THE HIGH COURT

COMMERCIAL

[2018 No. 965 S]

BETWEEN

PROMONTORIA (FINN) LIMITED

PLAINTIFF

AND

HERBERT BOYLE AND PAUL KELLY

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 20th day of March, 2019

INTRODUCTION

1. This is a claim by the plaintiff ("Promontoria") jointly and severally against the defendants ("Mr. Boyle" of Donnybrook, Dublin 4 and "Mr. Kelly" of Rathmines, Dublin 6) seeking summary judgment in the sum of STG£3,268,428.44, arising from its purchase of loans taken out by Mr. Boyle and Mr. Kelly from Ulster Bank Ireland Limited, a company incorporated in Ireland ("UBIL") and Ulster Bank Limited ("UBL"), a company incorporated in Northern Ireland, collectively the "Bank".

BACKGROUND FACTS

2. The borrowings arose from a facility letter ("Facility Letter") which is dated on its face 9th May, 2011, but which was accepted by Mr. Boyle and Mr. Kelly on 23rd May, 2011. This Facility Letter is signed on behalf of UBIL and UBL and it provided for the renewal/restructuring of previous facilities granted to Mr. Boyle and Mr. Kelly in connection with their purchase of 45 apartments above the Malmaison Hotel in Liverpool. The Facility Letter contains the following three loan facilities:

- Facility A which is from UBL and is an overdraft facility in the sum of STG£50,000. The repayment terms are stated to be as follows:

> "The Facility is repayable on demand in accordance with normal banking practice. Without prejudice to the Bank's overriding right to call for a repayment on demand it is agreed that the Facility will be cleared in full by 31st October 2011."

- Facility B is from UBL and is a committed loan facility in the sum of STG£570,000. The repayment terms are stated to be as follows:

> "The facility is advanced on an interest only basis for a further period until 31st October 2011 when the repayment arrangement is due for review or until the borrowing is cleared in full, whichever date is earlier."

- Facility C is from UBIL and is a bridging loan facility in the sum of STG £2,550,000. The repayment terms are stated to be as follows:

> "The facility is advanced on an interest only basis for a further period until 31st October 2011 when the repayment arrangement is due for review or until the borrowing is cleared in full, whichever date is earlier."

3. The Summary Summons gives a breakdown of the sum of STG£3,268,428.44 as follows, the sums being stated to be due as of 29th June, 2018:

Facility A - STG£49,291.88

Facility B - STG£584,587.43

Facility C - STG£2,457,448.13

Interest Roll Up Account - STG£177,101.00.

4. Mr. Boyle and Mr. Kelly had previously executed a legal charge in favour of UBIL on 21st April, 2008 charging 14 apartments above the Malmaison Hotel in Liverpool as security for borrowings from UBIL. The Facility Letter expressly provides that this charge was security for the borrowings set out in the Facility Letter, namely Facilities A, B and C..

5. The Facility Letter makes express reference to the Bank's General Conditions for Business Lending being applicable to the facilities in the Facility Letter and Clause 8.2 (a) of the General Terms and Conditions for Business Lending states:

> "Upon the occurrence of any of the events specified below, the Bank may by written notice to the Borrower terminate the Facility and/or demand immediate repayment of all or any amounts drawn and outstanding under the Facility and all accrued interest and other sums payable in respect of the Facility (and if the Facility is drawn or only partially drawn, the facility or the portion of the Facility which remains undrawn shall be cancelled) and the Bank may declare that the Security has become immediately enforceable;
>
> (a) Non-Payment: the Borrower fails to pay on the due date any amount payable under this Agreement […]"

6. It is not disputed that Mr. Boyle and Mr. Kelly executed the Facility Letter, that they received the benefit of those monies advanced by UBIL and UBL and that the sums have not been repaid by Mr. Boyle or Mr. Kelly to UBIL or UBL or indeed to Promontoria (the successor in title to this Facility Letter). In particular, it is not disputed that Facility A, being the overdraft facility, which was

repayable in full by 31st October 2011 was not paid in full by that date or indeed any other date by Mr. Boyle or Mr. Kelly. As a result, Promontoria claims that, pursuant to Clause 8.2(a) of the General Conditions, Messrs. Boyle and Kelly were in default in relation to Facility A and the Bank (or its successor in title) was entitled, as and from 1st November, 2011, to demand immediate repayment of all the amounts due under the Facility Letter, i.e. the amounts due under Facility B and C as well as under Facility A.

