrutinised by him, and it appears it had not been scrutinised by any of the other persons in the chain of professionals who examined the matter.

41. I am also influenced by the approach that O'Malley J. took to the question in that she identified the fact that no personal gain was likely to result from the incorrect statements of fact sworn by the officers of the bank in that case and that this suggested that there was "nothing to indicate a deliberate intention to swear to a falsehood". She identified what had occurred as "sloppiness", a description which may appropriately be implied to the present circumstances.

42. I am satisfied that Mr. Tennant did immediately make application to court and swore a corrective affidavit when he became aware of the error in his earlier evidence. I am also satisfied, notwithstanding the argument of counsel for the Harringtons, that he had nothing to gain personally from a false averment, albeit that he did, of course, stand to gain his professional fees on account of being appointed receiver.

43. Another authority of assistance is the judgment of McKechnie J. in *Kelly v. University College Dublin* [2009] IEHC 484, [2009] 4 IR 163, where an application was brought to set aside an order of the High Court on the basis that an official of the defendant had perjured herself in evidence and that the judgment had been obtained by fraud. McKechnie J. considered that there was no evidence that the court was "being deliberately misled by the defendant", at para. 30. Furthermore, he went on to point to the seriousness of the allegation of perjury from which he derived the following proposition:

> "The onus on the plaintiff, although measured on the balance of probability, is nevertheless of a rigorous standard. Given both the implicit finality of the court's ruling and the serious nature of the allegation, there would have to be significant evidence of perjury before such a finding could be made."

44. I am not satisfied that evidence of this nature is available to me, and I am of the view that Mr. Tennant did not deliberately seek to mislead the court, but he and Gulland officials were careless or sloppy in their approach to the security documents and the evidence of assignment of the security interest. Therefore, I reject the application that the proceedings be struck out for perjury or fraud, or that aggravated damages be awarded on that account.

45. I also reject the assertion of the plaintiff that the claim should be struck out for dishonesty or *mala fides*, and the facts of *Summers v. Fairclough Homes* [2010] EWCA Civ 1300, where the plaintiff was found to have deliberately exaggerated a claim, are quite different and made in quite a different context.

46. Having regard to my findings, none of the circumstances which might give rise to the "exceptional circumstances" required to strike out a claim on the basis identified by the Supreme Court in *O'Connor v. Bus Átha Cliath* [2003] 4 IR 459 exist and the test, as identified by Murray C.J., by which I could find that there was an irregularity amounting to "an offence against justice" is not met.

Damages
47. While I do not accept the characterisation sought to be advanced by counsel for the Harringtons that the appointment of Mr. Tennant as receiver was a fraudulent act. and that Mr. Tennant was guilty of perjury in swearing the affidavits by which the application for the interlocutory injunction was resisted, there can be little doubt that Mr. Tennant and Gulland acted in an unprofessional and wholly careless way in appointing a receiver without checking the underlying documentation.

48. The loans sale involved many hundreds of loans and security interests, but that fact does not in any way obviate the profound responsibility on lenders to identify, in each individual case, whether it has taken the benefit of a loan or security before calling in that loan.

49. The Harringtons were understandably and quite rightly upset by the appointment of a receiver over their lands. They are honourable business men who have a reputation earned from hard work and on account of having fully discharged all creditors when the Company business closed down. They are part of a small community and their reputation and credit worthiness and status in the community is of matter of importance to them. That fact should not have been ignored by a large commercial entity when, having taken the benefit of a loan or security, it moves to seek enforcement.

50. A careless or mindless calling in of loans, and more especially, the appointment of a receiver, is something that is not to be encouraged and having regard to the impact that such action may have on individual or small companies is a matter in respect of which I must mark my disapproval.

51. In *Conway v. Irish National Teachers Organisation* [1991] 2 IR 305, at p. 317, Finlay C.J. defined 'exemplary damages' as:

> "[…] damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he or she has suffered."

52. In *Garvey v. Ireland* [1966] ILRM 266, an award of exemplary damages in a case of breach of contract was made against the State for the arbitrary and wrongful dismissal of the plaintiff, who had been Commissioner of An Garda Síochána. McWilliam J., giving his judgment for the High Court, held as follows:

> "Damages appear to me to be conveniently grouped under three headings: (1) Special damage, which includes all pecuniary loss caused by a wrongful act. (2) General damages, which, where appropriate include recompense for such things as physical suffering, injury to reputation, consequential loss, etc. (3) Exemplary damages, which may, in certain circumstances, be awarded for the aggravated nature of the wrongful act" at page 2 of the judgment.

53. The plaintiff had claimed exemplary damages for the arbitrary nature of his dismissal. McWilliam J. awarded IR£1,298.11 in special damages but he did not award general compensatory damages since he found that the plaintiff had suffered no injury that could be directly related to the unlawful nature of his dismissal. McWilliam J. held as follows:

> "[U]nless some injury was occasioned to the Plaintiff as a result of the wrongful removal from office of the Plaintiff which could reasonably have been foreseen by the Defendants, I am of opinion that he is not entitled to any general damages under this heading", at page 5 of the judgment.

54. However, exemplary damages were awarded on the basis of Devlin L.J.'s *dicta* in *Rookes v Barnard* [1964] AC 1129 that exemplary damages should be available for "oppressive, arbitrary or unconstitutional action by the servants of the government." McWilliam J. noted that the plaintiff would have suffered some injury even if he had been lawfully removed from office and awarded the plaintiff IR£500 in exemplary damages:

> "I should award what I have described as exemplary damages to the Plaintiff but […] these must be related to the injury which the Plaintiff has suffered by reason of the arbitrary and oppressive conduct of the Government", at page 6 of the judgment.

