[2017] IEHC 473

THE HIGH COURT

2017 No. 224S

BETWEEN:

SEACONVIEW DESIGNATED ACTIVITY COMPANY

Plaintiff

– AND –

JOHN LALLY

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 20th July, 2017.

I. Background

1. Seaconview is a company incorporated under the laws of Ireland. Mr Lally is a property developer based in County Galway. These summary proceedings between company and developer are primarily concerned with the enforcement of an Interest Shortfall Guarantee provided by Mr Lally for the benefit of the Finance Parties to a Credit Agreement of 6th October, 2006. (Where terms that ought to appear in small font appear in capitalised form in the within judgment, it is because they bear a defined term within the meaning of the transaction documentation at issue in these proceedings. The court only pauses to expand on the meaning of a defined term when and as relevant).

2. The Credit Agreement of 6th October, 2006, was executed between Brackville Holdings Limited as Borrower, AIB plc and Ulster Bank Ireland Limited as Original Lenders, Ulster Bank Ireland Limited as Agent, and AIB plc as Security Trustee. Under it, the Original Lenders agreed to make available to Brackville an on-demand facility in the amount of €82.5m, on the terms and subject to the conditions of the Credit Agreement.

3. The Credit Agreement, at cl. 1.1, defines the term "*Finance Parties*" as meaning, for the purposes of that agreement, "*the Agent, the Lenders, the Hedging Lenders and the Security Trustee*", with the term "Finance Party" meaning any of them. The Credit Agreement further defines the term "*Lender*" as meaning "*(a) any Original Lender and (b) any person to which rights and/or obligations are novated, assigned or transferred pursuant to clause 21.1* [of the Credit Agreement]…[and] *which…has not ceased to be a Party in accordance with the terms of the Credit Agreement.*"

4. The Facility made available under the Credit Agreement was to be applied by Brackville in the acquisition of certain properties here in County Dublin. Clause 8 of the Credit Agreement provided that Brackville was to pay interest on each Drawing by reference to specified Interest Periods and at specified Interest Rates. Clause 15 of the Credit Agreement provides, *inter alia,* that the Drawings and all interest and other sums payable under or in respect of the Facility are to be secured by the Corporate Guarantees, the Interest Shortfall Guarantee, and a mortgage debenture granted by Brackville over all its present and future property, undertaking and assets.

5. By Interest Shortfall Guarantee made on 6th October 2006 by Mr Lally as Guarantor in favour of each of the Finance Parties as defined in the Credit Agreement as Beneficiaries, Mr Lally, unconditionally and irrevocably, as a continuing obligation, (i) guaranteed the proper and punctual performance and observance by Brackville of all its obligations to pay interest under cl.8 ("*INTEREST*") of the Credit Agreement; (ii) undertook to pay to each of the Finance Parties on demand, if Brackville failed to pay when due and payable, any amount of interest payable under the said cl. 8, and (iii) undertook to indemnify each of the Finance Parties on demand against all losses, damages which may be incurred or suffered by that Finance Party as a result of or arising out of any failure of Brackville to perform or observe such obligations. By debenture dated 6th October, 2006, Brackville granted certain security to AIB as Security Trustee in connection with the Credit Agreement.

6. By virtue of a process which, as will be seen hereafter, is partly in dispute, Seaconview claims to be the successor to the interest of Ulster Bank Ireland under the Credit Agreement and to have been vested with the rights, powers and duties of the Agent and Security Trustee under the Credit Agreement, and to be a Finance Party within the meaning of the Credit Agreement and a Beneficiary within the meaning of the Interest Shortfall Guarantee. The court accepts, for the reasons stated later below, that Seaconview is correct in the foregoing claims.

7. Under cl.7 of the Interest Shortfall Guarantee, Seaconview, as Security Trustee under the Credit Agreement, is entitled to take enforcement action under the Guarantee on behalf of the Beneficiaries or any one of the Beneficiaries.

8. By letter of demand dated 28th July, 2016, Seaconview, as agent and trustee under the Credit Agreement, demanded payment from Brackville of the full debt then owing under the Credit Agreement, being €88m+ plus daily interest accruing. Brackville failed to pay the sum demanded and on or about 29th July, 2016, Seaconview (as security trustee under the debenture) appointed a receiver over the assets of Brackville pursuant to the terms of the debenture.

