THE HIGH COURT

[2016 No. 2379 S.]

[2016 No. 2380 S.]

[2016 No. 2381 S.]

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF

AND

JOHN HUGHES AND MARGARET HUGHES

DEFENDANTS

AND

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF

AND

JOHN HUGHES

DEFENDANT

AND

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF

AND

JOHN HUGHES AND THOMAS BROWNE

DEFENDANTS

JUDGMENT of Mr. Justice Brian McGovern delivered on the 18th day of October, 2017

1. This matter comes before the court as an application for summary judgment in highly unusual circumstances. The application for summary judgment was heard by Barrett J. on 11th May, 2017, and he delivered judgment on 11th July, 2017. His judgment was a comprehensive one dealing with all the issues that arise on the papers before me including the same written legal submissions. On 24th July, 2017, the defendant, Mr. Thomas Browne, and his solicitor, Mr. Paul Meagher, swore affidavits grounding an application *ex post facto* for Barrett J. to recuse himself on the basis that the learned judge was a former company secretary of IBRC at a time when it decided to commence litigation against Mr. Browne for a sum of approximately €50m. It is not necessary for me to set out what is contained in the affidavits save to say that Mr. Meagher had no knowledge of any possible conflict of interest on the part of Barrett J. before Mr. Browne approached him sometime after the judgment was delivered.

2. Mr. Browne avers that he did not realise who Barrett J. was when the matter proceeded as if he had done so he would have brought an application at that stage for the judge to recuse himself. There is no suggestion that the IBRC proceedings against Mr. Browne were in any way connected with these proceedings nor is there any indication that Barrett J. was aware of any possible conflict of interest. Indeed, other than stating that Barrett J. was, at the relevant time, at senior management level in IBRC, there is no averment that he was actually involved in the decision to prosecute proceedings against Mr. Browne.

3. What is extraordinary is that Mr. Browne himself held a senior executive position in IBRC and one would have thought that if he had attended court he would have immediately identified the connection between himself and Barrett J. of which he now complains. It appears, however, that Mr. Browne let Mr. John Hughes "*make the running*" so far as these proceedings were concerned and represent the interest of all the defendants. It seems he was not present in court at the earlier hearing.

4. In any event, Barrett J. decided, out of an abundance of caution, to recuse himself even though he had already delivered his judgment and it was published on the Courts Service website. I have been informed that the judgment has not been perfected and has been vacated.

5. The only material fact that has changed since the hearing before Barrett J. is that counsel for the plaintiff has informed the court that it is not pursuing the claim for €502,864.59 on the current account or overdraft facility referred to in proceedings [2016 No. 2380 S.].

6. The hearing before me was essentially on the same documents and facts as that which took place before Barrett J. and in which he delivered a judgment which has now been vacated.

7. Having considered the papers and the arguments advanced by counsel, I am satisfied that the plaintiff is entitled to summary judgment against the defendants for the sums other than those arising in the current account. The defendants have not met the low threshold required by *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, or *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, in order to have the matter remitted for plenary hearing.

8. Although the judgment of Barrett J. delivered on 11th July, 2017, has been vacated, I have read the document and am in agreement with its contents. Since it no longer has the status of a judgment, I am appending that document to this judgment and I adopt the contents of it as my judgment in the matter save for the references to the current account and overdraft facility. It is

wholly unsatisfactory that the scarce resources of the court have been taken up with a second hearing which could have been avoided had Mr. Browne taken a more proactive role in these proceedings when they were before Barrett J. Since I am in agreement with the views expressed by Barrett J., it would be wholly wasteful of further court time if I had to repeat everything that is in that "*judgment*" and I do not propose to do so because I am in agreement with it.

9. I would make the following additional comments. I am satisfied that sufficient proof has been furnished by the plaintiff of the transfer of the loan to it. I am also satisfied that insofar as the defendants or any of them failed to sign some of the facility letters this does not afford them a defence. Clause 11.2 of the Lender's General Conditions state:-

> *"If the Borrower draws down or avails of a Facility in whole or in part this will constitute acceptance (without amendment) of the terms and conditions of the Facility."*

There is no doubt that some of the facility letters were signed and the failure to sign others is not a defence to the plaintiff's claim. Where no draw down of funds took place in circumstances where some of the facilities were restructured this does not afford a defence so long as the defendants had the use of funds that were covered by the restructuring facility. See *Governor and Company of the Bank of Ireland v. Flannagan & Anor* [2015] IECA 56.

10. Throughout the numerous affidavits and exhibits, no serious attempt has been made by the defendants or any of them to suggest that the monies claimed were not advanced and are still due.

11. While the defendants attempt to set up a collateral agreement concerning the waiving of residual debt after the sale of the Ailesbury Wood property, there is no documentary or corroborating evidence to support what is a mere assertion in this regard. Furthermore, the sworn statement of affairs and other documents exhibited before the court are wholly inconsistent with any such agreement. It is inconceivable that the defendants' solicitor would not have mentioned the alleged agreement in the letter of 18th October, 2016, in response to the demand from the plaintiff if such an agreement existed. Not only have the defendants offered no corroborating evidence of such an agreement but their own conduct, including the sworn statement of affairs, showing the residual debt as a current liability, amounts to an estoppel in respect of such a claim.