55. I agree with the dictum of Griffin J. in *Conway v. Irish National Teachers Organisation* that there is "no valid reason, in logic or common sense, for limiting the right to recover exemplary damages for oppressive, arbitrary or unconstitutional action to the acts of servants of the executive". Griffin J. approved the judgment of the Court of Appeal for England and Wales in *Broome v. Cassell* [1971] 2 QB 354 which departed from the so-called "new doctrine on exemplary damages" set forth in *Rookes v. Barnard*.

56. In *Haggart Construction Ltd. v. The Canadian Imperial Bank of Commerce* 1998 ABQB 5, the plaintiffs had obtained a loan from the first named defendant, The Canadian Imperial Bank of Commerce, for the purpose of providing the plaintiffs "with funds to pay its payables with the outstanding balance of the Loan reducing from the collection of [the plaintiffs'] receivables". The Bank became aware that the Loan was out of margin and in breach of the Condition to the extent of approximately $108,000.00 and it called in the loan, by demanding payment. The plaintiffs alleged, in essence, that the bank wrongfully called in the loan, froze the plaintiffs' account and failed to provide them with a reasonable time to pay the outstanding balance of the loan. Binder J., giving his judgment for the Court of Queen's Bench of Alberta, Canada, held as follows:

> "In this case I find that the Bank's conduct, including that which I have found to have constituted acting in bad faith, whereby Ingle ordered Behiel to obtain the Lots Assignment from Haggart and then immediately served Haggart with the Demands, together with Behiel at the same time having Haggart sign the necessary documents relating to the Mortgage Life Insurance, is deserving of punishment, for which I award the Plaintiffs $20,000.00."

57. Mr. Tennant was wrongly appointed as receiver and while the *interim* and interlocutory injunction made on the 18 March 2016 and 29 July 2016 respectively, restrained him from acting as receiver, rent was directed to be collected and retained by Mr. O'Neill, solicitor for the plaintiffs. Thus, while the defendants are correct that in broad terms the receiver was competent to act for a period of only five weeks, nonetheless the Harringtons were deprived of the benefit of the rent from which they paid service charges, insurance and other payments, and from which they derived their income for the period during which Gulland had no legal right to appoint a receiver.

58. In the light of the helpful observation of Binder J. in *Haggart Construction Ltd. v. The Canadian Imperial Bank of Commerce*, and there being no useful Irish case on point, I am satisfied that the plaintiffs are entitled to damages for trespass, and having regard to the fact the receiver was in practical terms able to operate as receiver for a period of approximately five weeks, I am satisfied that the correct measure of damages to express my disapproval of the careless actions of Gulland is to award the plaintiffs each the sum of €20,000.

Special damages: Alleged loss of tenant

59. The plaintiffs advance a claim in respect of the alleged loss of the tenant in unit 5, which is the subject of equity proceedings in the Circuit Court by the plaintiffs against Shannon OGC Ltd., issued on 12 July 2016, in which the tenant pleads "that it vacated the premises on 8 April 2016 as a consequence of the plaintiffs' unlawful termination of a periodic tenancy […] unilaterally and without notice of termination". It is pleaded that the Harringtons "forcibly took possession of the property, by entering into the property, changing the locks and the access codes" and that the tenant was thereby excluded from the property.

60. An examination of those pleadings in the Circuit Court, which must of course be regarded as no more than pleadings and not as assertions of truth, shows no reference to the impact of the appointment of the receiver on the vacation of the unit. It seems also from the evidence that the tenant of unit 5 was substantially in arrears of rent, and counsel for the defendants argues in reliance on the judgment of Laffoy J. in *in re Ronan* [2013] IEHC 386, at para. 21, that "a receiver is entitled to arrears of rent out of the assets over which he is appointed which have accrued prior to his appointment, but which are unpaid."

61. Having heard the evidence of Mr. Harrington and Mr. O'Gorman, the director of the tenant company, I am satisfied that Shannon OGC Ltd. was not an entirely satisfactory tenant and that it was in arrears of rent long before the receiver was appointed, and he was anxious to reduce the *quantum* of rent. It is possible that Mr. O'Gorman took advantage of the notification from the receiver of his appointment to vacate the premises and the allegation still before the Circuit Court that Mr. Harrington took steps to lock Mr O'Gorman out of the premises thereafter supports the view that the tenancy was likely to end unhappily, regardless of the unlawful

action of Gulland.

62. I am not satisfied on the evidence that an alternative tenant would have been available for the unit vacated by Mr. O'Gorman and I have no evidence to support the general proposition advanced by the plaintiffs that it was impossible to find an alternative tenant on account of the appointment of the receiver.

Damages for distress?
63. Mr. Tony Harrington gave creditable evidence of the distress and upset that he and his brother and their family suffered as a result of the appointment of a receiver and the calling in of the loans at short notice. I accept his evidence. Mr. Harrington came across as a truthful and not exaggerating witness and his evidence regarding the perception of the brothers that they had lost status and credit in their community is to my mind truthful.

64. However, case law suggests that general damages for distress do not sound for breach of contract and no submissions were made by counsel for the plaintiff that might assist me in to coming to a contrary view. An authority which I am bound to follow is the judgment of Denham C.J. in *Murray v. Budds* [2017] IESC 4, [2017] 2 IR 178.

65. I turn now to consider whether Gulland was entitled in the circumstances to call in the Harrington loans.

The nature of the loan facilities
66. The main issue arising is whether the facilities entitled Anglo and its successor in title to call in the loans as a unilateral right or whether, as contended by the plaintiffs, the loans could not be called in arbitrarily.

