THE COURT OF APPEAL

[2017] IECA 11

Kelly P.
Hogan J.
Edwards J.

Court of Appeal

Record No: 2015/000542

High Court

Record No: 2015/3352P

BETWEEN/

D & L PROPERTIES LIMITED

Plaintiff/ Respondent

-AND-

YOLANDA LIMITED

Defendant/Appellants

Judgment of Mr Justice John Edwards delivered on the 1st of February 2017

Introduction:
1. This is an appeal against a High Court order and judgment (McGovern J) made and delivered on the 20th of October 2015 dismissing an application by the appellant (Yolanda) and refusing the relief sought by it in a Notice of Motion dated the 29th of June 2015.

2. In the said motion Yolanda, as defendant to the proceedings, had sought the dismissal of proceedings brought against it by the respondent's (D & L) proceedings on two grounds; namely:-

> (a) under O. 19, r. 28 of the Rules of the Superior Courts 1986 on the grounds that the plaintiff's statement of claim disclosed no reasonable cause of action and/or on the grounds that the plaintiff's claim was frivolous and/or vexatious; and
>
> (b) under the inherent jurisdiction of the court on the grounds that the plaintiff's claim was frivolous, vexatious and/or bound to fail.

3. The proceedings are concerned with a claim for damages for breach of contract, breach of duty (including statutory and fiduciary duty), misrepresentation and conversion; alternatively for the repayment of monies, with interest, had and received by the defendant on foot of a joint venture agreement allegedly entered into between the plaintiff and the defendant on or about the 4th of November 2008 for the development of a property in London. The sum claimed is €9,739,880 comprising a sum of €2,200,000 allegedly advanced by the plaintiff to the defendant under the said alleged agreement, plus compound interest of €7,539,880 which is alleged to have accrued up to the date of the issuing of the proceedings. Yet further interest is also claimed on the basis that it continues to accrue.

4. Yolanda's motion was brought essentially on the basis that there was no, alternatively no enforceable, contract between the parties. A defence delivered by the Yolanda pleads expressly that it received the sum €2,200,000 on foot of an agreement between it and a third party Derek O'Leary, and not on foot of any agreement with D & L. It is further pleaded in the alternative that if, which is denied, there was any agreement between the D & L and Yolanda, it was unenforceable by operation of s.2 of the Statute of Frauds (Ireland) Act 1695 (the Statute of Frauds).

5. With respect to the relief claimed under the Rules of the Superior Courts the High Court judge held that applying Order 19, rule 28, as interpreted in *McCabe v Harding* [1994] ILRM 105 to the pleadings and the information put before the court on affidavit, it was not possible to come to the conclusion that the pleadings were frivolous or vexatious. He concluded that in the circumstances Yolanda had "*not met the test required by O. 19, r. 28 to have the statement of claim struck out or the action stayed or dismissed*."

6. With respect to the relief claimed under the inherent jurisdiction of the court the High Court judge held, following a review of the relevant authorities, that where, at the hearing of such a motion, there was a conflict or dispute on an issue or issues of fact central to the proceedings, as was the case in the matter before him, that conflict or dispute required to be resolved in favour of the plaintiff and that the plaintiff's case "*must be taken at its high watermark*". Moreover, in so far as the defendant had sought to argue that the alleged agreement of the 4th of November 2008 was unenforceable by operation of s.2 of the Statute of Frauds, it was sufficient for the purposes of resisting the motion that the plaintiff had produced evidence, albeit of a tenuous nature, suggestive of a note or memorandum. The same, he felt, could be said with respect to evidence proffered by the plaintiff suggestive of part performance. The High Court was therefore "*not satisfied that the plaintiff's claim was bound to fail*".

7. In this appeal Yolanda, as the appellant, had initially been contending that the High Court judge had erred in several respects both as to matters of law and fact, as set out in its grounds of appeal. However, Yolanda now confines its appeal to that part of the judgment related to the refusal by the High Court judge to strike out the proceedings pursuant to the inherent jurisdiction of the Court as being frivolous, vexatious and bound to fail owing to alleged non-compliance with s.2 of the Statute of Frauds.

D & L's Proceedings – The essentials of its claim as pleaded
8. D & L is a limited liability property investment company registered in Ireland. The principal shareholders in, and the directors of, the respondent company are the aforementioned Derek O'Leary, and his wife Linda O'Leary. Yolanda is a limited liability company registered in Guernsey, Channel Islands and at all material times was a wholly owned subsidiary of another Guernsey registered limited liability company, Elgin Limited (Elgin). Derek O'Leary was declared a bankrupt on the 7th of January 2013, but it is understood that he

has since been discharged from bankruptcy.