12. So far as the complaint to the Financial Services Ombudsman (FSO) is concerned, this provides no defence to the claim. The defendants urge the court to stay these proceedings or any judgment that might be granted pending the conclusion of the deliberations of the FSO.

13. The FSO has already declined to involve himself in these proceedings. Although he has been invited to reconsider the matter, he has not done so other than to state that he will await the development in these proceedings.

14. The gist of the complaint to the FSO seems to be that the defendants were not given sufficient time to meet a settlement proposal from the plaintiff. However, there is no obligation on any plaintiff to make a proposal for settlement. On 1st August, 2016, the plaintiff set out the basis upon which it would be prepared to deal with the outstanding debts of the defendant. These proposals provided for the payment of €500,000 to the plaintiff within seven days and the provision of a power of attorney to the plaintiff in respect of selling off secured assets. On the expiration of that period, the offer lapsed. However, these proceedings did not commenced until 7th December, 2016, and by that time there was still no agreement in place.

15. Section 57BX of the Central Bank Act 1942 (as amended) provides:-

> *"An eligible consumer may complain to the Financial Services Ombudsman about the conduct of a regulated financial service provider involving:-*
>
> > *(a) the provision of a financial service by the financial service provider, or*
> >
> > *(b) an offer by the financial service provider to provide such a service, or*
> >
> > *(c) a failure by the financial service provider to provide a particular financial service that has been requested." [Emphasis added]*

None of these criteria are met by the defendants' complaint to the FSO.

16. I find no warrant in the legislation for the suggestion that the FSO should involve himself in disputes between a lender and a borrower in respect of disputed debts once the matter has proceeded to court. The reference to the FSO does not provide any defence to the proceedings.

17. Finally, it has been suggested by counsel for the defendants the reference to the FSO should form the basis of a stay in the event that judgment is awarded. I reject that application on a number of grounds. In the first place, the remit of the FSO does not extend to these proceedings. Secondly, it is not clear what would happen if a stay was granted on that basis. Thirdly, I am satisfied that there would be unfair prejudice to the plaintiff if such a stay were to be granted. The defendants are significantly indebted both to the plaintiff and other parties and the prospects of recovery may be slim. If a stay were to be imposed on this judgment, other creditors might be able to take advantage of the position and leapfrog the plaintiff. This would clearly be unfair to the plaintiff. I will refuse a stay.

18. The plaintiff is entitled to judgment in respect of the sums claimed other than the amount outstanding on the overdraft account. The plaintiff is entitled to judgment in proceedings bearing record number [2016 No. 2379 S.] against the defendants in the sum of €1,107,891.26. The plaintiff is entitled to judgment in proceedings number [2016 No. 2380 S.] against the defendant in the sum of €3,495,933.99; and the plaintiff is entitled to judgment in proceedings bearing record number [2016 No. 2081 S.] against the defendants in the sum of €3,355,178.70.

[2017] IEHC 447

THE HIGH COURT

2016 No. 2379S

2016 No.2380S

2016 No. 2381S

BETWEEN:

(1)PROMONTORIA (ARAN) LIMITED

Plaintiff

–and –

JOHN HUGHES AND MARGARET HUGHES

Defendants

(2) PROMONTORIA (ARAN) LIMITED

Plaintiff

– and –

JOHN HUGHES

Defendant

(3) PROMONTORIA (ARAN) LIMITED

Plaintiff

– and –

JOHN HUGHES AND THOMAS BROWNE

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2017.

I. Overview

1. These are three sets of factually overlapping summary debt recovery proceedings. One set of proceedings (Promontoria (Aran) Limited v. John Hughes and Margaret Hughes) is defended. In the other two sets of proceedings, the relevant debts were effectively acknowledged at hearing. A question arises in all three sets of proceedings as to whether a stay ought to be granted following judgment in order to facilitate a determination, if determination there is to be, regarding certain complaints made to the Financial Services Ombudsman.

2. In this last regard it is perhaps appropriate to note that the Financial Services Ombudsman has, in a letter of 24th February, 2017, expressed the preliminary view to the solicitors for the defendants that, so far as the defendants' complaints are concerned, he should make a decision pursuant to s.57BZ of the Central Bank Act 1942, as amended, not to investigate the complaints made for the reason identified in s.57BZ(1)(d) (being that, in the within court proceedings "there is or was available to the complainant[s] an alternative and satisfactory means of redress in relation to the conduct complained of"). Since that letter issued, the correctness of the said preliminary view has been challenged by the defendants in correspondence with the Financial Services Ombudsman; however, the Ombudsman's preliminary view remains unchanged; thus it is, to put matters at their most favourable to the defendants, not at all clear at this time that there will ever be a determination by the Financial Services Ombudsman of their complaints.

II. Promontoria (Aran) Limited v. John Hughes and Margaret Hughes

(i) The Parties.

3. The plaintiff, Promontoria, is a single-member private company limited by shares. Each of the defendants is a natural person who has availed of commercial loans to facilitate property investment and/or development. Promontoria's claim arises on foot of one loan and one current account originally operated by Ulster Bank Ireland Limited ('Ulster Bank').