7. What the defendants do dispute is Promontoria's entitlement to summary judgment on a number of grounds, including whether Promontoria has correct legal title as the assignee of the loans from the Bank, so as to enforce them against the defendants. Although this Court does not propose to set out every ground in full, it has fully taken all grounds into account and sets out hereunder the key defences relied upon by the defendants.

Promontoria's chain of title to the Facility Letter

8. The first defence is that Promontoria is not legally entitled to stand in the shoes of the Bank under the Facility Letter so as to enable it to seek this summary judgment. The background to this defence is that a Mortgage Sale Deed (the "Mortgage Sale Deed") dated 23rd July, 2015 was entered into between, *inter alia*, UBIL, UBL and Promontoria Holdings 152 B.V. whereby UBIL and UBL agreed to sell certain mortgage assets together with the underlying loans and security to Promontoria Holdings 152 B.V. Mr. Kelly and Mr. Boyle are specifically listed in the Schedule to the Mortgage Sale Deed as obligors, whose loans are being sold, as is the security over the 14 apartments in Liverpool. It seems clear to this Court therefore that UBIL and UBL agreed to sell to Promontoria Holdings 152 B.V. loans it had made to the defendants.

9. The next link in the chain of title is a Deed of Novation dated 14th September, 2015 between, *inter alia*, UBIL, UBL, Promontoria Holdings 152 B.V. and Promontoria. This provides for the novation of the Mortgage Sale Deed in favour of Promontoria. There can be little doubt that this Deed of Novation substitutes Promontoria in place of Promontoria Holdings 152 B.V. as the buyer of the loans under the Mortgage Sale Deed.

10. The final link in the chain of title is a Global Deed of Transfer dated 23rd October, 2015 entered into between UBIL and Promontoria. This is the formal assignment by UBIL of the benefit of loans and related security documents, which were agreed to be transferred under the terms of the Mortgage Sale Deed. Uncontroverted evidence was provided on affidavit on behalf of Promontoria to the Court of so-called 'goodbye letters' from UBL and UBIL (and also 'hello letters' from Promontoria), to Mr. Boyle and Mr. Kelly in relation to the assignment of the defendants' loans from UBL and UBIL to Promontoria, so as to prove that there was compliance with s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877.

11. A key claim by the defendants is that the foregoing documentation does not provide a chain of title so as to enable Promontoria seek judgment under the Facility Letter against the defendants. They rely, in particular, on the fact that the Facility Letter which is referenced in the Schedule to the Global Deed of Transfer, as the facility letter being transferred, is stated to be one which is dated 23rd May, 2011 between UBIL and Mr. Boyle and Mr. Kelly. The defendants argue that the Facility Letter that they signed is in fact dated 9th May, 2011 on its face, although it was accepted by the defendants on 23rd May, 2011. On this basis, they argue that Promontoria did not acquire the benefit of the Facility Letter, upon which they are now seeking judgment. This Court does not accept this argument as being credible. The date an agreement is signed is the more correct way to refer to an agreement, rather than the date on the face of the agreement which could be a completely different date, as it was in this case. This Facility Letter, although on its face dated 9th May, 2011, was not entered into on that date. It was only entered into when it was signed by the defendants. If it had never been signed, but simply received by the defendants, it is clear that it would not be a binding facility letter as of the date on the face of that letter or indeed any other date. It only became binding on 23rd May, 2011 when it was signed and therefore there can be little doubt that the facility letter which is referred to as dated '23rd May, 2011' in the Schedule is the Facility Letter in this case.