67. Counsel for the Harringtons quotes from Breslin, *Banking Law* (3rd ed., Round Hall, 2007) at para. 4-14, which refers to two categories of loan:

> "In broad terms the nature of a bank loan tends in most cases to be either a term loan or a demand loan. With a term loan the Borrower is only obliged to repay the loan at the end of the term – subject to compliance with certain on-going obligations, the breach of which may constitute an event of default thereby triggering the Bank's right to call for repayment of the loan. With a demand loan the Bank can call for repayment on demand".

68. Clause 7 of the first facility provides that the loan is repayable on demand, but the special conditions provided that the loan would be repaid within two years of the sale of each of the seven warehouse units, with no express term that the units be sold within a specified time. It reads as follows:

> "The Facility is repayable on demand which demand may be served at any time by the Bank as its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the Facility shall be repaid as follows:
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> > Clearance within two years from full sale proceeds of each warehouse unit as they are released from the Bank's charged. Interest payable monthly by direct debit".

69. The second facility is also stated to be repayable on demand, although the facility in its special conditions created a term loan for two years. Its clause related to the repayment on demand reads as follows:

> "The Facility is repayable on demand which demand may be served at any time by the Bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the Facility shall be repaid as follows:
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> > Interest only shall be met by direct debit until May 2004. Principal and interest repayments will commence from June 2004. This facility shall be fully repaid on or before July 2012".

The *Titford* case
70. The first argument of the plaintiffs is that the demand clauses of the loan agreements are to be disregarded as being inconsistent with, and repugnant to, the true purpose of the loan agreements.

71. Monies were advanced to be repaid on a particular date (by July 2012 in the case of the second facility) or on the happening of a particular event (two years after full sale proceeds of each warehouse unit in the case of the first facility) and the substance of those transactions would, it is argued, be rendered absurd by the demand proviso.

72. In *Titford Property Company Ltd. v. Cannon Street Acceptances Ltd.* (Unreported, Goff L.J., High Court for England and Wales, 22 May 1975, quoted in *Encyclopaedia of Banking Law, Division CT*, at para. 326) the defendant bank entered into an arrangement with the plaintiff companies whose business was to buy and develop land. All the plaintiff's borrowings were to come from the bank, which provided a fixed term overdraft facility with a separate account for each project. The facility letter provided a facility for a fixed term secured by first charge and provided for interest. Each letter contained a clause as follows:

> "Clause 9: All monies due by you whether by way of capital or interest shall be payable on demand and you shall have the right to repay all the monies due without notice".

73. The provision for a fixed term and the stated purposes was as follows:

"We have pleasure in advising you of the terms and conditions upon which we are prepared to provide an overdraft facility in the maximum sum of €248,000 for a period of twelve months to assist you in the purchase and development of the under-mentioned freehold premises".

74. In answer to the question whether the loans were repayable on demand, Goff L.J. said:

> "It seems to me where a bank allows an overdraft for a fixed term for a specific purpose - whether that time be such as the parties think is required for the achievement of the purpose or where it is only the most the bank will allow at that time is binding on the Bank; otherwise a customer might well be led into a disastrous position, as has happened here. The customer on the faith of the Bank's promise for a loan, and overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities and in addition he has incurred an indebtedness to the Bank in

respect of abortive expenditure".

75. Goff J. dealt with an argument that Clause 9 was ambiguous and concluded that it was not. He continued:

> "So construed, Clause 9 is in my judgment completely repugnant to the whole Facility. The Bank could not in my judgment with one hand grant a Facility for a term for a purpose to which to its knowledge clearly involved the Plaintiffs incurring expenditure and liabilities with a view to ultimate profit and with the other take it away by an unqualified right to require repayment on demand at any time. In my judgment therefore I must modify Clause 9 by reading it as subject to the provision as to the duration of this facility or ignore it altogether."

76. *Titford* was considered by Gibson J. in *Williams & Glyn's Bank Ltd v. Barnes* [1981] Com LR 205:

> "It is clear to me that Goff J. decided that the true purpose of the Agreement contained in the Facility Letter was to provide money to be laid out in a development project with a view of profit. A provision for repayment on demand was he concluded repugnant to that main purpose. If on the proper construction of that agreement the true purpose had been held to be that the Bank would lend the money for the project on terms that the lending should not in any event extend beyond the term date and on the terms that the Bank's participation should continue only so long as the Bank finds it useful and in their own interest to continue the lending, then there is nothing in the judgment of Goff J. to require that provision for repayment on demand be disregarded as repugnant. If the judgment of Goff J. did require such a conclusion upon a different construction of the Facility Letter, if justified, and is to be regarded as stating that in the contest for primacy between a term loan, and a Clause for repayment on demand, the provision for the term loan must have always prevail, then with respect I should not be able to follow it. Such a conclusion would in my judgment be contrary to the basic principle of common law of contract restated by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd*. [1980] 1 All ER 556 to the effect that parties to a contract are free to determine for themselves what primary obligations they will accept subject to certain well known categories of exception which are not relevant to this point. I take the true principle to be that stated by Lord Denning M.R. in *Neuchatel Asphalt Co v. Barnett* 1 All ER 362 which Goff J. cited:
>
> 'It is a well settled rule of construction that if one party puts forward a printed form of words for signature by the other, and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, the court will limit or reject the printed words so as to insure that the main object of the transaction is achieved.'"