9. The Statement of Claim filed in these proceedings by D & L alleges a series of transactions on foot of which contractual and other legal relationships between the parties are said to have arisen. It is pleaded (inter alia):.

> "4. At all material times, the defendant owned and was developing 12 Palace Street, London (hereinafter referred to as the Development Lands), which development was being carried out ultimately as a joint enterprise as between the defendant and the plaintiff through the plaintiff's acquisition of shares in Elgin.
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> 5. On or about 4 November 2008, the plaintiff entered into an agreement with the defendant, its servants or agents, that it would advance the sum of up to €3.8miliion to the defendant (hereinafter referred to as "the Agreement"). The following were express and/or implied terms, conditions and/or warranties of the Agreement:-
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> (a) the plaintiff would advance the sum of up to €3.8million to the defendant;
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> (b) the defendant would pay to the plaintiff interest of 20% per annum on sums drawndown for a period of 12 months and, thereafter, would pay a rate of 2% monthly on sums drawndown and remaining outstanding;
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> (c) that the monies advanced by the plaintiff would be paid following the sales of the apartments and after monies were repaid to Close Bank;
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> (d) the defendant would not convert the monies to its own use;
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> (e) that, for a consideration of GB£25 (€30), the plaintiff would receive a 12.5 per cent shareholding in Elgin;
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> (f) on receipt of the shareholding in Elgin, the defendant would carry out such acts as necessary for the purpose of keeping the plaintiff informed regarding the project and the defendant's business including giving access to the plaintiff of the defendant's and Elgin's respective books and records;
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> (g) the plaintiff would receive a consultancy fee of GB£2,000 per day plus expenses for each day that Mr Derek O'Leary attended the project;
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> (h) the plaintiff would receive a second charge on the Development Lands;
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> (i) The defendant, its servants, or agents would take all necessary steps for the purpose of effecting a second charge in favour of the plaintiff in relation to the Development Lands;
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> (j) the defendant, its servants, or agents would co-operate with the plaintiff as regards the financing and building of the Development Lands and furnish to the plaintiff all necessary information and documentation relating to the enterprise;
>
> (k) the defendant, its servants, or agents would act in good faith towards the plaintiff;
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> (I) the defendant, its servants, or agents would not act and/or omit to act in a manner that would prevent and/or prejudice the repayment of the monies to the plaintiff;
>
> (m)the defendant, its servants, or agents, would not act in a manner that had the object and effect of excluding the plaintiff from the project, any information and/or profits arising therefrom and/or from information pertaining to the defendant, including, its profit and loss and/or other accounts;
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> (n) the defendant, its servants, or agents would not do anything and/or act in a manner that would affect, prejudice and/or prevent the repayment of the loan monies;
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> (o) the defendant, its servants, or agents would account for the proceeds of sale of the units and/or apartments of the Development Site.
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> 6. Pursuant to the Agreement, and on or about 5th November 2008 the plaintiff advanced to the defendant the sum of €2.2million, which for expediency was paid from the bank account of Mr Derek O'Leary and Ms Linda O'Leary to the account of the defendant. Further, the shareholding of 12.5 per cent of Elgin was transferred to the plaintiff and is held on trust for its benefit by Consign Nominees Limited by way of a declaration of trust dated 1 November 2010.
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> 7. Further and/or in the alternative, the said loan by the plaintiff to the defendant constituted a joint venture type investment between the plaintiff and the defendant whereby the plaintiff agreed to inject monies into the project by way of loan for the purpose of allowing the project to be completed and would thereafter profit from the agreed interest rate and from its ownership and any distributions of the defendant. In the premise, the relationship had a fiduciary nature and/or was one of trust as between the parties and/or the principle of good faith was inherent in the relationship as between the plaintiff and the defendant.
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> 8. Further and/or in the alternative, and without prejudice to the foregoing, the defendant, its servants, or agents owed to the plaintiff a duty of care and/or a statutory duty and/or fiduciary duty, which duty was co-extensive with the terms of the Agreement and/or the terms pleaded at paragraphs 5 and 7 above.
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> 9. Further and/or in the alternative, and without prejudice to the foregoing, prior to the plaintiff entering into the Agreement and advancing the monies, the defendant, its servants, or agents, represented expressly or alternatively impliedly, each of the matters pleaded at paragraphs 5 and 7 above knowing that the plaintiff would rely upon the said representations and would be induced thereby to advance the said monies. In the premise, the defendant, its servants, or agents were under a duty to ensure that the said representations were true and accurate and would not be released from such representations in the event that they were wrong. Acting on the face of the said representations and induced thereby, the plaintiff entered into the Agreement and made the said investment."