12. In addition, although the Schedule to the Global Transfer Deed refers to a facility letter dated 23rd May, 2011 between UBIL and the defendants and does not refer to UBL, it seems clear that this is the Facility Letter, since there is no averment by the defendants that there was some other facility letter executed between them and UBIL and/or UBL to which this document dated 23rd May 2011 in the Schedule of the Global Transfer Deed, refers. This is particularly so since, as noted in greater detail at para 13 *et seq* hereunder, terms defined in the Mortgage Sale Deed have the same meaning when used in the Global Transfer Deed and also UBIL was appointed to act as agent for UBL for the purposes of executing the Global Transfer Deed. Thus, when the Global Transfer Deed, by its express terms, provides that UBIL, as 'Seller', assigns the 'Underlying Loans' as set out in Schedule 1, it is UBIL and UBL as Seller (since that is how that term is defined in the Mortgage Sale Deed) assigning those 'Underlying Loans' which were agreed to be sold under the Mortgage Sale Deed to Promontoria, namely the loans set out in the Schedule to the Mortgage Sale Deed, which contains loans between UBIL *and* UBL and certain obligors, including Mr. Boyle and Mr. Kelly, who are expressly referenced therein. There can be little doubt in all these circumstances that the facility letter dated 23rd May, 2011, referenced in the Schedule to the Global Transfer Deed and assigned thereby, is the Facility Letter, notwithstanding the absence of a reference to UBL. Therefore, this Court does not accept that this 'chain of title' defence offers the defendants a credible defence to the claim that Promontoria are entitled to judgment pursuant to the terms of the Facility Letter.

13. In a similar argument, the defendants also argue that, as UBL is not a party to the Global Deed of Transfer, that Deed did not transfer Facility A and Facility B to Promontoria, since these two facilities were entered into by the defendants with UBL. However, pursuant to Clause 2.5 of the Mortgage Sale Deed, UBL appointed UBIL to act on its behalf as its agent in relation to the sale of the loans in the following terms:

> "UBL by its execution of this Deed irrevocably appoints UBIL to act on its behalf as its agent in relation to the Transaction Documents and irrevocably authorises:
>
> 2.5.1 UBIL on its behalf to supply all information concerning itself contemplated by this Deed to the Buyer and to give all notices, consents and instructions, to make such agreements and to effect the relevant amendments, supplements and variations capable of being given, made or effected by UBL notwithstanding that they may affect UBL, without further reference to or the consent of UBL; and
>
> 2.5.2 the Buyer to give any notice, demand or other communications to UBL pursuant to the Transaction documents to UBIL.
>
> UBL shall be bound as though UBL itself had given the notices and instructions (including, without limitation, any Excluded Asset Notices) or executed or made the agreements [redacted text] or effected the amendments, supplements or variations, or received the relevant notice, demand or other communications."

The term 'Transaction Documents' is defined in Clause 1.1 as follows:

> "Transaction Documents means (i) this Deed, (ii) each Transfer Document (iii) the Disclosure Letter (iv) the Transitional Services Agreement; (v) the Receiver Novation Deeds, (vi) the Guarantee, (vii) the EU Transfer Documents and (viii) each of the other documents entered into between the Sellers and the Buyer in accordance with the terms of Clause 2 (Sale And Purchase) of this Deed."

14. The term 'Seller' in the Mortgage Sale Deed is defined to include UBIL and UBL. In addition, Clause 2 of the Mortgage Sale Deed sets out in express terms that UBL agrees to sell the loans extended to the defendants (as they are listed in the Schedule) to Promontoria. Therefore, it is clear that UBIL is, by virtue of Clause 2.5 of the Mortgage Sale Deed, appointed as the agent for UBL to execute documents which are required to complete this sale that has been agreed by UBL.

15. On this basis it seems, UBIL alone executed the Global Transfer Deed as the Seller. However, the Global Transfer Deed makes clear that defined terms (such as 'Seller') have the same meaning in the Global Transfer Deed as they were given in the Mortgage Sale Deed. On this basis, it is clear that the assignment in the Global Transfer Deed by the 'Seller' of the loans to Promontoria means the assignment by UBIL and UBL of those loans. In addition, it means that when UBIL executes that Global Transfer Deed, it is doing so in its own capacity and as agent of UBL. For this reason, this Court does not accept that it is a credible defence for the defendants, to claim that the failure to explicitly refer to UBL in the Global Transfer Deed means that the Global Transfer Deed did not validly assign all the defendants' loans contained in the Facility Letter to Promontoria. Accordingly, this is not a basis for this matter to be sent forward to a plenary hearing.