9. By contract dated 16th August, 2016, various assets were sold by Brackville, with the net proceeds being applied in reduction of Brackville's liabilities under the Credit Agreement. By letter of demand dated 13th January, 2017, Seaconview notified Mr Lally that close on €9m was then owing by Brackville to Seaconview pursuant to the Credit Agreement and that daily interest continued to accrue in the amount of circa. €1.6k per day. The letter also demanded payment of the sum of the said sums pursuant to the Interest Shortfall Guarantee, with payment to be made by 4p.m. on 18th January, 2017.

10. The letter of demand indicated that the sum demanded did not represent the entire interest owing by Brackville under the Credit Agreement and in respect of which obligations Mr Lally had provided the Interest Shortfall Guarantee. The letter of demand specified that the demand was made only in respect of that proportion of the interest owing by Brackville under the Credit Agreement which is owing to Seaconview as successor to Ulster Bank Ireland.

11. The date of 18th January, 2017, has come and gone and no payment has been made by Mr Lally under the Interest Shortfall Guarantee. In consequence, Seaconview has come to court seeking summary judgment for just short of €9m plus interest.

12. There is a lot to the foregoing. Even explaining how the Interest Shortfall Guarantee came about and what claim is now being made has taken a few pages to explain; a consideration of the various arguments arising between the parties will occupy a few pages

more. Although the court had, in advance of hearing this application, read the pleadings and papers provided to it, with the result that every detail of every document did not require formally to be opened before it, the application still took the better part of a day to hear. None of that, however, has the necessary consequence that anything at issue in the within proceedings is especially complex. Long bundles of pleadings, a long day in court, even a long judgment thereafter, are not a sure recipe for a plenary hearing. Were matters otherwise, any debt claim arising pursuant to a transaction of some sophistication would require to be sent to plenary hearing, and that has never been the law. Were it the law, any defence counsel worth her or his salt would be able to engineer a position in which, through the skilful protraction of pleadings and hearings, a court could effectively be compelled to send matters to plenary trial that now fall properly to be decided in summary manner – such an abuse, the court emphasises, has not presented in the within application, but could never in any event be countenanced in an effective system of justice. The fundamental questions to be posed in summary debt applications great and small, in cases which generate an Everest of paper and those which do not, in cases which take a while to open as well as those that do not, in cases that prompt a day's-worth of argument and those in which the arguments arising can more briefly be stated, are always as was identified by Hardiman J. in Aer *Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623, viz."[I]*s it 'very clear' that the Defendant has no case?;* [I]*s there either no issue to be tried or only issues which are simple and easily determined?;* [D]*o the Defendant's affidavits fail to disclose even an arguable defence?"*

II. Objection to Mr Farrell's Evidence

13. The principal affidavit evidence for Seaconview in the within proceedings has been sworn by Mr Brendan Farrell. He is a financial consultant employed by Lapithus Management DAC which acts as a service provider to Seaconview. Mr Farrell avers that he has overall day-to-day responsibility for managing the loans and associated security that are the focus of the within proceedings. Mr Lally objects to the fact that Mr Farrell is not employed by Seaconview. He also appears to raise objection to the fact that as the pleadings unfolded certain matters that he raised were then belatedly answered by Mr Farrell in later affidavit evidence.

14. There is no requirement that the person who swears the principal affidavit evidence for a plaintiff creditor must be an employee of that creditor. This is clear from the observations of Laffoy J. in *Ulster Bank Ireland Ltd v. O'Brien* [2015] 2 I.R. 656, para. [14], where having considered O.37, r.1 of the Rules of the Superior Courts 1986, as amended – Rule 37 is entitled "*Hearing of Proceedings Commenced by Summary Summons*" – Laffoy J. observes as follows: "*It is clear on the wording of that rule that, as regards proof of the claim, an affidavit sworn by a person other than the plaintiff who can swear positively to the relevant facts is sufficient*." It follows that the first of Mr Lally's objections to Mr Farrell must fail. As to the second of his objections, which in effect is that Mr Farrell refined his initial affidavit evidence in response to such affidavit evidence as was filed by Mr Lally, the court sees nothing in what has transpired in the course of the pleadings that is not a normal feature of the successive affidavits filed in every application that proceeds on affidavit.