(ii) The Loan Offer-Letter.

4. By loan offer-letter of 21st February, 2011, Ulster Bank offered to make available to the defendants a demand loan facility in the sum of €2.384m (the 'Loan Facility'), subject to the terms and conditions prescribed therein and Ulster Bank's then General Terms and Conditions for Lending to Partnerships. The loan letter and the General Terms and Conditions contain, inter alia, the following express terms and conditions:

> (1) Letter, 'Purpose' Clause.
>
> "The Facility shall be made available for the sole purpose of:
>
> > (i) continuation of the existing facility to assist with the purchase of a property [in Dublin (the 'Dublin Property')]…
> >
> > (ii) refinancing the Borrower's fixed rate loan, now expired, provided to assist with the purchase of the Property in the amount of €1,384,000."

The term 'Borrower' is defined in the loan letter and embraces both of Mr and Ms Hughes.

> (2) Letter, 'Interest Rate' Clause.
>
> > The interest rate stated in the 'Interest Rate' clause of the loan letter as the 'Bank's Cost of Funds rate varying including a rate of 1.50% per annum'. This yielded on 21st February, 2011, an annual percentage rate (APR) of 2.70% per annum.
>
> (3) Terms and Conditions, Joint and Several Liability.
>
> > Under cl. 9.8 of the General Terms and Conditions, "Where [as here] the Borrower includes more than one person, the liability of such persons for the repayment of the Facilities and for the performance of each Borrower's

obligations under the Facility Letter shall be joint and several".

(4) Letter, 'Facility' Clause.

The facility is stated in the loan letter to be a 'Demand Loan Facility'. Clause 3.2 of the General Terms and Conditions provides as follows in this regard:

> "A demand loan Facility is repayable on demand and the Bank may at any time by written notice: (a) terminate the Facility; and/or (b) 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.

Immediately upon such a demand being made, the Borrower shall be liable to pay all such amounts, interest and other sums and any amount undrawn under the Facility shall be cancelled…".

5. The terms and conditions of the loan facility were accepted by each of the defendants who thereafter had full use and benefit of the sum of €2.384m referenced above.

(iii) The Current Account.

6. It is claimed that on or about 2nd February, 2015, the defendants opened a business current account with Ulster Bank, subject to the then General Terms and Conditions for Business Lending to Partnerships. The current account did not have an agreed overdraft facility. However, the General Terms and Conditions provide at cl.3.2 that "An overdraft Facility is repayable on demand".

(iv) The Transfer.

7. By mortgage sale deed dated 16th December, 2014, made between Ulster Bank and Promontoria Holding 128 B.V. ('Holding'), Holding agreed to purchase, inter alia, all rights, title, interest and benefit (present and future) of Ulster Bank pursuant to the Loan Facility and the current account with effect from 12th March, 2015.

8. As demonstrated by counsel for the defendants at the hearing of the within application, the trail whereby one gets from an Ulster Bank loan to the plaintiff being the proper party to the within proceedings is not adequately set out in the pleadings. However, although this is an important matter, it is also in some ways a slight matter that can readily be addressed by the court requiring as a pre-condition to the issuance of any order pursuant to this judgment that Promontoria file a further affidavit which, after hearing any (if any) further argument that the parties might wish to make, the court considers to remediate any deficiency in the pleadings in this regard.

9. For the sake of completeness, notwithstanding that the debts sought in the other two proceedings are effectively acknowledged, the court would request that the to-be-sworn affidavit also trace the sequence of transfer of the other loans to Promontoria, which sequence presumably is all but identical in any event.

10. Although the court considers the foregoing the most pragmatic and sensible manner in which to proceed at this juncture, it is not clear to it why such an affidavit has not hitherto been sworn, or why the repeated and reasonable requests of Mr and Ms Hughes' solicitor that the plaintiff demonstrate that it is the proper party to bring the within proceedings have gone unheeded: it is eminently possible to prove title to a loan without also disclosing commercially sensitive information.

(v) The Demands.

11. In breach of the terms and conditions of the Loan Facility, the defendants have failed, refused and/or neglected to meet their obligations to the plaintiff. Moreover, in breach of the terms and conditions of the current account, the defendants have permitted the current account to remain continuously overdrawn. By letters of demand sent to the both defendants on 11th October, 2016, the plaintiff demanded immediate repayment of the sum of €1,608,712.70 (comprising €1,105,848.11 owing under the Loan Facility and €502,864.59 owing on the current account). In spite of the said letters of demand, as of the date of hearing the defendants had failed, refused and/or neglected to discharge the sums due and owing under the Loan Facility and the current account. The plaintiff has therefore come to court by way of the within summary proceedings seeking such amounts as it claims are now owing to it plus interest thereon.

(vi) The Defences Raised.

12. In essence, three defences and one additional point are raised by the defendants. These are as follows. First, that the defendants did not sign the offer-letter of 21st February, 2011. Second, that historically an oral agreement had been reached by the defendants with Ulster Bank that it would 'write off' certain debt arising. Third, that the defendants never opened the purported current account. Fourth, not a defence but a point relevant to the stay application made, the defendants have made certain complaints to the Financial Services Ombudsman that have yet to be determined by same, though (as mentioned above) it may well be, at this point it seems more likely than not, that they will never fall to be determined by same.