77. In *Durant v. Barclays Bank Plc.* (Unreported, Court of Appeal for England and Wales, 26 May 1993) Stuart Smith L.J. referred to Goff J.'s decision in *Titford*:

> "In [Titford] there was an express term that the loan was to be for a year. There was also provision that the loan was repayable on demand. These were inconsistent provisions and Mr Justice Goff held that, as a matter of construction, the former prevailed over the latter. But that is not this case. There is nothing inconsistent in the two clauses. I cannot construe the words, "the loan will be repaid within two years", as meaning that it will not be repayable until two years have elapsed. It is the exact opposite. I am prepared to accept that the Bank could not frustrate the purpose of the loan by calling it in before that purpose was achieved. I think there must be an implied term to that effect. The purpose of loan was two-fold: to pay off the Abbey National loan and to finance the building project. It is clear it was in fact used for these purposes. Moreover, the request said to have been made in late 1989 to refinance the borrowing is not the same thing as demanding repayment of the loan. That demand was not made until August 1991, which was over two years after the loan was made. It was an express term that it was to be repaid within that period and this was not done."

78. In *Carey Group plc. v. AIB Group (UK) plc.* [2011] EWHC 567 (Ch), [2012] Ch 304, para. 39, Briggs J. held as follows:

> "The court will not lightly find that an important provision in a banking facility, such as for repayment on demand, is repugnant, although the particular facts of the *Titford* case afforded a powerful basis for that conclusion. Similar arguments failed in *Williams & Glyn's Bank Ltd v Barnes* [1981] Com LR 205 and in *Lloyds Bank plc v Lampert* [1999] 1 All ER (Comm) 161, albeit on differently worded agreements."

Discussion

79. Counsel for the plaintiffs contends that the facts of the present case are similar to those in *Titford* and afford an authoritative basis for a finding that the demand provisions of the subject loans are repugnant to the purpose of the loan agreements. I do not agree.

80. The two facilities were advanced for identified and different purposes. The first facility expressly stated its purpose was to finance the construction of seven warehouse units at Churchfield, Co. Cork., and the second facility expressly stated that its purpose was "to assist the Borrowers repay a company debt". The overall intention of the borrowings was to provide the plaintiffs with a modest pension. The units are built. The plaintiffs benefited from the rental income, and the purpose has long since been achieved.

81. In *Titford*, the loan at issue was an overdraft facility for a fixed period of one year which was found to be inconsistent with an earlier demand in the light of the purpose for which the loan was advanced. The facility therefor materially different from the facilities at issue in the present case where the monies were immediately advanced and utilised for a particular purpose.

82. For this reason, I consider that *Titford* does not assist the plaintiffs and the demand proviso is not to be disregarded as being repugnant to the main object and intention of the loan agreements, as the purpose of the loans was not frustrated by the addition of the clause for repayment on demand.

83. I now turn to consider the other arguments made by the plaintiffs.

The demands

84. Gulland claims a qualified and unrestricted right to call in the loans irrespective of default and the evidence of the witnesses from Gulland was that it was the demand nature of the facility, and not any default of which they were aware, that led to the decision to make the demands.

85. No default other than a failure to pay following demand has been identified in regard to the first facility, but arguably, the second facility is in default as the initial two-year term had expired. The second facility was never met by capital and interest repayments,

was not repaid in full in July 2012, the identified end of the term, and interest only repayments continued throughout.

86. The Harringtons say that at all times they repaid the loans on an interest only basis, precisely the terms demanded by Anglo and IBRC, including following review. The defendants, at para. 3 of their defence, admit that "the Plaintiff duly and punctually paid the instalments due on an interest only basis in respect of each facility". Throughout Anglo and later IBRC accepted the interest only repayment without demur. The Harringtons say that they were never requested to commence payment of capital and interest, and that accordingly, they were not in default at any material time.

87. By letters of demand dated 14 October 2015, 2 February 2016, and 29 November 2016 Gulland, through its agents, called on the plaintiffs to discharge the total amount outstanding in respect of both facilities, then calculated to include surcharge interest as €1,261,912.22. The letter of 14 October 2015 was sent to the address of Michael Harrington, the first plaintiff, but not to Tony Harrington's then address. However, the demand letters must be taken to have been received as the solicitor for the Harringtons on their behalf and on behalf of the Company wrote in reply on 20 October 2015 and 11 February 2016, and asked for details of the accounts and copies of the facility letters. A reply which identified the title of Gulland was sent by the solicitors for Gulland on 13 November 2015 .

88. Mr. Tony Harrington gave uncontroverted evidence that the first time the brothers heard that Gulland had appointed a receiver was when the tenants contacted him after they had received notice through DNG Creedon Auctioneers, on 11 February 2016, and the letters from Grant Thornton notifying the auctioneers that Mr. Tennant had been appointed receiver.

89. Mr. Harrington said he visited each tenant personally and explained his upset at the appointment of the receiver and that from his point of view and that of his brother they were not in arrears.

90. The Harringtons say that the demands "came out of the blue" and that at all time material to the claim, the loans were being serviced in the manner agreed by Gulland's predecessor in title and that those arrangements had not been terminated.

91. In reply to cross-examination, Mr. Harrington accepted that, in principle, the loans were not intended to continue indefinitely, but said that the arrangement with Anglo was that the capital would be paid off as the units were sold in the future. He accepted that there was no actual agreement that the units would be sold at an identified future time or in any particular sequence, but that the intention was that he and his brother would derive income and pension security from the rents and would repay the capital on the sale of any unit, when and if this came to pass.

92. In cross-examination Mr. Harrington accepted that he would have known, "ballpark" how much he and his brother owed at any one time, and I noted in the course of his evidence that he was fluent in unsolicited and quick calculations in reply to questions regarding his after-tax income and the rent flows.