Yolanda's case and the evidence in support of it.
10. Yolanda's motion was grounded upon an affidavit of Thomas Joseph Coyle, who is a businessman and a beneficial shareholder in Elgin. Mr Coyle, who was authorised to swear the affidavit on behalf of Yolanda, deposed (at para 13) that:

> "Yolanda disputes that it ever had any loan agreement with D&L. The only dealings which it had regarding a loan of €3.8 million were with Mr O'Leary personally who ultimately agreed to lend that sum. At no time during the negotiations (all of which took place in Ireland) did Mr O'Leary assert that he was an agent of or was otherwise fronting for D&L or any other party. The only role for D&L was to act as an invoicing mechanism when a charge would be raised for Mr. O'Leary's time in visiting London."

11. Mr Coyle further deposed that in any event the purported loan agreement as pleaded in the Statement of Claim was not a contract to be performed within one year. Moreover, he claimed, D & L were not in a position to demonstrate compliance with the evidential requirements laid down in s.2 of the Statute of Frauds (Ireland) 1695.

12. From paragraphs 17 to 40 inclusive of his affidavit Mr Coyle set out, from Yolanda's perspective, the background to, and the history concerning, the dealings between the parties. He stated (inter alia):

> '17. Yolanda is a special purpose vehicle which was incorporated to own and develop the Development. The Development comprises of a new theatre, bar and restaurant under eight floors of a thirty-five unit residential development in the Westminster area of London.
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> 18. Originally, the Development was a joint venture between Tom Dowling ("Mr Dowling") and Pat Conlon ("Mr Conlon") who were the initial ultimate beneficial owners of Yolanda. I understand that Mr Dowling bought out Mr Conlon and, after some restructuring, Yolanda became 100% beneficially owned by Kundera Limited ("Kundera") which in turn was wholly owned by Gallium Limited ("Gallium"). Both of those companies are registered in Ireland. Mr Dowling was the Chairman and majority shareholder of Gallium which traded as First Equity Group.
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> 19. At around the same time as Mr Conlon's exit the Development's original lender, Irish Nationwide Bank, also withdrew from the project. As the Development was now a distressed project and needed further equity and debt finance, it was necessary for Gallium to find other investors to continue it.
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> 20. Mr Dowling/Gallium and I were both clients of Anthony Carey ("Mr Carey"), a partner of Cooney Carey which is a firm of accountants in Dublin. I had previously told Mr Carey that I was generally interested in any new property developments in London of which he may become aware. As a result, around September 2007 Mr Carey informed me of the Development and that new investors were being sought.
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> 21. After some discussion and due diligence, I agreed to invest in the Development in return for a 40% interest. My investment was finalised in January 2008 with the beneficial shareholders of Elgin being me (40%), Kundera (40%) and Mr Carey (20%). Mr Carey had been given a 20% shareholding in recognition of his work in bringing me in as an investor, amongst other things. At the same time, a new senior lender for the project was found, being Close Brothers Limited ("Close").
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> 22. Following January 2008, Yolanda was seeking to obtain a revised planning approval for the Development to increase its area from 37,500 to 48,000 square feet, with a 35 unit scheme in lieu of the existing 32 unit one. On receipt of the revised planning, the new scheme required more funding and Close wanted more equity to be injected into the Development. As a result, Yolanda needed to find another investor.
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> 23. Mr Carey also had a relationship with Mr O'Leary. This is how Mr O'Leary became introduced to the Development. Given Mr Carey's relationship with Mr O'Leary, in the early stages he was the main conduit between Mr O'Leary, me and the other Elgin beneficial shareholders.
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> 24. During October and November 2008 there were a number of discussions and email exchanges (mostly via Irish domain email addresses) with Mr O'Leary, and two or three meetings were held at Cooney Carey's offices in Dublin involving Mr O'Leary, Mr Carey, Mr Dowling, Alan Barry (the then Managing Director of Gallium) ("Mr Barry") and me, although I may not have attended all the meetings. Mr O'Leary also undertook his own independent due diligence on the Development. This culminated in the following emails exchanges:
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> (a) On 30 October 2008, Mr O'Leary sent an email to Mr Carey setting out Mr O'Leary's proposal for his investment in the Development.
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> (b) Mr Carey responded to Mr O'Leary's email on 31 October 2008 setting out his clarification on Mr O'Leary's proposal. (Mr Carey forwarded that email and Mr O'Leary's email onto Mr Dowling and me, and there was some discussion between us).
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> (c) On 31 October 2008, Mr O'Leary subsequently responded to Mr Carey's email setting out the basis upon which he was prepared to invest in the Development, which in turn was replied to by Mr Carey on the same day stating he was happy with the proposed terms and would discuss it with Mr Dowling and me.
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> (d) On 4 November 2008, Mr. O'Leary sent a further email summarising his "*understanding of my involvement in this project*".
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> Copies of the above emails are under Tab 5 of "TJC1" (collectively referred to as the "Email Exchange").'