(a) Non-signature of Offer-Letter.

13. The offer-letter of 21st February, 2011 has not been signed. However, there has been a draw-down of the funds advanced; so a loan has been offered and accepted, and there must be terms applicable. It has been good law since at least the time of the decision of the House of Lords in Brogden v. Metropolitan Railway Company (1877) 2 App. Cas. 666 that acceptance can be effected by conduct, and likely good law for a great deal longer than that – Lord Blackburn, at 692, refers to a decision of Chief Justice Bryan in a 15th century case that is supportive of this proposition. So the court entertains no doubt but that the necessary elements of a binding contract presented and present on the facts of this case. And even if the offer-letter of 21st February, 2011 does not govern the loan arrangement, and there is good reason to believe it does, the funds at issue were extended so as to enable a restructuring of certain earlier borrowings of Mr and Ms Hughes, with the result that if the terms of the offer-letter of 21st February, 2011, do not apply, the terms of those earlier borrowings (which terms have been placed before the court) apply instead. As to which set of terms and conditions applies, the court does not consider it necessary to conclude: it is clear that a default has arisen under whichever of the terms applies and that a consequent indebtedness is properly being sued upon.

(b) 'Write-Off' Agreement.

A. General

14. Following agreement between Ulster Bank and the defendants, there was a voluntary sale of the Dublin Property in March, 2014. Mr Hughes claims that there was an oral agreement in place with Ulster Bank about this time that any shortfall between the proceeds of sale of the Dublin Property and the amount of the facility letter would not thereafter be sought of him or Ms Hughes, i.e. that the amount of the sale proceeds would be taken in settlement of the debt arising.

15. Two immediate problems arise with this line of contention:

– first, it is an attempt by Mr Hughes to alter the terms of whichever loan agreement falls properly to apply by means of parol evidence, something the courts, for reasons of public policy have long not permitted. (For a recent re-statement and application of the parol evidence rule, see Ulster Bank Ireland Limited v. Deane [2012] IEHC 248, 4).

– second, while a material conflict of fact is generally sufficient to grant leave to defend summary proceedings, a mere assertion of fact is insufficient. As Clarke J. noted in Irish Bank Resolution Corporation Limited (In Special Liquidation) v. McCaughey [2014] 1 I.R. 749, 759:

> "The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances…".

16. There is nothing in the evidence, beyond Mr Hughes' averment that there was a 'write-off' agreement, to suggest that it was ever arrived at. No detail is provided as to where, how and when the agreement was reached. No corroborative evidence of any nature has been furnished to the court. The court finds enough in (a) the facts just stated, (b) the difficulties presented by Deane as regards the line of argument that Mr and Ms Hughes wish to pursue in this regard, and (c) the observations of Clarke J. in McCaughey as to the sort of factual assertions which may not provide an arguable defence, for it to conclude that so far as the purported 'write-off' agreement is concerned, no arguable defence arises in this regard.

B. The Sworn Statement of Affairs

a. General

17. Mr and Ms Hughes swore a 'Statement of Personal & Financial Details' on 23rd June, 2015, which acknowledges that, contrary to Mr Hughes' suggestion as to the existence of an oral agreement waiving any continuing liability on their part in respect of any short-fall between the sales proceeds and the debt arising, a debt did arise (and continues to arise) in respect of the Dublin Property. The court considers the conclusions it reached in the preceding paragraph to be an end of matters so far as the purported 'write-off' agreement is concerned and hence that it is not necessary for it to pray in aid the statement of affairs to conclude that no arguable defence arises pursuant to or otherwise in respect of same. However, for the sake of completeness, the court proceeds in any event to consider certain arguments raised in this regard.

b. Hearsay and Estoppel

1. General.

18. It has been contended (a) for Mr and Ms Hughes, that the sworn statement of affairs is inadmissible as hearsay and (b) for Promontoria, that whether by estoppel by representation or estoppel by convention, Mr and Ms Hughes are precluded, as they have sought, to resile from the contents of the sworn statement of affairs on the basis that they are erroneous.

2. Admissibility of Purported Hearsay.

19. When it comes to whether or not a sworn statement of affairs is inadmissible hearsay, the court would make the following observations:

– first, the figures detailed in the statement of affairs, which relate to the debts forming the subject-matter of the proceedings, are clear admissions against interest and thus fall within an established exception to the hearsay rule. In Walsh v. Sligo County Council [2011] 2 I.R. 260, the prominent case concerning rights of way at Lissadell House in County Sligo, it was held that a statement by a party, whether orally or in writing, that is adverse to her case is admissible as an admission, McMahon J. observing as follows, at 326–7:

> "[151] There are two commonly accepted exceptions to the hearsay rule. These are:-
>
> (i) admissions; and
>
> (ii) statements by deceased….
>
> [152] An admission is a statement made by a party which is adverse to his or her case….
>
> [153] There are essentially three species of admissions: (a) express admissions; (b) admissions by conduct; and (c) vicarious admissions. The first of these is where a party, orally or in writing, makes a statement which is adverse to his or her case. Whether a statement is in fact an admission is a matter for the court to decide, having regard to the words used, the context in which the statement was made, and all of the surrounding circumstances".