93. The correspondence before the Gulland purchase is of some importance. By letter of 16 September 2011, Anglo asked the Harringtons to put a proposal to the bank regarding its "overall exit strategy for the debt". While that correspondence did not go any further, it should have been clear to the Harringtons at that stage that Anglo might have been not prepared to allow the first facility to continue indefinitely, and that it expected some means by which the capital payments might be met in the future. Anglo sought "a proposal to the bank outlining the overall exit strategy for the total debt" from the plaintiffs. In that letter there is no reference to July 2012 as the term in respect of which the second facility was deemed to be fully repaid, but only that Anglo was "due to return to credit committee with the Harrington Facilities" and that it was "seeking to put a principal and interest repayment plan in place" that would "see the debt fully repaid over a period of time".

94. A letter some three years later of 16 September 2014, from Anglo notified the Harringtons that the 2003 facility had expired in 2012 and was repayable on demand, and although that letter is not a demand for payment, it does and should have triggered in the Harringtons sufficient warning or notice that Anglo might thereafter require them to pay the capital amount on the second loan. The writer Mr. Gallagher stated *inter alia* "We draw your attention to clause 7 of the [second] Facility Letter and note that the Facilities expired on or before July 2012 and are repayable on demand". The letter provides relevant contact numbers (which are redacted) in relation to the availability of IBRC to discuss the contents of such letter and the financial circumstances of the plaintiffs.

95. For these reasons and because of the evidence I reject the argument of counsel for the Harringtons that the demand sent by Gulland in late 2016, "came out of the blue", and they were in general aware that the facilities might be called in and that Gulland had taken the benefit of the Anglo loans.

96. I find that the Harringtons were aware that after the loans were transferred to Gulland, the previous arrangements were likely to be less acceptable as they offered to redeem the loans in two letters of offer of 21 January 2016 and 11 February 2016, which were rejected by Gulland. I find these offers were made in the knowledge that Gulland might at the minimum demand the commencement of capital and interest repayments, or that the units be sold in an orderly fashion to deal with the first facility.

Implied term?

97. Clarke J. in *ACC Bank Plc. v. Kelly* [2011] IEHC 7, at para. 7.7, in relation to the issue of the entitlement of a financial institution to call in a loan for no reason, said as follows:

> "[I]t may be possible to argue that a financial institution needs at least some reason in order to call in the loan (at least in cases where the relevant facility contemplates a term arrangement) even though it may not be a reason which amounts to a breach of a term of the relevant facility."

98. That obiter was quoted by Irvine J. in *O'Flynn v. Carbon Finance Ltd*. [2014] IEHC 458, at paras. 151-152. She was satisfied, for the purposes of granting interlocutory relief to the plaintiff, that "they had established a serious issue to be tried as to whether [the defendant], in issuing the demand letters for the admitted sole purpose of seeking to procure an event of default that would allow them appoint receivers and call in the corporate loans, acted in a capricious, arbitrary or unreasonable manner such as to call into question the validity of such demands", and said as follows:

> "However, this is an interlocutory application and the threshold which the plaintiffs have to achieve is relatively modest. In these circumstances I am satisfied that they have established a serious issue to be tried as to whether Carbon in issuing the demand letters for the admitted sole purpose of seeking to procure an event of default that would allow them appoint receivers and call in the corporate loans, acted in a capricious, arbitrary or unreasonable manner such as to call into question the validity of such demands", at para. 154.

99. Irvine J. did not need to deal with the substance of the test for establishing when a unilateral right conferred in a loan facility is invalidly exercised by an arbitrary or unreasonable acting of the caller of the loan. Further, the issue under consideration was the motive of Carbon and whether its purpose in making demand was to procure an event of default.

100. Counsel for the plaintiffs argue that the loan contracts contain an implied term and that in order to give business efficacy to the borrowings and notwithstanding the demand nature of the facilities, the lender could not unilaterally and without cause call in the loan in a way that was capricious, arbitrary or unreasonable and that the demand for repayment of both facilities is, therefore, void.

101. Counsel for the defendants argues that the implied term suggested by the plaintiffs "would contradict an express term in the loan agreement" since both demand clauses of the loan facilities contain the express term that facilities be repayable "without stating any reason for such demand".

102. It is well established in the authorities that a term may be implied into a contract if it is necessary to give a so-called "business efficacy" to the contract and if it is so obvious that the it "goes without saying", and capable of clear expression, as described in Lewison, The Interpretation of Contracts (2nd ed., Sweet & Maxwell, 1997) p. 126. In *Cheldon Property Finance DAC v. Hale* [2017] IEHC 432, an authority on which the defendants rely, it was argued that there was an implied term that the bank would not transfer the loan to an unregulated or unauthorised entity. McGovern J., quoting from the leading judgment of the Court of Appeal in *Flynn v. Breccia* [2017] IECA 74, [2017] 1 ILRM 369, held as follows:

> "13. In the *Breccia* case, the trial judge drew together the various strands emerging from jurisprudence in this State and in England and Wales on the subject of incorporating implied terms and from these authorities he held that the following principles emerge: -
>
> '[B]efore a term can be implied…:
> (1) it must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (3) it must be so obvious that "it goes without saying";
>
> (4) it must be capable of clear expression;
>
> (5) it must not contradict any express term of the contract…'
>
> "14. The terms which the defendants seek to have implied in the loan facility do not meet the above tests and would have the effect of contradicting an express term of the contract. As a matter of law, such a claim is bound to fail. Accordingly, this is an issue capable of being determined in an application for summary judgment. There is no warrant for implying such a term and I decline to do so."