15. It does not appear to be seriously disputed between the parties that the loan facility that was the subject-matter of the credit agreement was in fact advanced to Brackville and has not been repaid. It is not disputed at all that Mr Lally provided the Interest Shortfall Guarantee. Mr Farrell's affidavit evidence indicates the foregoing to be so and, in truth, when one reads Mr Lally's affidavits, these appear to confirm that the foregoing is so. Thus, for example, Mr Lally avers to the fact that "[A] *loan…was advanced over 10 years ago to Brackville Holdings Limited*". Mr Farrell exhibits documentation that records the relevant advances. And Mr Lally has not disputed that he provided the Interest Shortfall Guarantee.

III. The Irish Law Deed of Transfer

16. Mr Lally challenges the entitlement of Seaconview to make demand under the Interest Shortfall Guarantee. To demonstrate Seaconview's entitlement to do so, it is necessary to recite a number of contractual provisions. However, there is nothing difficult in the process of identifying how Seaconview became so entitled. The fact that one has to jump through a number of contractual 'hoops' to arrive at the proper conclusion as to whether a party is entitled to make demand under a guarantee: (i) may be and here is attributable solely to the fact that the guarantee was executed as part of a comprehensively documented, though not especially complex, financial transaction; and (ii) does not have at its result that such conclusions as may be and are reached by the court in this regard cannot properly be arrived at in summary proceedings.

17. Perhaps before proceeding to consider how Seaconview became entitled to make demand under the Interest Shortfall Guarantee, it is useful to consider the relevant criticisms averred to by Mr Lally in his affidavit evidence:

> *"Mr Farrell exhibits what is described as a copy of the 'Irish Law Deed of Transfer (Excluding Property)' ('the Transfer') which he says is redacted in part for reasons of commercial sensitivity and banker client confidentiality. He does not exhibit the underlying mortgage sale deed. Schedule 1 to the Transfer lists a deed of mortgage/charge given by Brackville dated 6 October 2006. However, whilst Schedule 1 refers to three guarantees which apparently relate to Brackville, the entries in relation to the 'date of document' and 'bank name on document' give rise to significant confusion. Whereas the entry in respect of the deed of mortgage/charge identifies the date as being 6 October 2006, the bank name as being Allied Irish Banks plc and the obligor as Brackville, the entry in respect of one of the guarantees states 'Incorrect Mortgage Uploaded Please Remove from Data Room' in respect of each of these three piece of information. The other two guarantees have no information provided in relation to the date of the document, the bank name on the document and the obligor other than an entry which states 'No Doc in VDR'. In the circumstances, it is not in any way clear that, as averred to by Mr Farrell, 'the interests of UBI, Ulster Bank Limited and UB SIG (ROI) Limited' in the underlying loan and, in particular for present purposes, the Interest Shortfall Guarantee, purportedly transferred to the Plaintiff pursuant to this deed. This is particularly so given the entry in Schedule 1 of the Transfer which appears to relate to the Credit Agreement, and to which the date 28 September 2006 is attributed. The entries relied upon nu the Plaintiff are not just incredible but are also incoherent."*

18. The mortgage sale deed has since been exhibited. The court turns first to a consideration of the relevant documentation in the context of such other points as are referred to above.

19. Recital A to the Irish Law Deed of Transfer explains that "*By a Mortgage Sale Deed dated 22 July 2015 (the Mortgage Sale Deed) the Sellers agreed to sell and the Buyer agreed to purchase the Security Interests and the contractual rights of the Sellers under, the Finance Documents more particularly described in Schedule 1 hereto*". Clause 1 of the Irish Law Deed of Transfer then provides as follows:

> *"In consideration of the payment by the Buyer of the Adjusted Purchase Price (the receipt of which is hereby acknowledged) the Sellers as beneficial owners free from Encumbrances and as the registered owner or, as applicable, the party entitled to be registered as owner, hereby grants, conveys, assigns, transfers and assures unto the Buyer, subject to the subsisting rights of redemption of the Borrowers and any Obligor and to the extent capable of*

assignment, all its right title, interest, benefit and obligation, (past present and future) in and under each Security, Underlying Loan, and each of the Finance Documents, and the Sellers' right, title and interest in and to the Ancillary Rights and Claims and including, without limitation…".