– second, it has been the law in Ireland since at least the time of Tait v. Beggs [1905] 2 I.R. 525 that an admission made, as here, in the context of negotiations to compromise a claim will constitute admissible evidence. In that case, Mrs Tait successfully sued a Mr Beggs and his wife for a slander spoken by Mrs Beggs. Prior to the trial of the action, Mr Beggs went to Mrs Tait and offered her money in settlement of matters, accompanied by a threat if she did not settle. The Court of Appeal held, inter alia, that the evidence of the husband's conduct (referred to by Holmes L.J., at 539, as the "admission made by the husband in offering money to settle the action, and by threatening to bring witnesses and other charges if it was not settled") was properly admissible and effectively allayed the concerns arising from the admission at trial of certain other evidence that was found to have been wrongly admitted by the trial judge.

– third, on a related note, it has been held by the Supreme Court in Ulster Bank Ireland Limited v. O'Brien [2015] 2 I.R. 656, that a failure to deny a debt following receipt of a letter of demand from a financial institution could have the same effect, Charleton J., observing, as follows at 683–4:

> "[T]he documents exhibited in the affidavit of Mary Murray [for Ulster Bank] 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, and admission against interest. This principle is based on sound authority. It is also one of the primary exceptions to the rule against hearsay."

Here, (a) neither of the defendants sought to deny the existence of their liabilities to the plaintiff following receipt of the letters of demand, (b) for a time following the initial demand, the defendants continued to negotiate with the plaintiff with a view to compromising the liabilities now contended not to arise, (c) at no time prior to the delivery of Mr Hughes' first affidavit in January 2017 was it suggested that the statements of affairs were inaccurate.

20. Having regard to the foregoing, it seems to the court that the sworn statement of affairs is evidence on which the court can properly rely.

3. Estoppel.

21. The statement of affairs was prepared by Mr and Ms Hughes in the context of commercial negotiations. The court attaches some significance to the fact that: (1) Mr and Ms Hughes were not so-called 'ordinary' consumers who might not understand the significance of preparing a statement of affairs for a creditor, which latter circumstance could raise an issue as to whether there was the necessary assurance to yield any purported equitable estoppel; and (2) the statement of affairs was sworn by Mr and Ms Hughes before a solicitor; so it was clearly a document that they took seriously and contemplated that Promontoria would likewise take seriously and indeed rely upon, and Promontoria maintains that it did rely on the statement of affairs in exercising forbearance in bringing suit, and that it did so to its detriment.

22. It is only when it comes to the very last element of matters, i.e. whether there was detriment, that the court considers Promontoria's claims as to estoppel to be deficient. While it may be true that Promontoria forbore from suing on what was owing on Day 'X', when it subsequently came, on Day 'Y', to commencing the within proceedings, Promontoria claimed all the indebtedness that was owing up to Day X plus all the indebtedness that accrued after Day X and up to and including Day Y plus any daily interest that has accrued from Day Y to the date of this judgment. So at all times Promontoria has been able to sue for all that is owing to it; and while deteriorating chances of recovery over the period spanning Day X and Day Y could constitute detriment sufficient to yield an estoppel, more would be required of Promontoria than is presently in evidence before the court for it (the court) to conclude that such a detriment had in fact occurred. In other words what Promontoria faces in this regard is an evidential deficiency, not a general legal difficulty, for the court accepts the underlying contention made by Promontoria that a sworn statement of affairs, prepared by a debtor in all seriousness and intended by that debtor to be relied upon by its creditor in deciding the creditor's future course of action and in fact relied upon by that creditor to its detriment could be found by a court to present the necessary assurance, reliance and detriment as to yield an equitable estoppel.

23. What form of estoppel can arise in such circumstances? It seems to the court that it must either be an estoppel by representation or an estoppel by convention, the effect of which estoppel would be (were it to arise in the circumstances of the within case, and the court has concluded, by reference to the issue of detriment, that it cannot safely be concluded, at this time, to arise) that Mr and Ms Hughes would be estopped from contending either (i) that they are not indebted to Promontoria in any sum or (ii) that they are only indebted in a much lower amount than is admitted in the statement of affairs.

24. As to estoppel by representation, the court recalls in this regard the below-quoted observation of Griffin J. in Doran v. Thompson Limited [1978] I.R. 223, 230, as recently adopted by Cregan J. in Flynn v. National Asset Loan Management Limited [2014] IEHC 408, 54:

> "Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance."