103. The difficulty apparent in the analysis for which the plaintiffs contend is that the express terms of the contract are difficult to reconcile with any implied term that the lender act reasonably, as the facilities were unequivocally demand facilities and contained no express restriction on when a demand could be made, and a plain reading of the demand nature of the facilities does suggest that the lender could make a demand for immediate repayment irrespective of performance.

104. I am not persuaded that the judgment of the Court of Appeal for England and Wales in *Abu Dhabi National Tanker Co. v. Product Star Shipping Ltd. (No 2) (The Product Star case)* [1993] 1 Lloyd's Rep 397 is on point. There, the Court held that the exercise of an owners' discretion whether to allow a vessel under the terms of a charterparty to proceed to a port of discharge when he believed that that port of loading was unsafe or dangerous was not to be made in an arbitrary, capricious or unreasonable manner, but honestly and fairly in the interests of all the parties. That Court considered that the discretion in a charterparty to divert a vessel was to be exercised reasonably. Leggit L.J. said as follows:

> "Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably."

105. There is no discretionary element in the express terms of the facilities that might import a discretion, still less an obligation, whether express or implied, that it be exercised reasonably.

106. I am not prepared to agree with the submission by counsel for the plaintiffs that there exists an implied term of good faith in exercising the unilateral right contained in this contract and in that I am bound by the decision in *Flynn v. Breccia* that no such overriding principle exists.

107. Further, the judgment in *O'Flynn v. Carbon Finance* was given in an interlocutory injunction and the *dictum* of Clarke J. in *ACC Bank v. Kelly* raises a question regarding in particular the possibility that demand cannot frustrate the purpose for which a loan was agreed to be advanced. I have considered the point above. Neither judgment can support the implication of the term for which the plaintiffs contend.

The demands: Were the letters of demand defective in form?

108. Further, it is argued that the facilities were always intended to be separately and independently construed, but the demand letters made one demand in respect of the accounts jointly and no attempt was made to isolate or identify the separate elements, and that the demand were defective.

109. Gulland accepts that there was an error in the first letter of demand of 14 October 2015, albeit one that it seeks to characterise as a "technical error", in that the amount sought was the amount then outstanding jointly on the two facilities but the letter referred only to the second facility. It is also accepted that the second letter of demand of 2 February 2016 contained an error of a similar type, albeit the reverse error, in that the letter of demand referred only to the first facility and again sought the amount due under the two facilities taken together.

110. No error of calculation or identification is shown to have occurred in the third letter of demand of 29 November 2016, the one

which demanded repayment within 24 hours, save with regard to the claim for surcharge interest which was waived at trial.

111. The authority relied on by the defendant is *Bank of Baroda v. Panessar* [1987] 1 Ch 335, where Walton J. held that a demand for "all moneys due to us" was a valid demand even though it did not specify the sum owed.

112. In *Flynn v. National Asset Loan Management Ltd*. [2014] IEHC 408, Cregan J. held that the letter of demand, even if it did overstate the amount due, was a valid letter of demand. That judgment is authoritative and consistent with the authorities that a letter of demand is not invalid on account of a mistake in the amount demanded.

Conclusion on the demands

113. I accept that the first two letters of demand that payment be made "after three days" and "forthwith" were sent and received, but Gulland or its agents did not deal in a satisfactory way with the reasonable requests contained in the letters from Mr. O'Neill in which he sought particulars of the loans. These letters were especially important as the demands were unclear, and failed to identify the account to which they related or the amounts outstanding.

114. In particular, the correspondence suggested the term of the facilities expressed as a whole, had expired, and that characterisation was accepted in the course of the evidence by the Gulland witnesses as not correct regarding the first facility, as there was no agreed end date for payment. While it is true to say that the second facility had long passed its end date, the lender could not rely on that fact to ground an assertion that the facilities were both in default.

115. The final letter of demand gave a mere 24 hours' notice.

116. In the particular circumstances of this case I am satisfied that the demands were not valid to require payment "forthwith", or within 24 hours, of the facilities which were being met in accordance with an informal arrangement between the parties for fifteen years and where it must have been apparent to Gulland notwithstanding its very limited knowledge of the factual nexus and almost complete absence of relevant background documentation, that the borrowers could not have been in a position to repay at such short notice.

117. The fact that three letters were sent over a quite lengthy period of time does not make the final demand of 24 hours valid, as the Harringtons continued with the established payments and no clear indication was given that this was not acceptable to Gulland.

118. Further, it is critical in that context that in a letter of 1 July 2015 Pepper on behalf of Gulland after identifying it as agent for Gulland said:

> "Please accept this letter as confirmation that interest payments are being received on the loan accounts under the above client reference."

119. The letter made absolutely no complaint regarding the mode of payment or the amounts and merely asked for updated information regarding tenants, a valuation and confirmation that the tax affairs of the borrowers were up to date. That letter gave the impression that Gulland had no objection to the ongoing arrangement. I accept however that the letters commencing with that of 13 November 2015 from the solicitors for Gulland did make the position clear. For that reason, I cannot accept the argument that there was insufficient information available to the Harringtons by the end of 2015 for them to understand the basis on which Gulland claimed repayment.

120. However, the Harringtons also claim that there exists an estoppel sufficient to invalidate the demands.

Estoppel by convention?

121. It is argued by the plaintiffs that the conduct of Anglo and its successors in title in respect of both the facilities amounts, at the least, to an estoppel by convention and that, therefore, the defendants are to be prevented from relying on the strict terms of the facilities. Counsel for the plaintiffs argue that an estoppel by convention arose from the actions of Anglo, and later the special liquidators of IBRC, in regard to the operation of the loans, and that a common assumption had developed between the parties arising from the manner in which repayments were made and accepted.