20. The court does not pause to consider all of the "*and including without limitation*" element of clause 1 because what follows is merely an identification "*without limitation…*".

21. Schedule 1 refers to three guarantees. This is consistent with the Credit Agreement which makes provision for two corporate guarantees and the Interest Shortfall Guarantee. There could, it is true, be a more detailed reference in Schedule 1 to the guarantees. It appears from the grid in Schedule 1 that it was intended to include such further reference. But that it was not included does not avail Mr Lally. It must be, it can only be, that the three guarantees contemplated in the Credit Agreement are the three guarantees referred to in relation to Brackville Holdings Limited in Schedule 1. No confusion of any sort arises in this regard, never mind the "*significant confusion*" to which Mr Lally avers. And to the extent that there is any (if any) confusion presenting, and the court sees none, consistent with *Analog Devices v. Zurich Insurance* [2005] 1 I.R. 274, and the admissibility of evidence of surrounding circumstances contemplated in same, the court notes that there is an uncontroverted averment by Mr Farrell that the Interest Shortfall Guarantee was included in the security documents which were furnished to Seaconview by the Sellers in the so-called 'data room' that was used in connection with the loan transfer process.

22. One further incidental point is made by Mr Lally and can simply and easily be determined. The point is this. Schedule 1 to the Irish Law Deed of Transfer appears to mis-state the date of the credit agreement. Mr Farrell avers to what has occurred in this regard as having been in effect a 'typo' and points to the fact that the relevant credit agreement is easily and separately identifiable by reference to such other data as appears in the Schedule, viz. its Facility ID number and the, correctly identified, Borrower, Bank and Connection Name. This is so, and the point made in truth is of little significance and no real consequence.

IV. The Mortgage Sale Deed

23. Even if the court is completely wrong, even if there is some confusion presenting by virtue of Schedule 1 to the Irish Law Deed of Transfer, and again the court sees none, the mortgage sale deed provides, in three different ways, a complete answer to such complaint as is made by Mr Lally concerning the Irish Law Deed of Transfer and makes clear that the Interest Shortfall Guarantee necessarily falls within the terms of the Mortgage Sale Deed and Transfer.

24. The Mortgage Sale Deed has been executed between Ulster Bank Ireland Limited, UB SIG (ROI) Limited, Ulster Bank Limited (as 'Sellers' and each a 'Seller') and Seaconview Limited, as 'Buyer'. Recitals A and B explain the background to the Deed:

"A. The Sellers are the legal and beneficial owners of the Mortgage Assets.

B. The Sellers intend to and have agreed to sell and the Buyer intends to and has agreed to purchase and accept an absolute and unconditional assignment and/or transfer of and/or declaration of trust and/or sub-participation over all rights to under or in connection with the Mortgage assets, together with the Underlying Loans and certain contractual rights of the Sellers relating to the other Finance Documents, the Swap Claims and all Ancillary Rights and Claims, subject to the terms and conditions set out in this Deed."

25. The term "*Mortgage Assets*" is defined in cl.1.1 of the Mortgage Sale Deed as meaning:

"any and all of the Sellers' rights, title and interest (past, present and future, except as otherwise expressly stated in this Deed) in and to [inter alia]

(a) the Security Documents together with any and all corresponding rights and benefits under an ancillary guarantee or security relating thereto;

(b) the principal amounts, accrued interest and any other amounts outstanding as at the Cut-Off Date or which become due after the Cut-Off Date under or in connection with the Underlying Loans[1]…

(e) the Ancillary Rights and Claims[2]…".