25. As to estoppel by convention, the court notes that following the delivery of the statement of affairs, (a) commercial negotiations continued, in part by reference to same, a fact which suggests a clear understanding on the part of Promontoria and Mr and Ms Hughes that the latter were indebted to Promontoria in the amounts now claimed, and (b) no effort was made by either defendant to suggest that any inaccuracy presented in the statement of affairs. So far as the law on estoppel by convention is concerned, the court notes the recent extensive treatment given by the Supreme Court to this form of estoppel in Ulster Investment Bank Limited v. Rockrohan Estate Limited [2015] IESC 17, a case which, like Doran as it happens, was concerned with the application of the Statute of Limitations. In Rockrohan, Charleton J., at 10, adopted the following summary of principle in Treitel's Law of Contract (13th ed.), 3.094:

> "Estoppel by convention may arise where both parties to a transaction 'act on an assumed state of fact or law, the assumption being either shared by both or made by one and acquiesced in by the other'. The parties are then precluded from denying the truth of that assumption, if it would be unjust or 'unconscionable' to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any 'clear and unequivocal' representation or promise. It can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party, though the common assumption of the parties, objectively assessed, must itself be 'unambiguous and unequivocal'.

4. Conclusion.

26. The court ends where it started as regards the statement of affairs. There is nothing in the evidence, beyond Mr Hughes' averment that there was a 'write-off' agreement, to suggest that it was ever arrived at. No detail is provided as to where, how and when the purported 'write-off' agreement was reached. No corroborative evidence of any nature has been furnished to the court. The court finds enough in these facts just stated, in the difficulties presented by Deane as regards the line of argument that Mr and Ms Hughes wish to pursue in this regard, and the observations of Clarke J. in McCaughey as to the sort of factual assertions which may not provide an arguable defence, for it to conclude that so far as the purported 'write-off' agreement is concerned, no arguable defence arises in this regard. The court does not consider that it is necessary to have regard to the statement of affairs to reach this conclusion.

(c) The Current Account.

27. The plaintiff all but conceded at the hearing of the within application that (and, the court would observe that this is putting matters at their best) its papers were not in order as regards this aspect of its summary application. It is denied by the defendants that they ever opened the current account and the plaintiff has failed to establish its entitlement to summary judgment in this regard.

(d) The Complaint to the Financial Services Ombudsman.

28. Following the default there was, as one would expect, ongoing liaison between between the parties. Then, on 1st August, 2016, in what the defendants contend was an 'out of the blue' event, an e-mail issued at 17:31 from Capita Asset Services on behalf of Promontoria, stating, inter alia, as follows:

> "Subject to Contract/Contract Denied
>
> I am pleased to advise that my client, Promontoria (Aran) Ltd ('PAL') has approved the following in respect of your outstanding indebtedness, and the indebtedness of your co-borrowers Margaret Hughes and Tom Browne.
>
> • Payment of €0,5m to PAL [Promontoria] by no later than close of business on Monday 8th August 2016 settling the shortfall/personal deficiency (being 21 days from agreement);
>
> • Each Borrower to provide a Power of Attorney to PAL in respect of selling off the secured assets, the proceeds of which will also be applied in reduction of your debt.
>
> Please confirm acceptance by signing and returning the attached Heads of Terms immediately.
>
> I have lined up Mason Hayes Curran to draft the relevant documents and should they be able to confirm their fee to you tomorrow. Could you also confirm what lawyer will act for you and Margaret Hughes/Tom Browne.
>
> We will require detailed KYC information for each Borrower including detail on the source of funds for the €0.5m. Please give me a call to discuss this."

29. This was a notably generous offer in all the circumstances. However, it was not accepted and is no longer capable of acceptance. To take but one aspect of the offer, perhaps the most important aspect, the cash requirement of €0.5m was never paid, either by Monday 8th August, 2016, or allowing for the vagueness of the author's phraseology, within 21 days of that date.

30. The defendants have complained to the Financial Services Ombudsman about the manner in which Promontoria 'withdrew' the above offer. But the offer was never withdrawn; it lapsed because it was not satisfied on its own terms. It sat 'out there' live and capable of acceptance for a limited period of time, but that time passed without acceptance, and so the offer died. It is true that the Financial Services Ombudsman has the power under s.57CI(4)(a) of the Central Bank Act 1942 to direct a financial services provider, inter alia, to "review, rectify, mitigate or change the conduct complained of or its consequences". But the notion that the Financial Services Ombudsman, in the proper exercise of his legal powers, would seek to resurrect a lapsed offer because the recipients of same were not in a financial position to accept it during its currency but wish to accept it now, is just not credible. The court turns later below to the issue of whether the court should grant a (discretionary) stay to allow the defendants to prosecute their existing complaints before the Financial Services Ombudsman.

(vii) The Law as to Summary Judgment.

31. The hurdle to be surmounted by the defendants as regards having this matter sent to plenary hearing is a low one. As Hardiman J. stated in the Supreme Court in Aer Rianta c.p.t. v. Ryanair Limited [2001] 4 I.R. 607, 623:

"[T]he fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

32. In Harrisrange Ltd v. Duncan [2003] 4 I.R. 1, at 7, McKechnie J. summarised the relevant principles when a court approaches the issue of whether to grant summary judgment or leave to defend:

> "(i) the power to grant summary judgment should be exercised with discernible caution;
>
> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…
>
> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…
>
> (iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
>
> (v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
>
> (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument

and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…

(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

(viii). The Law as to Granting a Stay in the Context of a Complaint to the Financial Services Ombudsman.