122. The plaintiffs also say that the provision for full repayment of the second facility on or before July 2012 was never enforced by either Anglo or its successors in title and that at no time any demand was made by them for repayment of the full sum. It is further stated that both Anglo and its successors in title continued to accept the instalments tendered by the plaintiffs, and that at no point demanded payment of the full capital sum outstanding.

123. By way of illustration, correspondence was had between the Harringtons and Anglo and IBRC in relation to the facilities. A letter dated 11 July 2014 on behalf of the special liquidators said as follows:

> "Please note that your obligations to IBRC and your payment terms are unaffected by the liquidation of IBRC and those obligations and the terms of your loan(s) remain the same regardless of who acquires your loan(s) form the Special Liquidators. You should continue to make payments to IBRC in the agreed amounts and on the agreed dates. It remains open to you to repay your loan(s) in full at any time prior to your loan(s) being sold."

124. Subsequently, various letters from the special liquidators were sent to the plaintiffs containing the same warnings. No warning was given in any of the letters regarding the right of IBRC to demand immediate repayment.

125. A number of factors bear on my consideration which may not be present in all cases where a lender seeks to rely on the demand nature of a facility. What is striking in the present case is not that the lender forbore to seek repayment in accordance with the express terms of either the first or second facility, but that the consistent course of dealings between the parties throughout the entire term of the facility up to the date of demand in 2016 was not in accordance with the strict terms of the contract, but was in accordance with the informally agreed, or at least informally represented, position so that, for a period of fifteen years, payments were met punctually and in the correct amount in accordance with that unwritten agreement or convention, and accepted without demur.

126. Correspondence in 2011 and 2014 from Anglo and IBRC was not sufficiently clear to warn the plaintiffs that the arrangement was likely to be terminated without notice and indeed the correspondence suggested that a negotiated arrangement satisfactory to both parties was the preferred approach.

127. The course of conduct was long lasting and there is no difficulty in identifying the nature of the representation or undocumented variation, namely that payments be met on an interest only basis from month to month, and the Harringtons acted on the agreement or representation.

128. Because of the engagement had with Anglo on the various annual reviews on the account by Anglo throughout the years the ongoing payment of interest only was accepted as satisfactory for that lender's purposes, and accordingly the borrowers were entitled to know if and when that arrangement was being treated as terminated.

129. Following the formal registration of Gulland as owner of the charge, one letter of demand, the last of the chain, was sent on 29 November 2016 which notified that the facility and the security had been registered in the name of Gulland, formally demand payment of the amount said to be due at close of business on 28 November 2016, and notified that, if payment was not received within 24 hours from receipt of the letter, Gulland would exercise its rights, including the right to enforce the security, appoint a receiver or "a statutory receiver" without further notice.

130. In their evidence, Gulland's witnesses accepted that it did not have the benefit of knowledge of any of the engagement which had occurred with Anglo and the choice made by Gulland to call in the loan was not one that was made following any consideration whatsoever of the circumstances of the operation of the loan accounts which, by the time the facilities were called in, were fifteen years old.

131. Gulland did not know of the engagement of Mr. O'Neill, the fact that Anglo had furnished an unconditional release of its security on the sale of the first unit without demanding a partial repayment of the loan, and the fact that all payments in accordance with the customary method of repayment between the parties had been met.

132. The circumstances are broadly similar to those identified by Birmingham J. in *Zurich Bank v. McConnon* [2011] IEHC 75, where he held that the standstill agreement by the bank did not amount to an estoppel by which would prevent it from calling in the loans, and noted in particular that following the end of the agreed standstill period an offer was made to redeem the loans by the defendants. While Birmingham J. accepted that the agreement not to enforce during the standstill period was enforceable, he rejected the argument that that agreement imposed a further obligation, and that it could not be said that there was a "common interest" between borrower and lender. Birmingham J. found nothing unfair, inequitable, or unconscionable in the actions of the bank, such as to give rise to an actionable estoppel.

133. But one factor I consider relevant in distinguishing the approach of Birmingham J. in *Zurich Bank v. McConnon* from the facts of the present case is that the evidence of Gulland witnesses at the hearing of the action was to the effect that Gulland made no attempt to weight up the factual *nexus* in which the loans had been repaid heretofore, and relied exclusively or wholly on the demand nature of the facility without more.

134. That evidence bears examination in detail.

The evidence of Mr. Sullivan

135. The evidence of Donal Sullivan, director of Gulland, explained that Gulland had purchased a "bundle" of secured and unsecured loans without any "real" investigation and where limited diligence was engaged. Mr. O'Sullivan said that, in general, Gulland purchased the loans, "as is" and no title requisitions or investigation was permitted. He also confirmed that the purchases from the special liquidators of IBRC did not include any obligation on the special liquidators to provide "background" information or to identify previous course of dealings, to specify any special elements in the relationship with the borrowers, and that the papers Gulland obtained on closing was the relevant facility letters and up to date statements but relatively little other documentation.

136. Mr. O'Sullivan admitted that he was unaware what percentage of the loans purchased by Gulland in 2014 were preforming, and accepted that it was unlikely that Gulland would have been furnished with any of the *memoranda* on the file concerning the individual engagement with the Harringtons, nor the correspondence with Messrs. St. J. O'Neill, their solicitor. Mr. O'Sullivan was unclear whether it was Gulland or Pepper that made a decision to call in the loan, but regarded it "as quite normal" that Pepper would do this as one of its delegated functions. He confirmed that a decision to call in a loan was generally made following approval of a credit committee made up of investors and their agents.