[1] The term "*Underlying Loans*" is defined in cl.1.1 of the Mortgage Sale Deed as meaning "*the loans and other credit facilities as outlined in the Data Tape advanced to the Borrowers under the Underlying Loan Agreements to be purchased by the Buyer pursuant to this Deed and each an Underlying Loan".* The term "*Underlying Loan Agreements*" is defined, again in cl.1.1, as meaning "*the loan documents and facility letters relating to each Underlying Loan (excluding any Underlying Loan Agreements which are or relate to Excluded Assets) and each an Underlying Loan Agreement*".

[2] The term "*Ancillary Rights and Claims*" is defined in cl.1.1 of the Mortgage Sale Deed as meaning "*(to the extent that same are capable of being or permitted to be assigned by each Seller) all claims, suits, causes of action, and any other right of any Seller whether known or unknown, against any Obligor, or any of their respective Affiliates, agents, representatives, contractors, advisors, or any other person that is (in each case exclusively and explicitly) based upon, arises out of or is related to assets referred to in the definition of Mortgage Assets, including all claims (in contract or in tort) suits, causes of action, and any other right of the Sellers against any auditor, legal, tax, financial or other professional advisor, or other person arising under or in connection with the Finance Documents".*

26. The phrase "*ancillary guarantee or security relating thereto*" patently extends to the Interest Shortfall Guarantee. Seaconview's right to sue Mr Lally on foot of the Interest Shortfall Guarantee represents a right (once a right of the Sellers) to an amount outstanding "*under or in connection with the Underlying Loans*". And Seaconview's right to sue on the Interest Shortfall Guarantee likewise falls within the definition of "*Ancillary Rights and Claims*".

V. The Transfer Certificate

27. An alleged difficulty arises as regards the Transfer Certificate at the heart of these proceedings. The court will run through the applicable contractual provisions below. However, the alleged difficulty can be briefly summarised. A template Transfer Certificate appears at Schedule 6 to the Credit Agreement. Although various 'blanks' in the template form have been completed in the executed

Transfer Certificate of 29th September, 2015, certain blank sections in the Schedule thereto have not. The contention of Seaconview in this respect is, to paraphrase the wording of Hardiman J. in *Aer Rianta*, that any (if any) issue as presents in this regard is simple and easily determined.

28. It may be helpful briefly to explain how the need for the Transfer Certificate arises. Clause 21 of the Credit Agreement ("*CHANGES TO LENDERS*") provides, *inter alia*, as follows (emphases in original):

> *"21.1* ***Assignments and transfers by the Lenders***
>
> *Subject to this clause 21 (Changes to Lenders), a Lender (the 'existing Lender') may:*
>
> *21.1.1 assign any of its rights; or*
>
> *21.1.2 transfer by novation any of its rights and obligations,*
>
> *to any person (the 'New Lender')*
>
> *21.2* ***Conditions of assignment and transfer***
>
> *21.2.1 An assignment will only be effective on receipt by the Agent of written confirmation from the New Lender (in form and substance satisfactory to the Agent) that the New Lender will assume the same obligations to the other Finance Parties as it would have been under if it was an Original Lender.*
>
> *21.2.2 A transfer will only be effective if the procedure set out in clause 21.5 (Procedure for transfer) is complied with….*
>
> *21.5* ***Procedure for transfer***
>
> *21.5.1 Subject to the conditions set out in clause 21.2 (Conditions of assignment or transfer) a transfer is effected in accordance with clause 21.5.2 when the Agent executes an otherwise duly completed Transfer Certificate delivered to it by the Existing Lender and the New Lender. The Agent shall, as soon as reasonably practicable after receipt by it of a duly completed Transfer Certificate appearing on its face to comply with the terms of this Agreement and delivered in accordance with the terms of this Agreement, execute that Transfer Certificate."*

29. The Transfer Certificate as executed on 29th September, 2015, contains at its outset the clause "*To:* [BLANK] (*on its own behalf and as agent for each of the Lenders and the Obligors as defined in the Credit Agreement*)." It seems from cl.21.5.1 and from the balance of the Credit Agreement and the balance of the executed Transfer Certificate that it was intended to be addressed to Ulster Bank Ireland Limited, as Agent (and Ulster Bank Ireland Limited is a party to the Transfer Certificate as Agent). So this uncompleted blank creates an issue that is simply and easily determined.