The admissibility of the sworn evidence

16. Next, the defendants claim that the evidence of Mr. Ronan Hopkins, which supports the application for summary judgment, amounts to inadmissible hearsay. Mr. Ronan Hopkins ("Mr. Hopkins") of Link ASI Limited, a company which provides loan administration and asset management services to Promontoria in respect of Messrs. Boyle's and Kelly's borrowings, swore the grounding affidavit on 1st August, 2018. He also swore a supplemental affidavit on 3rd December, 2018. In both affidavits, Mr. Hopkins confirms that he was swearing the affidavit with the authority of Promontoria and had full access to the ordinary books and records (including computer records) of Promontoria relevant to these proceedings and that he believed the facts set out to be true and accurate. Mr. John Burke ("Mr. Burke"), a director of Promontoria, swore an affidavit dated 3rd December, 2018 in which he confirms that Mr. Hopkins was authorised to swear the grounding affidavit on behalf of Promontoria and Mr. Burke confirms in his affidavit that all the averments contained in Mr. Hopkins' grounding affidavit and supplemental affidavit are true.

17. Against this background, it is relevant to note that Mr. Hopkins swears that on 23rd September, 2016 Promontoria first made demand of Mr. Boyle and Mr. Kelly for payment of the sums due on foot of the Facility Letter. Following on from this demand, Promontoria appointed a receiver over the apartments in Liverpool on 13th January, 2017. Messrs. Boyle and Kelly argued that Mr. Hopkins' evidence before the Court is inadmissible to ground an application for summary judgment, since Mr. Hopkins is not an employee of UBIL or UBL or even Promontoria. However, as is clear from the decision of Barniville J. in *Promontoria v. Burke* [2018] IEHC 773, it is not a bar to summary judgment that the affidavit grounding the application is sworn by someone who was not an employee of the bank that authorised the borrowings or of the plaintiff purchaser of the loan from the bank. Indeed, in this case, unlike the situation in the *Burke case*, which also involved an employee of ASI Limited swearing an affidavit, there is an affidavit from a director of Promontoria confirming that the averments of Mr. Hopkins are true.

18. Furthermore, in considering the defendants' claim that the evidence of Mr. Hopkins is not admissible, it also relevant to note the defendants do not dispute the crucial averments being made, including the one that Promontoria first made demand for the repayment of the borrowings from the defendants on 23rd September, 2016. It would have been an easy matter for the defendants to simply dispute that Promontoria first made demand on 23rd September, 2016, if they believed that this was not true, especially since one of their primary defences is based on the Statute of Limitations and for which defence this first date of demand is crucially relevant.

19. In the *Burke case*, when deciding that the evidence (in that case of exhibited documents in an affidavit of an employee of Link ASI Limited) was admissible, Barniville J., at para. 57 attaches particular significance to the fact that the defendants, like in the present case, did not dispute the sworn evidence:

> "Significantly the defendants do not dispute any of those documents."

20. In this regard, whether one is dealing with an exhibited document or an averment made by an employee of a loan administration company, it is significant if the positive swearing as to the factual position or the existence of a document is not disputed. This is clear from the Supreme Court decision in *Ulster Bank v. O'Brien* [2015] 2 I.R. 656, where it was claimed that a summary judgment was obtained on the basis of hearsay evidence when an affidavit was sworn by an employee of the plaintiff bank, a Ms. Mary Murray. While that case concerned an employee of a plaintiff bank and exhibited documents, as distinct from an employee of a loan administration company making a sworn statement regarding the time a demand was made, it is nonetheless relevant to consider the reasoning of Charleton J. in upholding the summary judgment. At para. 57 he states:

> "Of themselves, the documents exhibited in the affidavit of Mary Murray carry indications of reliability. These are bolstered by her sworn evidence coming, as it does, from a position where she has had the means of knowledge to support what she says. Of those documents, perhaps the most important is the letter of demand. That letter was sent to the defendants and it was never replied to. The sworn affidavit was furnished to the legal representatives of the defendants and it was never replied to. Both the sworn and the unsworn documents amount to the same thing: a party is making an allegation that money has been borrowed and that a debt has not been repaid, which is now due for payment. Depending upon the particular circumstances, an inference can be drawn, where a reasonable person would feel compelled to issue some form of denial, whereby the absence of contradiction can amount to the acceptance of the contrary case; in other words, an admission against interest. This principle is based on sound authority. It is also one of the primary exceptions to the rule against hearsay."

21. In this case, Mr. Hopkins, an employee of the loan administration company engaged by Promontoria, positively swears that the first demand was made on the 23rd September, 2016. He swears that, in making this averment, he has had full access to the books and records having relevance to these proceedings. A director of Promontoria, Mr. Burke, swears an affidavit in which he confirms that the averments contained in Mr. Hopkins' affidavit are true. Mr. Boyle and Mr. Kelly put in replying affidavits in which they do not deny that they borrowed the money, that it has not been repaid and most significantly, in this context at least, they do not dispute Mr. Hopkins' averment that a first demand for repayment was made of them on 23rd September, 2016.

22. For all these reasons, and in light of the foregoing caselaw, this Court does not accept the defendants' claim that the evidence of Mr. Hopkins, including that the first demand for payment under the Facility Letter was made on 23rd September, 2016, is inadmissible. Rather, it concludes that as this averment is not disputed by the defendants in their replying affidavits, that this is an area where

there is no dispute as to the facts. Thus, there is no basis for sending the matter to plenary hearing because of the defendants' claim that these facts are sworn to by a person who is not an employee of the Bank or Promontoria.

Statute of Limitations
23. The defendants also put up as a defence to the summary judgment that Facility A, the overdraft, was due for repayment on 31st October, 2011 and that Facilities B and C were due for review on that date. They claim that proceedings should have issued within six years of 1st November, 2011 when they say the cause of action arose, i.e. by 31st October, 2017. The proceedings actually issued some nine months later on 7th August, 2018. On this basis, the defendants claim that these proceedings are statute barred.

24. It seems clear to this Court that Clause 8.2(a) of the General Conditions applicable to the Facility Letter entitled the Bank on 1st November, 2011 to call in Facility B and C, as a result of the defendants' failure to repay the overdraft (Facility A) by 31st October, 2011. There is uncontroverted sworn evidence that Promontoria, the Bank's successor in title, did call in the Facility Letter on 23rd September, 2016. This is the date therefore when in relation to Facilities B and C, the cause of action arose, by virtue of the defendants' failure to comply with this demand. Accordingly, this Court cannot see any credible basis for a claim that the proceedings against the defendants in respect of Facility B and C are statute barred, since they were issued within six years of 23rd September, 2016.

25. As regards Facility A, as previously noted, the security for these borrowings under the terms of the Facility Letter is a charge on land, namely the mortgage over the apartments in Liverpool. Section 36(1)(a) of the Statute of Limitations, 1957 states:

> "No action shall be brought to recover any principal sum of money secured by a mortgage or charge on land or personal property (other than a ship) after the expiration of twelve years from the date when the right to receive the money accrued."

Mr. Burke in his affidavit refers to the fact that the borrowings under the Facility Letter were secured by a charge and this is not disputed by the defendants. It seems clear therefore to this Court that also as regards Facility A, the Statute of Limitations does not provide a defence to these proceedings, insofar as (in the words of s 36(1)(a)) they seek any *'principal sum'* owing on those borrowings. This is because the proceedings in respect of Facility A were also issued on 7th August, 2018 and thus within 12 years from 1st November, 2011.

Agreement that recourse to the security before recourse to defendants?
26. The defendants have also claimed as a defence to these proceedings that it was understood between the Bank and the defendants that the Bank would first have recourse to the apartments, which were security for the borrowings, before seeking judgment personally against the defendants. This defence is stated in the defendants' affidavits in the following terms:

> "By agreement with the Ulster Bank entities it was understood that the capital would be paid down in due course from sale of the secured assets."