137. Mr. O'Sullivan confirmed in cross-examination his view that the first loan was not expressly repayable other than on the sale of the individual units, that Gulland could not "unilaterally" convert that loan into an annuity loan on which principal and interest would be paid. He accepted in those circumstances that the only option available to Gulland to call in the loan the demand nature of the facility and that in his view permitted Gulland to call in the loan in its entirety.

The evidence of Mr. Minnock

138. Evidence was also heard from Brian Minnock, who formerly worked with Pepper, who accepted that the demand for surcharge interest was an error. Mr. Minnock also confirmed that Gulland relied on the demand nature of the first facility to demand payment.

139. In cross-examination Mr. Minnock confirmed that he did not investigate the specific demands made of the Harringtons, but he did confirm that Pepper proposed at a credit committee in January 2016 that a receiver be appointed. He confirmed that Pepper wanted a proposal that would give Gulland a "higher return" and that would take into account the means of the borrowers and their capacity to repay and as such was not forthcoming the decision was made to terminate the facilities. In reply to cross-examination, Mr. Minnock did not accept that characterisation of the Pepper administration as "chaotic" although he did accept that correspondence to him and from him to Mr. O'Neill got lost between the various Pepper offices and he cannot explain how the demand letter of 14 October 2015 was sent to old addresses or places of business and not the current addresses of the Harringtons.

140. The two witnesses were unable to offer any evidence that could counter the weighty evince on Mr. Harrington that he and his brother had in their long engagement with Anglo and later with the IBRC never been advised that the demand provision of the facilities might be activated without some or some reasonable notice, and that the facilities were performing in the manner agreed.

Conclusion on the estoppel

141. I am satisfied that Gulland did not act in a way that was contemplated by the contract as it operated between Anglo and the Harringtons, and in accordance with the expectations and on-going arrangements between them over the currency of the loans.

142. I am not satisfied, however, that the transactions create an estoppel preventing Anglo and its successors in title from making demand of the loans. But in my view, further time should have been given to meet the demand, and a reasonable time to respect the borrowers' equity of redemption, which I now turn to consider.

Equity of redemption
143. The general approach of the court to mortgage security has been to recognise that the equity of redemption carries with it a corresponding obligation on the part of the mortgagee not to engage in any action that might prevent the mortgagor redeeming the loan and freeing the property from the security.

144. Certain duties of good faith that are said to be imported into the relationship of mortgagor and mortgagee find expression in the dicta of Templeman L.J. in *Downsview Nominees Ltd. v. First City Corporation Ltd*. [1993] AC 295, where he said the following:

> "Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower."

145. The principles thus explained do not mean that a mortgagee must exercise its powers to the benefit of the borrower or with the borrower's own commercial interests in mind. The duty is not fiduciary. However, the interplay between the rights conferred on both mortgagor and mortgagee, and the right of the borrower to have the security released on repayment, offers protection for the borrower and a right which must not be ignored.

146. This means, in the present case, that Gulland could indeed call in the loans, but could not do so entirely arbitrarily and without a consideration of all of the circumstances. On the facts of the present case, I consider that Gulland has proffered no reason at all why a decision was made to give 24 hours' notice for the repayment of the entire amount.

147. The loan facilities may not be understood as operating independently of or separately from the charge, and having regard to the right of redemption of the borrowers, the effect of the calling in of the loans at ADD -3 days' or 24 hours' notice was not an exercise of a power envisaged by the ADD -overall agreement.

148. It is not necessary for me to determine the precise length of notice that ought to have been given, because on any reading of a requirement that notice be given to respect the rights of borrower and lender, the notices given by Gulland, in the particular circumstances and history of the loans are not likely to have been remotely capable of being achieved by the borrowers, even if they did have monies available to them to discharge the loans.

Unfair terms and consumer contracts
149. Further and in the alternative, the Harringtons argue that they made the borrowings for the sole purpose of providing themselves with a modest pension, and for that reason, they are to be treated as "consumers" for the purposes of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts ("the Consumers Directive). They further argue that the clauses entitling Anglo to a repayment in full when there is no default are in breach of the Consumers Directive which was subsequently amended by Directive 2011/83/EU.

150. The European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, S.I. No. 27/1995 ("the Consumer Regulations") transposed the Consumers Directive into Irish law, one of the objects thereof being "to remove unfair terms from [consumers] contracts".

151. It is well established in the authorities that the question of whether a person is a consumer is a matter to be determined objectively and irrespective of the characterisation that the parties might have applied to the loan. In *ACC Loan Management Ltd. v. Browne* [2015] IEHC 722 I held that the label or characterisation that the parties themselves "may be deemed to have put on a loan is not determinative", although the characterisation put by the parties themselves may be of some benefit to that analysis.

152. The borrowers were partners in business enterprise and although they did engage that enterprise with a view to providing an income for themselves, they were partners and borrowed in that capacity and not as personal borrowers. The borrowings are similar in nature to those considered by Kelly J. in *AIB v Higgins* [2010] IEHC 219 and by me in *Stapleford Finance Ltd v. Lavelle* [2016] IEHC 385 where the fact that the defendants had borrowed for the purpose of a partnership was noted as central to the decision of Kelly J. in *AIB v Higgins*. The Harringtons were not consumers for the purposes of the Act or the Regulations.

Decision and summary
153. I am satisfied that the letters of demand were not validly served. There being no other basis of default in payment, the counterclaim fails.

154. However, Gulland may by suitable letter of demand seek the repayment of the full amount now due, except surcharge interest, and the loans are not subject to an implied term that the interest only arrangement is to continue indefinitely.

155. The plaintiffs are awarded €20,000 each for trespass and, as I am satisfied that the error was the responsibility of Gulland, this is to be awarded against Gulland only.

156. Declarations in the terms of this judgment will be made.