13. I have considered the exhibits at Tab 5 of TJC1 representing the email exchange and am satisfied that their substance and import has been fairly summarized by Mr Coyle. I note, however, that the e-mail of the 4th of November 2008 from Mr O'Leary does contain a stipulation that "*My company D & L Properties Limited will be paid £2000 per day and reimbursed all expenses for any time I spend in London*".

14. Mr Coyle's affidavit continued:

'Also, on 4 November 2008, I attended a meeting at Cooney Carey's offices in Dublin which was also attended by Mr Carey, Mr O'Leary, Mr Dowling and Mr Barry. At that meeting, Mr Carey produced a copy of the Email Exchange and wrote on that document "Agreed in Principle" which was then signed by Mr O'Leary, Mr Carey, Mr Dowling and me. A copy of this signed exchange is under Tab 6 of "TJC1".'

15. Again I have scrutinised the documents at Tab 6 of TJC1 and have verified that what is represented by Mr Coyle is the case. Mr Coyle continued:

'It was always intended that the transaction would be formalised and more fully set out in a written agreement to be executed by the parties. In that regard, Ciaran McIntyre (the then in-house lawyer with First Equity Group) ("Mr McIntyre") sent an email on 4 November 2008 to Mr Carey, Mr Dowling, Mr Barry and I attaching a draft Loan Agreement between Elgin, Yolanda, the Elgin beneficial shareholders and Mr O'Leary. Similarly on 5 November 2008, Mr Carey sent an email to Mr McIntyre, copied to Mr O'Leary, asking him to prepare *"draft agreements re Derek's involvement*". That email set out the terms of the agreement which recorded (amongst other things) *"Amount: €3,800 (sic) euro loan to Yolanda from Derek O'Leary*" (emphasis added), with which Mr O'Leary took no issue. Copies of these e-mails and the attached draft Loan Agreement are under Tab 7 of "TJC1".'

16. I am satisfied that the substance and import of the documents at Tab 7 of TJC1 has been fairly summarized by Mr Coyle, and I note in particular that the draft agreement reflects that what had been agreed was with Mr Derek O'Leary who is described as "*the Lender*" and that D & L is nowhere referred to within it. I further note that Mr Carey's e-mail of the 5th of November 2008 *inter alia* advises Mr McIntyre that *"[a] binding agreement was concluded as per the terms herein and signed by the parties on the 4th November 2008. This document is a summary of same and is to be used as the basis of drafting an all inclusive agreement and as the basis for receiving professional advices on efficient structure."* Moreover the investor is identified as "*Derek O'Leary, Oakmount, The Birches, Foxrock, Dublin 18*". Once again, however, and following the heading "*Expenses"*, it is stated that "In the event that Yolanda get the extra planning sought -- D.&L Properties Limited will be paid £2,000 per day and reimbursed all expenses for any time Derek spends in London. This will be invoiced for immediate payment monthly. Expect no more than 3 days per month. (May have to charge VAT)." Mr Coyle then continued:

This Loan Agreement was not finalised and executed. However, if I or any of the other individuals involved in the discussions had thought that the lender was to be D&L and not Mr O'Leary, the draft would not have named Mr O'Leary in the first place or it would have been immediately corrected by Mr Carey, Mr Dowling or this deponent when we saw it. No such correction was ever made or suggested.

28. On or around 7 November 2008, the initial drawdown of €2.2 million was transferred from an account in the names of "Derek and Linda O'Leary" at Anglo Irish Bank Corporation plc in Dublin into Yolanda's bank account. A copy of the Credit Advice Slip and SWIFT receipt for that transaction is under Tab 8 of "TJC1".

29. On 20 November 2008, on the basis that the facility was up to €3.8 million, Cosign Nominees Limited (an Intertrust company) executed a Declaration of Trust acknowledging and declaring that it held a 12.5% shareholding in Elgin as nominee of and in trust for Mr O'Leary. At Mr O'Leary's request, a new Declaration of Trust was executed on 1 November 2010 to the effect that his beneficial shareholding was held for D&L with retrospective effect from 20 November 2008. Copies of those declarations of trust are under Tab 9 of "TJC1". In making this request Mr O'Leary did not seek to suggest that it had anything to do with D&L being the lender for the facility afforded to Yolanda.