27. However, no evidence of any nature is provided to support this averment. As such, it is, at most, a mere assertion and therefore does not provide a defence to Promontoria's claim for summary judgment. As stated by Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 at p 622 where he quoted with approval *dictum* from *National Westminster Bank v. Daniel* [1993] 1 W.L.R. 1453 at 1457:

> "The mere assertion in an affidavit of a given situation which is to be the basis of a defence did not of itself provide leave to defend: the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence."

28. In any case the assertion by the defendants of an *'understanding'* regarding the use of the security in this way seems to this Court to be simply a statement of the obvious, namely that most borrowers of secured loans would hope or expect (and therefore it is 'understood') that the capital provided for the loan would be paid off at some future date from the secured assets, particularly where, as in this case, one is dealing with investment property. However, that hope or expectation does not mean that a bank, which has provided secured lending is not entitled to personally pursue the borrowers who are in default on their loan, or indeed that the bank is obliged to defer pursuing the borrowers personally until the secured asset has been sold. Accordingly, this defence is not credible and does not entitle the defendants to have the matter sent forward for a plenary hearing.

Alleged error in the sum claimed by Promontoria
29. The defendants allege that the liquidated sum of STG£3,268.428.44 is significantly overstated and so summary judgment should not be granted. They rely on the fact that a receiver has been appointed over the property and the fact, which is not disputed, that the receiver holds funds of approximately STG£200,000 which he has collected in rent in respect of the 14 apartments in Liverpool. The defendants say that this fact should have led to a reduction in the sum being sought in these proceedings. However, uncontroverted sworn evidence has been provided on behalf of Promontoria to the effect that the rent collected by the receiver has been lodged in an escrow account by him. This is because there is a dispute between the occupant of the apartments (a short term letting agent) and the receiver regarding the nature of the agent's occupation. Thus, Promontoria states that there is no guarantee how much, if any, of this sum will be received by it. In addition, of course, the receiver is the agent of the defendants and so this is their money as matters stand, and not the money of Promontoria, and the amount actually to be paid over to Promontoria, if and when it is paid, will be net of the costs of the receiver. It is of course the case that if and when this money is paid over to Promontoria, that Promontoria will have to give credit to the defendants for same. However, as matters stand, the existence of that money in an escrow account held by the agent of the defendants is not a credible defence to these summary proceedings, since it does not support the claim that there is an error in the judgment sum being sought, and so this is not a basis for this matter to be referred to plenary hearing.

Overdraft account not assigned to Promontoria
30. Another defence by the defendants is that Facility A, the overdraft, is not included in the assignment to Promontoria. However, Schedule 1 of the Global Transfer Deed (which contains the underlying loans to be transferred thereunder) expressly refers to a facility letter dated 23rd May, 2011 (and as noted above, this is the appropriate manner to refer to the Facility Letter, which is dated on its face 9th May, 2011 but was executed on 23rd May, 2011). This Facility Letter, as previously noted, expressly contains the overdraft facility (Facility A). Therefore, to this Court it seems clear that the overdraft was assigned by the Global Transfer Deed.

Incorrect interest charged
31. The defendants also claim that unexplained and/or incorrect credits and debits were applied to their accounts. However, these have been explained in Mr. Hopkins' replying affidavit as relating to:

•the failure by the defendants to pay service charges or ground rents on the apartments in Liverpool over a number of years and the consequent legal fees paid by Promontoria to avoid forfeiture of the apartments, and

• an erroneous credit by Promontoria to the defendants' account (arising from the sale of an asset owned by Mr. Kelly alone, as Mr. Kelly also has other borrowings with Promontoria). When this error was realised, the credit was reversed on the defendants' account. This then led to additional interest having to be charged to the defendants' account for the period when the principal was less than it should have been by virtue of the erroneous credit, and so this interest was debited subsequently.

Since none of these averments were disputed by the defendants, this is not an area where there is any factual dispute, such as to justify the matter being sent to plenary hearing.