33. In his affidavit evidence, Mr Hughes avers, inter alia, as follows:

"[Having] filed a complaint with the Financial Services Ombudsman ('FSO')…in advance of the issuing of these proceedings…I am advised and so believe that it would be inappropriate for this Honourable Court to proceed to deal with these judgment proceedings...".

34. Is it "inappropriate" for the court to proceed to deal with the relevant proceedings until the complaints made to the Financial Services Ombudsman have been determined by the Financial Services Ombudsman? In this regard the court has been referred by counsel to the decisions of the High Court in Moohan and Anor v. S&R Motors Ltd [2008] 3 I.R. 650, Danske Bank v. McFadden [2010] IEHC 119, and Start Mortgages Limited v. O'Regan [2017] IEHC 170 which it considers below.

35. In Moohan, judgment was granted to the plaintiffs for certain sums claimed but a stay put on the recovery of any amounts in excess of a stated sum pending the conclusion of an arbitration in respect of a counter-claim by the defendants. Reference was made by Clarke J. in that case, at 655, et seq. to the judgment of Kingsmill Moore in Prendergast v. Biddle (Unreported, Supreme Court, 31st July, 1957), a case in which the Supreme Court considered the manner in which a court should approach a claim for summary judgment which is met by a counterclaim for damages. In his judgment, at 7–8, Kingsmill Moore J. observes as follows:

> "On such applications it is incumbent upon the Plaintiff, if he is to get judgment, to satisfy the Court that he has an unanswerable case, and if he does this he is entitled to immediate judgment. If, however, the Defendant, while admitting that he has no direct defence to the claim puts forward a plausible counterclaim a difficult problem must arise. Though the necessary evidence to support the claim is already before the Court and judgment on the claim can be given at once, there must usually be delay in formulating the counterclaim in a pleading, in preparing the evidence to support it at a hearing (if it be contested), and in waiting for a trial. On the one hand it may be asked why a Plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of a judgment on his claim because the Defendant asserts a plausible but unproved and contested counterclaim. On the other hand it may equally be asked why a Defendant should be required to pay the Plaintiff's demand when he asserts and may be able to prove that the Plaintiff owes him a larger amount. To such questions there can be no hard and fast answer. It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counter-claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the Defendant could show that the Plaintiff was in embarrassed circumstances it might be considered a reason why the Plaintiff should not be allowed to get judgment, or execute judgment on his claim till after the counterclaim had been heard, for the Plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counterclaim would be fruitless."

36. In McFadden, Clarke J. granted judgment on a guarantee against Mr McFadden and the question that arose was whether a stay should be granted pending appeal to the Supreme Court. In his judgment, Clarke J., at 2–4, identified the following principles of relevance to his decision:

> "2.1…[T]wo broad issues will ordinarily arise for consideration in relation to whether a stay should be placed on an order of this Court pending appeal to the Supreme Court.
>
> 2.2 The first issue is that, in order that a stay might be considered, any such appeal must be bona fide. [No issue arose in this regard in McFadden as it was acknowledged by counsel for Danske Bank that any appeal arising would be bona fide] ….
>
> 2.4 Where the appeal is genuine, it seems clear…that the court should conduct a process analogous to the balance of convenience test which the court is required to apply in determining whether to grant an interlocutory injunction….
>
> 2.5 To these considerations I would add one further matter….It may be that a stay on terms or the imposition of terms without a stay can ameliorate the potential detriment to both sides in the event that either a stay is granted and the appeal fails or a stay is not granted and the appeal succeeds."

37. In the event, Clarke J. granted a stay on terms.

38. The court must admit that it is not especially persuaded as to the relevance of the foregoing case-law in the context of the within proceedings; and its view in this regard is buttressed by the honest admission in the written submissions for the defendants that "[I]t is not suggested by the Defendants here that the complaint before the FSO and the remedies sought are necessarily to be equated with a cross-claim on damages of the kind under consideration in Prendergast…or indeed Moohan". But if the court was to

draw a couple of points from the above-quoted judgments that appear to have a resonance in the context of the within proceedings, it would be the observation of Kingsmill Moore J. that "It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counter-claim and the answer suggested to it…", and in the first of the three principles identified by Clarke J., which in truth is an echo of the just-quoted observation of Kingsmill Moore J., namely that "The first issue is that, in order that a stay might be considered, any such appeal must be bona fide."

39. Though the court does not suggest that the complaint now made to the Financial Services Ombudsman is not bona fide, it is unhesitatingly of the view, for the reasons stated elsewhere above, that the complaint entails a flawed understanding/presentation of facts in that it alleges that an offer was withdrawn when in fact the offer merely lapsed; and further entails what, with every respect, is the unfounded belief that the Financial Services Ombudsman, in the proper exercise of his lawful powers, would resurrect a lapsed offer which simply lapsed on its own terms. One can, the court does, have sympathy for the defendants and the position in which they now find themselves: willing and, it seems, funded so as to be able to meet the terms of an offer which was undoubtedly attractive but which, unfortunately, has lapsed and is no longer capable of being accepted. But such sympathy offers no basis for granting the stay sought.