30. Mr O'Leary's beneficial shareholding in Elgin required a dilution of the other beneficial shareholdings. Accordingly, as at 20 November 2008 the beneficial owners of Elgin's shares were me (35%), Gallium (35%), Mr Carey (17,5%) and Mr O'Leary (12.5%). A diagram of Yolanda's shareholding at this time is under Tab 10 of "TJC1".

17. Once again, I are satisfied that the substance and import of the documents at Tabs 8, 9 and 10 of TJC1 has been fairly summarized by Mr Coyle, who then continued:

'Funding difficulties with the Development

31. The Development then proceeded with Mr O'Leary having input into the project. Discussions between Mr O'Leary, Mr Dowling, Mr Barry, Mr Carey and I were via email, telephone calls and meetings. The vast majority of meetings were held in Dublin.

32. The advent of the worldwide financial crisis and the resulting collapse of the global property market in late 2008/early 2009 meant the Development ran into difficulties. At one stage, there was discussion about putting Yolanda into receivership.

33. Gallium itself had been experiencing financial difficulties in late 2008, and was eventually placed into liquidation in early 2009.

34. The revised planning consent for the Development was granted in early 2009 by which time additional equity and debt funding was needed. Discussions were entered into between Elgin's beneficial shareholders (including Mr O'Leary) and Close. This culminated in Close offering a revolving loan facility to Yolanda by letter dated 18 December 2009, a copy of which is under Tab 11 of "TJC1", which was accepted. One of the conditions precedent to the new facility (at clause 9(d)) (the "Condition Precedent") was a payment of £2 million in reduction of the outstanding balance on Close's existing loan account for the Development. The majority of these funds were to be provided by Mr O'Leary.

35. In February 2010, Close began insisting on the payment of £2 million new equity under the Condition Precedent. Discussions were entered into between Mr O'Leary and the other beneficial shareholders in relation to the payment of those monies.

36. On 11 May 2010, Mr O'Leary sent an email to Mr Carey and me advising that he could raise sufficient funds to satisfy the Condition Precedent. However, Mr O'Leary further advised that his bank was insisting on certain security requirements. A copy of that email is under Tab 12 of "TJC1". It was at this point that Mrs O'Leary was being put forward by Mr O'Leary as the lender for the further equity instead of him. No reason was ever provided by Mr O'Leary for this proposed change of lender and there was never any reference to the sums having been advanced or to be advanced by D&L.

37. On 13 May 2010, Mr O'Leary sent an email to Mr Carey and me stating that the agreement needed to be changed as, amongst other things, Mrs O'Leary was to introduce mezzanine capital of £1.7 million and Mr O'Leary would not be introducing the balance as per the "old shareholders agreement" (which I understood as reference to the balance of monies owing under the loan transaction pertaining to the facility of up to €3.8 million). A copy of that email is under Tab 13 of "TJC1".

38. On 20 May 2010, Mr Carey forwarded to Mr O'Leary and I an email sent on the same date on behalf of John O'Donovan of Orpen Franks Solicitors in Dublin ("Mr O'Donovan"). I understood that Orpen Franks were the Irish solicitors retained by Mr O'Leary. That email recorded Mr O'Donovan's understanding of the proposed transaction and attached a draft Mezzanine Loan Agreement between Yolanda and Mrs O'Leary (the "Draft Mezzanine Loan Agreement"). A copy of that email and the Draft Mezzanine Loan Agreement is under Tab 14 of "TJC'l".

39. As Mr O'Leary imposed conditions on the further equity which were not acceptable to Close, the Mezzanine Loan Agreement was never executed and no further equity was provided by Mr O'Leary or Mrs O'Leary. As a result, Yolanda was in a financially distressed position. It had to secure alternative funding from a third party to the satisfaction of Close, which Yolanda finally managed to do but with financial consequences. This allowed the Development to be completed with the continuing support of Close.

Completion and status of the Development

40. The works on the Development were fully completed in September 2012.'

18. I am also satisfied that the substance and import of the documents at Tabs 11, 12, 13 and 14 of TJC1 has been fairly summarized by Mr Coyle. It is further noted that the letter from Mr O'Donovan dated the 20th of May 2010 refers expressly to "*Derek's initial £2,000,000 sterling investment*" and that it contains no reference whatever to D & L.

19. It is contended on behalf of Yolanda, and it must be accepted, that in the various documents exhibited by Mr Coyle, and previously referred to, Mr O'Leary is acknowledged in express terms as being the party that had contracted with Yolanda. Mr Coyle has also produced, and exhibited at Tab 16 of TJC,1 a series of further e-mails from Mr O'Leary to various parties in which he is referred to as being the lender.