Interest Roll Up Account

32. The defendants claim that the use of the separate interest roll up account was done by Promontoria without the consent of the defendants and therefore they should not be liable for the sums of money allegedly due from them in this account. However, in reply to this claim, sworn evidence was provided on behalf of Promontoria that this account was opened by Promontoria as an interest roll up account for the bridging loan account (Facility C), in the same manner as was done by the Bank, so that interest would not be charged on interest.

33. Again, the defendants did not dispute these averments or more significantly they did not dispute that the amount of interest charged (whether in the bridging loan account or transferred to the interest roll up account) was improperly calculated or was not due from them. In essence, they appear to be claiming that they should not be liable to repay the sums in the interest roll up account, because of this internal administrative banking procedure adopted by Promontoria, namely the opening of that account, which was done previously by the Bank, for the purpose of avoiding the defendants being charged interest on interest. However, since it is not disputed by the defendants that they owe interest and it is not disputed how that interest is calculated, this Court does not regard the fact that this interest is transferred to an interest roll up account, as a credible defence to these summary proceedings and therefore it would not send this matter to a plenary hearing on this basis.

CONCLUSION

34. Based on the foregoing analysis, to this Court it is clear that there is not a fair and reasonable probability of the defendants having a real or *bona fide* defence to the summary judgment to the claims seeking summary judgment in respect of Facility B (which had a sum due of STG£584,587.43 as of 29th June, 2018) and in respect of Facility C (which had a sum due of STG£2,457,448.13 as of 29th June, 2018), as well as the interest from Facility B in the interest roll up account (which had a sum due of STG£177,101 as of 29th June, 2018). The Court will hear from counsel regarding the precise terms of the order in respect of this summary judgment.

35. As regards Facility A (the overdraft, which had a sum due of STG£49,291.88 as of 29th June, 2018), this Court has determined that it is subject to the 12 year statute of limitations, which means that even though these proceedings were outside the normal six year time limit (as they were issued after the sixth year anniversary of the due date for the overdraft of 1st November, 2011), these proceedings can, because of s. 36(1)(a) of the Statute of Limitations 1957, seek '*any principal sum of money*' due on this Facility A. However, it is not clear to this Court how much, if any, of the sum of STG£49,291.88 is a principal sum. Accordingly, whether all or any of the sum claimed by Promontoria under Facility A is a principal sum of money is not a matter that is '*easily determinable*' from the evidence before this Court, to use the expression of McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 at p 7. While this would mean that this matter should be sent for plenary hearing, this Court believes there is merit in adopting the approach of Noonan J. in *Promontoria v. Burns* [2019] IEHC 75, where he dealt with a summary judgment application, which did not meet the strict test for summary judgments, in the following manner:

> "The evidence as it currently stands therefore, is in my view insufficient to enable the court to grant judgment for the plaintiff. In a case such as this, O. 37 r. 7 provides a range of options for the court. The court may give judgment for the relief claimed, dismiss the action or adjourn it for plenary hearing. The court has a fourth option under the rule which is to make "such order for determination of the questions in issue in the action as may seem just.
>
> There is only one issue arising in this case and it is an issue which may be capable of being easily remedied by a further affidavit or affidavits from the plaintiff. I must also bear in mind that beyond a bare denial of the debt, the defendant has not contested any of the factual averments made on behalf of the plaintiff. In that circumstance, it would I think be unjust to dismiss the claim at this stage, without affording the opportunity to the plaintiff to put further evidence on this issue before the court, should it wish to do so. By the same token, I think there is little to be gained by adjourning this matter for plenary hearing when the issue arising is capable of ready resolution by the court without the necessity for the parties incurring the substantially greater costs arising in a plenary hearing.
>
> Accordingly, I propose to discuss further with the parties whether they wish to put any further evidence before the court confined to that single issue."

36. In this case, the evidence regarding Facility A is also insufficient to grant summary judgment. Mindful of the possibility of greater costs being unnecessarily incurred, this Court will therefore discuss with the parties if they wish to put further evidence before this Court regarding any principal sum due on Facility A in which case the Court could make "*such order for determination of the questions in issue in the action as may seem just.*"