30. The principal part of the operative text of the Transfer Certificate reads as follows:

> *"Ulster Bank Ireland Limited (the Existing Lender) (a) confirms to Seaconview Limited (the New Lender) that the details set out in the Schedule hereto under the headings 'Existing Lender's Commitments' and 'Relevant Participation' accurately summarise its Commitments and the term and amount of its participation in one or more existing Drawings and (b) requests the New Lender to accept and procure the novation to the New Lender in accordance with clause 21 (Changes to Lenders) of the Credit Agreement of <u>the portion(s) (if any) specified in the Schedule hereto</u> so as to be novated of its Commitments and of its participation in any such drawings to the extent specified."* [Emphasis added].

31. The Schedule can be quoted in its entirety and provides as follows:

> ***"Schedule1***
>
> *Payment Instructions: [BLANK]*
>
> *Existing Lender's Commitments: [BLANK] Portion to be novated: [BLANK]*
>
> *Relevant Participation: [BLANK] Portion to be novated: [BLANK]*
>
> *1 UB to insert relevant information"* [Emphases in Original]

32. The footnoted text does not appear in the original template Transfer Certificate that appears in Schedule 6 to the Credit Agreement.

33. How is the court properly to read the Transfer Certificate and a Schedule that is substantively blank, save for the footnoted text? It appears to the court that the key element in the principal part of the operative text is the above-underlined wording "the portion(s) (if any) specified in the Schedule hereto". It is clear from this wording that no portion need necessarily be specified, and in the executed version no portion is in fact specified. Why would one execute a Transfer Certificate and not specify the portion to be novated? The answer, it seems to the court is simple and easily determined. The word portion means 'a part of a whole'. So one would only mention that part of the whole that was being novated if less than the whole was being novated. A duly executed transfer certificate that does not mention that part of the whole which is being novated can only make sense and only be read as doing what Seaconview contends that the transfer certificate did, which was to transfer to Seaconview the whole of the 'Existing Lender's Commitments' (and there is nothing in evidence to suggest that same were, by 29th September, 2015, less than the initial Commitment of €41.25m.). The court therefore finds that the Transfer Certificate, as executed, was and is good for purpose: it is clear that on the execution of the Transfer Certificate by Ulster Bank Ireland, as Agent, a transfer of its Commitment under the Credit Agreement was effected to Seaconview which thereby came bound by the terms and conditions of the Credit Agreement. What then of the footnoted text? It appears to the court that the text neither adds to, nor takes from, the Transfer Certificate, as executed. All it suggests is that at some point someone thought, rightly or wrongly, that Ulster Bank would insert certain information, which information, in the circumstances, and for the reasons just identified by the court, fell not to be included.

VI. The Letters of Demand, the Bank Confirmation Statement

and the Redemption Statement

(i) The Letters of Demand.

34. Mr Lally complains as to certain discrepancies in the figures cited in the demand letter to Brackville and that to Mr Lally. The ostensible discrepancies are explained away by Mr Farrell in his second affidavit, at paras. 31-34 thereof. Suffice it to note that there are no discrepancies and the amount sought of Mr Lally is correct.

(ii) The Bank Confirmation Statement.

35. As part of the annual audit process done by Deloitte as auditors of Brackville Holdings Limited, a Bank Confirmation Report was at some point sought of Ulster Bank as banker to the company. The requested Bank Confirmation Report issued on 16th August, 2016, and identifies the then account details of Brackville as per Ulster Bank's records. The letter issued from a Belfast office of Ulster Bank and is stated in Pounds Sterling. Mr Lally maintains that the Bank Confirmation Statement is reflective of a variation of the underlying loan agreement to which his consent was not sought as guarantor and thus that his liability as guarantor is vitiated. It is in effect an argument that the rule in Holme v. Brunskill (1878) 3 Q.B.D. 495 falls to be applied in Mr Lally's favour in this regard. There are at least two problems with this contention. First, Mr Farrell has checked with Ulster Bank and it turns out that the Bank Confirmation Statement was issued in error insofar as it contained reference to Pounds Sterling: the underlying loan was, is and remains a euro-denominated loan and the letter ought to have contained euro figures. Second, the rule in Holme v. Brunksill is that a guarantor's liability is vitiated if a creditor and principal debtor agree to vary the contract between them. There is no suggestion in the evidence of any such agreement. Ulster Bank has simply stated, and mistakenly stated, in Pounds Sterling, the amount owing under a loan that was and remains denominated in euro. Even Homer nods. There is nothing in the foregoing that suffices to vitiate Mr Lally's liability under the Interest Shortfall Guarantee.