20. Finally, reliance is placed by Yolanda on D & L's accounts for the years ended 31 December 2008 to 31 December 2013 (inclusive), and in particular the figures for "debtors" in the abridged balance sheet for each year during that period, which fail to reflect the figures claimed in respect of the alleged loan of €2,200,000 and accrued interest of €7,539,880 to Yolanda or, as Mr Coyle puts it, "anything approaching them".

21. Yolanda also relies upon an affidavit of Paul Schreibke sworn on the 24th of July 2015. Mr Schreibke is a director of Intertrust International Management Limited (Intertrust). He explained that Intertrust was previously known as Fortis and confirmed that at all material times Fortis/Intertrust administered the trust arrangements whereby certain shares in Elgin Limited were to be held in trust, and his affidavit describes those arrangements. In summary he states that the Declarations of Trust pertaining to the shareholding in Elgin Limited had been issued to Derek O'Leary on the basis that he was the beneficial owner of those shares, and that that was entirely consistent with the initial instructions that Fortis/Intertrust had received, namely that the shares were to be held for Mr O'Leary and that the trust over them was to be in his name only. Contrary to what Mr O'Leary now contends, at the time that the trust was established no intention was communicated to Fortis/Intertrust that the relevant shareholding was to be held in trust for D & L. While it was subsequently intimated in late 2008 that Mrs O'Leary rather than Mr O'Leary ought to have been named as the beneficial owner of the shares no transfer to Mrs O'Leary was ever in fact effected, as Mr O'Leary refused to give written instructions regarding alteration of the relevant Declaration of Trust, and contended that beneficial ownership of the shares should never have been attributed to him in the first place. There matters lay until October 2010 when Mr O'Leary enquired if the name on the Declaration of Trust could be changed to D & L. On 1 November 2010 Mr O'Leary e-mailed Intertrust stating "*This should always have been in the name of D & L Properties. Will this be backdated?*"

D & L's response to the motion and the evidence in support of it

22. D & L's response and the evidence in support of it is to be found in the affidavits of Derek O'Leary sworn on the 3rd of July 2015, and on the 10th of September 2015, and the documents therein exhibited, as well as in the affidavits of Declan Lernihan sworn on the 3rd of July 2015 and on the 11th of September 2015, and the documents therein exhibited.

23. In his first affidavit Mr O'Leary asserts that on or about 4 November 2008, D & L entered into an agreement with Yolanda that it would advance the sum of up to €3.8million to Yolanda and refers to e-mail correspondence between the parties around that time. He says that D & L agreed to advance these monies in circumstances where Yolanda was carrying out a development project on 12 Palace Street, London, England and was seeking an urgent injection of funds. Without the €2.2milIion advanced, the project would have failed.

24. According to Mr O'Leary, the basis of the agreement was, inter alia, that D & L would advance the sum of up to €3.8million to Yolanda and Yolanda would repay this sum to D & L along with a minimum interest of 20% per annum on sums drawn for a period of 12 months and, thereafter, would pay a rate of 2% per month on sums drawn down and remaining outstanding. In addition to this, it was agreed that, for a consideration of GB£25 (€30), D & L would receive a 12.5% shareholding in Elgin Limited, the parent company of Yolanda. In addition and/or or in the alternative, the Agreement was a joint venture type agreement whereby D & L would advance up to €3.8million by way of loan on certain terms and conditions and would, separately acquire a shareholding in the first named Yolanda for GB£25 (€30).

25. Mr O'Leary contends that D & L advanced the sum of €2.2million, which sums were paid from his account (and the account of Ms Linda O'Leary) to the account of Yolanda on the 7th November 2008. He asserts that whilst Yolanda seeks to rely on this payment transaction as evidence that the monies were advanced by him personally, this is not so. The monies were paid in this manner for expediency as the project was at risk of failing.

26. Mr O'Leary has deposed that Yolanda has not repaid the principal sum nor has it paid interest in accordance with the agreement, which currently stands at €7,734,678. In addition to this, D & L did not receive a second charge on the lands in question, being 12 Palace Street, London, England. Essentially, therefore, Yolanda has failed to repay the monies and have simply converted the monies to its own use.

27. He states that this has occurred despite the fact that Yolanda has sold the 38 apartments for approximately

stg£60million/£70million, and asks the Court to note a failure on Mr. Coyle's part to advert to this. He states that in addition to this, despite D & L receiving a 12.5% shareholding in Elgin Limited, D & L has received no information in relation to that company, and nor has it received any dividends despite the apartments having been sold. D & L's shares are held in trust by Cosign Nominees Limited, which initially (and inaccurately) executed the Declaration of Trust in his favour, which was remedied so that it constituted a Declaration of Trust in favour of D & L. Again, he comments, Mr. Coyle fails to deal with this fact.