40. In truth, it seems to the court that the defendants are in exactly the same position which confronted it in Start Mortgages Limited v. Jeremiah O'Regan [2017] IEHC 170, another case in which summary judgment was sought at a time when the defendant had live complaints outstanding to the Financial Services Ombudsman, and it seems also the Central Bank of Ireland, concerning the behaviour of the plaintiff-lender – and thus the only case that is directly on point. In that case the court observed, inter alia, as follows:

> "2. The defendant objects to the within application proceeding to judgment until resolution of all complaints made by him to the Financial Services Ombudsman (and, it seems, the Central Bank). With respect to the defendant, it seems to the court that that is to conflate these proceedings and those complaints, at least to some extent. Whether or not the within proceedings ought now to go to plenary hearing is a matter that the court is competent to, and capable of, deciding at this time. And if, as the court hereafter concludes, the plaintiff's application can properly be dealt with by way of summary proceedings, the issue of whether or not the defendant is liable for the amounts claimed is also a matter that can be decided at this time on the evidence before the court. What the court can do, to the extent that any legitimate complaint(s) to the Financial Services Ombudsman and/or Central Bank remain unresolved at the moment the within judgment issues, is to:
>
> > (a) put a stay on any order that issues pursuant to its judgment, pending the resolution of such complaint(s)….
>
> a3. There is at least one limit on the extent to which the court would be inclined to grant a stay such as that just mentioned: were the court ever to be persuaded that the defendant was merely making complaint(s) to the Financial Services Ombudsman, the Central Bank and/or any other body or person which (i) had the predominant objective of merely staving off the day when a debt properly owing fell to be paid, and/or (ii) whether or not successful, would have no impact on his liability at law to repay such debt, then it would be entirely proper for the court to decide either to refuse a stay or to lift any such stay as had been granted."

41. To that "one limit", the court would add the following elaboration on what the court touches on in the last-quoted text, being that where (i) a complaint to the Financial Services Ombudsman is premised on a wrong understanding of applicable fact (here the offer lapsed; it was not withdrawn) and/or (ii) there is no real prospect of a complainant securing the relief it desires from the Financial Services Ombudsman, a court should generally be slow to grant a stay on its judgment pending a determination by the Financial Services Ombudsman of the relevant complaint(s), if determination there is to be (and here it seems unlikely, at least at this time, that there will be). The granting of any stay pending any (if any) appeal to be made from the judgment of this Court is not an application that has yet been made and would, of course, be a matter for separate assessment.

(ix) Conclusion.

42. There might be a temptation when reading a relatively long judgment given in respect of a summary debt application to conclude that if it took so long for the court to address the points raised at the summary hearing, then there must have been enough in what was raised for the matter to go to plenary hearing. But that is specious logic which would yield the absurd result that any defendant to a summary debt application would simply raise every conceivable argument in defence, no matter how weak, in a bid to lengthen the time at hearing and the eventual judgment that ensued, in the hope that a reference to plenary hearing would necessarily (or more likely) follow. Long bundles of pleadings, a long day in court and a long judgment thereafter, are not a sure recipe for a plenary hearing. In truth, the key conclusions to be reached in this application can – not without sympathy for the defendants and the unhappy predicament in which they find themselves – be stated simply by the court: it is clear from all of the foregoing that, save as regards the €0.5m+ claimed to be owing on the current account, Mr and Ms Hughes, to borrow from the wording of Hardiman J. in Aer Rianta, have no case; there is either no issue to be tried or such issues as arise to be tried are simple and easily determined (and have been determined) by the court; and the affidavit evidence furnished by the defendants fails, regretfully for them, to disclose even an arguable defence. Except as regards the above-stated amount claimed on the current account, Mr and Ms Hughes have failed to surmount even that limited hurdle identified by Hardiman J. in Aer Rianta for those seeking a plenary hearing of a matter in respect of which summary relief has been sought.

43. Though mindful of that "discernible caution" to which McKechnie J. refers in Harrisrange when it comes to the power to grant summary judgment, the court, subject to its observations at point (iv) above, is coerced as a matter of law into granting the summary judgment now sought against Mr and Ms Hughes. The court's granting of the summary judgment sought does not extend to the €0.5m+ portion of the debt sued for on the current account; that aspect of matters, for the reasons stated above, falls to be sent to plenary hearing. Also, and again for the reasons stated above, the application by the defendants for a stay on any orders that are now to issue, pending any determination that the Financial Services Ombudsman may yet reach in respect of the complaints made to him, is respectfully refused.

III. Promontoria (Aran) Limited v. John Hughes

44. The relevant debt arising in this application was effectively acknowledged at hearing. The court will enter judgment for the amount sought. For the reasons stated above, the application by the defendant for a stay on any orders that are now to issue, pending any determination that the Financial Services Ombudsman may yet reach in respect of the complaints made to him, is respectfully refused.

IV. Promontoria (Aran) Limited v. John Hughes and Thomas Browne

45. The relevant debt arising in this application was effectively acknowledged at hearing. The court will enter judgment for the amount sought. For the reasons stated above, the application by the defendants for a stay on any orders that are now to issue, pending any determination that the Financial Services Ombudsman may yet reach in respect of the complaints made to him, is respectfully refused.