*(iii) The Redemption Statements***.**

36. Mr Lally complains that two Redemption Statements of 9th January, 2017, issued "without any explanation" from Capita Asset Services (Ireland) and contain certain discrepancies. There should have been and be no surprise about the role of Capita which was clearly explained to Mr Lally in a letter of 4th November, 2015, which states, *inter alia*, that (i) Ulster Bank has transferred its interest in the Brackville loans to Seaconview, (ii) all amounts owing will be due to Seaconview, (iii) Lapithus Management Limited and Capita Asset Services (Ireland) Limited have been appointed by Seaconview as service-providers, and (iv) (*inter alia*) Capita will provide loan administration services in relation to the Facilities. As to the amount owing by Mr Lally, the court has before it, *inter alia*, the uncontroverted evidence of Mr Farrell – and no error, manifest or otherwise, has been identified by Mr Lally in that evidence. For the reasons identified previously above, the court does not consider that it need have regard to such further consistent evidence as has been provided in this regard by Mr Smith, a director of Seaconview; however, it notes that such evidence has been furnished and that, again, no error has been identified in that evidence.

VII. Application of Funds by Receiver

37. It was made clear at hearing that no objection is taken by Mr Lally to the appointment of a receiver. Rather, his concern is that such funds as were received by the receiver were mis-applied. In this regard, Mr Lally draws the attention of the court to the fact that cl.10.3 of the Credit Agreement provides, *inter alia*, that:

> *"If the Agent receives a payment insufficient to discharge all the amounts then due and payable by the Borrower under the Finance Documents, the Agent must apply that payment towards the obligations of the Borrower [in a prescribed manner]".*

38. In what circumstances, Mr Lally asks could "payment insufficient to discharge all the amounts then due and payable" arise other than in a default scenario? Thus cl.10.3, Mr Lally claims, clearly applies, and was not observed.

39. There are at least five difficulties with Mr Lally's contentions in this regard:

> (1) it is readily possible to imagine a non-default situation in which "payment insufficient to discharge all the amounts then due and payable" might be made: such a situation could occur where a Borrower not in default elects to make an additional repayment because of an up-turn in its commercial fortunes;
>
> (2) cl.12.6 of the Mortgage Debenture of 6th October, 2006, pursuant to which the receiver was appointed, makes express provision as to how monies received by the receiver are to be applied, being
>
> > *"12.6.1 in payment of all costs charges and expenses of an incidental to the appointment of any Receiver and the exercise of all or any of the powers aforesaid and of all outgoings properly paid by any Receiver;*
> >
> > *12.6.2 in payment of remuneration to any Receiver…*
> >
> > *12.6.3 in or towards payment and discharge of the Secured Liabilities…".*
>
> (3) under cl.2.2 of the Mortgage Debenture, Brackville has waived "any right to appropriate any payment to, or other sum received, recovered or held by the Security Trustee in or towards the discharge of any particular part of the Secured Liabilities and agrees that the Security Trustee [a defined term which, per cl.1.1 of the Mortgage Debenture, "includes all…persons…who shall be entitled to enforce and proceed upon this Debenture"] shall have the exclusive and unfettered right to appropriate any such payment or other sum in or towards the discharge of such part(s) of the Secured Liabilities as the Security Trustee sees fit;
>
> (4) under cl.18.2 of the Credit Agreement, upon an event of default under that agreement, *inter alia*, "the Commitments of each of the Lenders and any obligation of the Lenders to advance any Drawing shall be terminated" and "the Drawings [shall]…become immediately due and payable"; if the Facility has ceased to be available to the Borrower, it seems to the court that this buttresses the conclusion that partial payments do not fall to be applied in the manner prescribed by cl.10.3 of the Credit Agreement; and
>
> (5) "the aggregate cash consideration received by the Borrower in relation to disposal of all or any part of the Properties or any interest or right therein" (the "Net Proceeds", per cl.1.1 of the Credit Agreement) must, under cl.7.2.3 of that