28. Mr O'Leary says that it is D& L's case that the monies were advanced by way of loan in circumstances where there was a joint venture enterprise as between D & L and Yolanda as regards the development of the units including the apartments, and the ultimate sale of the apartments. Therefore, despite taking the monies, and conferring upon D & L a shareholding in the Elgin, Yolanda has failed to account to D & L (or to Mr O'Leary insofar as that is Yolanda's contention) for the principal sum borrowed and/or for the sales of the apartments. Essentially, it is contended, Yolanda has converted the monies to its own use and benefit.

29. Turning specifically to Mr Coyle's affidavit, Mr O'Leary contends that his assertion that the monies were not advanced by D & L, but rather by Mr O'Leary personally "*is completely contrived and is designed to try to ensure that they never have to repay the money*." Mr O'Leary says this is not the case and that at its height Yolanda's claim is that, because there was no reference to D & L during the negotiations, it could have not been D & L that entered into the agreement and/or lent the money. In fact, Mr Coyle goes no further than to say that Mr O'Leary was the "intended lender". Even then, it is acknowledged that it was always the intention of the parties to "formalise" the transaction by reducing it to a written agreement to be signed by the parties.

30. Mr O'Leary says that Yolanda is simply wrong. It was D & L that agreed to advance the monies and it was D & L that lent the monies. He says that contrary to what is sworn by Mr. Coyle at paragraph 45 of his Affidavit, the fact that D & L was the entity involved is reflected in the D & L's company accounts for the years 31 December 2008 to 31 December 2009 and he exhibits those accounts.

31. I have examined the accounts in question as exhibited by Mr O'Leary. It would appear to be overstatement to say that the involvement of D & L with Yolanda is reflected in those accounts. What they do reflect, however, is that D & L is recorded as having received a loan from Mr O'Leary personally of €2.26 million in the year ended 31 December 2008, which appears to have been repaid in the year ended 31 December 2009. This is consistent with an explanation furnished subsequently by Mr O'Leary at paragraphs 6 and 7 of his second affidavit (described as First Supplemental Affidavit of Derek O'Leary) which was sworn on 10th September 2015. However, Mr Coyle is also correct in his point that the debtors figure on the abridged balance sheet in both years does not appear to record a figure for loans to, or debts due from, any party for a figure remotely approaching that contended for by Mr O'Leary as having been lent by D & L to Yolanda. Yolanda is not mentioned anywhere in the accounts.

32. In seeking to further address issues raised by Mr Coyle, Mr O'Leary contends that Yolanda would be just as able to advance a counterclaim as against D & L in these proceedings as against him personally. He makes the further point that at no stage has Yolanda sued for any alleged loss notwithstanding the passage of years since the money was advanced, nor has it sought specific performance of what it is claimed should have been provided by way of additional loan.

33. The remainder of the affidavit makes a number of legal points that were more properly a matter for legal submissions.

34. In his second affidavit Mr O'Leary seeks to engage with the contents of the affidavit of Mr Schreibke which I have summarized earlier in this judgment. He makes the point that Mr Schreibke was not involved in the negotiations that led to the agreement the subject matter of these proceedings.

35. Mr O'Leary asserts at paragraphs 6 and 7 of his second affidavit (to which I have previously alluded) that:

> *"6. The Plaintiff has always been very clear as to the agreement. For reasons of expediency and urgency, the monies, being the sum of €2.2million, were lent to the Defendant and were paid using an account in my name and the name of my wife, Linda O'Leary in November 2008. This was because the project was about to fail and the Defendant needed the money straightaway. The Plaintiff did not then have ready access to its cash which was subject to a notice period of withdrawal from its bank account. When the loan monies were available to the Plaintiff and the structure of the loan agreed by the Plaintiff's accountant, Declan Lernihan, and Gerry Higgins of Cooney Carey Accountants representing the Defendant, the loan monies were repaid by the Plaintiff to your Deponent and my wife Linda and all of this is appropriately recorded in the bank account and the filed accounts of the Plaintiff."*
>
> *7. The need and payment of the loan monies was immediate in early November 2008. The structure of the payment was a matter for me to take professional advice on and the parties were happy for the structure of the transaction to be set up following my taking professional advice. This is apparent from my email to Mr. Carey and Mr. Coyle dated 4 November 2008 (15:56) wherein I record that the money was needed by the defendant next week but that "Tony [Carey] to agree most tax efficient tax structure with Declan Lernihan".*

36. The email of 4 November 2008 was exhibited, as was an email of 5 November 2008 at 18.35 from Mr Carey to Mr Ciaran McIntyre which asked :