Agreement, be paid into the "Proceeds Account"; however, under cl.15.4.5, "At any time when an Event of Default is outstanding, the Security trustee may (and is irrevocably authorised by the Borrower to) apply from time to time all amounts standing to the credit of the Accounts in or towards the discharge of all amounts due and payable to the Finance Parties under the Finance Documents"; thus sums realised from a sale of the Properties never fall to be treated as Partial Payments.

40. In short, sums realised by the receiver fell to be applied, pursuant to the terms of cl.12.6 of the Mortgage Debenture, as detailed above, and Brackville has waived any entitlement to call for any such realisation to be applied against any particular part of the Secured Liabilities.

41. In passing, the court notes that on 11th July of last year, Seaconview and National Asset Loan Management Ltd., as Lenders, and Seaconview, as Agent and Security Trustee, entered into a 'Sharing and Instruction' Agreement whereby they agreed to regulate the arrangements between them in respect of the taking of enforcement action pursuant to the Mortgage Debenture. What was agreed between the parties in this regard is (contrary to what was contended for Mr Lally at hearing) an irrelevance to the operation of the Credit Agreement, which has operated and continues to operate in the manner described above.

42. Notwithstanding the various conclusions aforesaid, the court notes in passing that it does not accept the contention that, to the extent that any issue arises in relation to the application of receivership proceeds (and the court, for the reasons stated, considers no such issue to arise here) this is exclusively a matter between borrower and receiver. In seeking to enforce a guarantee pursuant to which demand has been made and no payment received, a beneficiary who is plaintiff in any ensuing action on the guarantee must establish, on the balance of probabilities, its entitlement to the sums sought. Subject to applicable contractual provision, it is open to and proper for a guarantor in such circumstances to seek to raise the defence that the amount sought of it is not in fact the amount owing, if indeed any amount is owing. Such a defence may properly touch upon the previous treatment of monies receipted from or for a debtor to whom the guarantor stands surety, including realised proceeds from the sale of secured properties.

VIII. Delay

43. Mr Lally contends that, at the latest, all drawings under the Facility became repayable by Brackville at end–2008, with the within summary summons being issued at start-2017, with the result that he has a defence to the within proceedings on grounds of unreasonable and excessive delay. Yet again, this is an issue that is simply and easily determined. The Interest Shortfall Guarantee, per cl.1, is a "continuing guarantee" and, per cl.4 "shall not be discharged or impaired by…any release of or granting of time or any other indulgence or concession to the Principal or any other person". So the fact that the default was not immediately sued upon yields no defence in the circumstances presenting.

IX. Applicable Law

44. 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?"*

45. In Harrisrange Ltd v. Duncan [2003] 4 I.R. 1, 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."*

X. Conclusion

46. Enterprise and speculation are the lifeblood of a free economy. Mr Lally is a man of enterprise who speculated on property. For a time, it seems, he was successful. More recently, his fortunes have turned and brought him to the present juncture, for which he is deserving of, and has, the court's sympathy. Yet notwithstanding the many arguments that Mr Lally has raised, and which it has been sought in the within judgment to address comprehensively, the court must respectfully conclude, by reference to the judgment of Hardiman J. in Aer Rianta, that (i) it is very clear that Mr Lally has no case, (ii) such points as he has raised either yield no issue to be tried or only issues which are simple and easily determined (and which have been determined by the court), and (iii) his affidavit evidence fails to disclose even an arguable defence. Notwithstanding that "discernible caution" to which McKechnie J. refers in his judgment in Harrisrange, and which the court has brought to its consideration of the within application, the court considers itself coerced as a matter of law into granting now to Seaconview the summary judgment that it has come seeking, and does so.