> *"Hi Ciaran*
>
> *I would be obliged please if you would review any draft agreements prepared re Derek's involvement in Elgin Limited: The following are the terms to be incorporated therein. I will need this document completed by next Wednesday.*
>
> *May I also ask please that you:*
>
> *a) Arrange for the share transfers and the appointment of a nominee director to Guernsey.*
>
> *b) Meet Mr. Declan Lernihan at PGL Accountants...You should brief Gerry Higgins of this office who will attend with you. The purpose is to agree a suitable structure for Derek. It is best if the existing structure fitted us all."*

37. The said email was accompanied with a bullet-point list comprising a summary of the terms said to have been concluded and signed by the parties on the 4th of November 2008, which summary was "*to be used as the basis of drafting an all inclusive agreement and as the basis for receiving professional advices on efficient structure*" One bullet point was entitled "*Structure*", and provided: "*In a manner to be agreed. Most likely by way of provision of shareholding in Elgin Limited and utilisation of nominee director who will act on DOL's behalf*."

38. Mr O'Leary further contended that the account of Mr. Coyle in his affidavit sworn on 26 June 2015 was entirely opportunistic and contradictory to his own understanding of the arrangement as contained in his email dated 19 March 2013 (17:00) to Ms. Linda O'Leary (and copied to Mr. Schreibke) wherein he had asserted:-

> *"It is important for you to understand that only a portion of funds committed by Derek on behalf of both of you to the Palace St project were actually received by Yolanda Ltd. A shareholding in Yolanda was transferred to D&L Properties Limited on the basis that this commitment would be honoured. However, given that your commitment was only partially honoured, the current shareholding in Yolanda Ltd will need to be agreed and adjusted to reflect this situation in the first instance.*
>
> *Separately, can you clarify for me whether I respond to you in a personal capacity or as the person in control of D&L Properties and what evidence can you provide me on the current status of the company?"*

39. In the same vein, Mr O'Leary has also exhibited a further e-mail from Mr Coyle to him (Mr O'Leary) (and again copied to Mr. Schreibke) dated 9 May 2013 wherein he says:

> *"However, I still have very serious concerns, as outlined to Linda in my email of 19/03/13 and 19/04/13 regarding the non fulfilment of the monies that D and L Properties Ltd committed to providing at the outset of this matter back in November 2009... ."*

40. Mr O'Leary's second affidavit also seeks to cast doubt on Mr Coyle's candour as a deponent in these proceedings, and also on his independence in as much as it is suggested he has conflicts of interest in a number of respects.

41. This Court has also had the benefit of two affidavits of Declan Lernihan sworn on the 3rd of July 2015 and the 11th of September 2015, respectively. Mr Lernihan is a partner in PGL Chartered Accountants, and Mr O'Leary is a client of his firm. In the first of his affidavits Mr Lernihan describes his involvement in the events of late October /early November 2008. He stated (inter alia):

> 3. … In or about October 2008 Mr O'Leary advised me he had been approached to provide funding to the developers of a property development at Palace Street in London (the Development). I say and believe Mr O'Leary had been approached in this regard by Mr Anthony Carey, accountant of Cooney Carey: who had an interest in the Development. I say and believe the broad terms of an agreement whereby Mr O'Leary would cause funding to be made available to the Development were reached in late October and early November 2008.
>
> 4. I say and believe and was advised at the time by Mr O'Leary that there was an urgency to securing the funding and Mr O'Leary caused a sum of €2.2million to be paid to Yolanda on the 7th November 2008.
>
> 5. It was always my instruction that Mr O'Leary agreed to the advance subject to the structure of the investment being confirmed which, at the date of the advance, had yet to be decided but which was to be decided by him following the receipt by Mr O'Leary of tax and accountancy advice from me. Mr O'Leary sought that advice from me in late October and early November 2008.1 discussed the matter with Mr Gerard Higgins of Cooney Carey and I advised Mr O'Leary to structure the funding through D & L Properties Limited.
>
> 6. I say and believe the €2.2million was advanced by Mr O'Leary to Yolanda Limited from a personal bank account on the 7th November 2008 before the appropriate structure was finalised due to the urgency of the matter. That advance was then recorded in the books and records of D&L Properties Limited as an asset of the company financed by way of loan due to Mr & Mrs O'Leary and is recorded as such in that company's Audited Accounts for the year ending 31st December 2008. In March 2009 the loan of €2.2million was repaid by D&L Properties to Mr & Mrs O'Leary and is recorded in the books and records of D&L Properties as having been repaid to him.
>
> 7. I say and believe the Development then encountered difficulties due to the general financial collapse. Consequently by the 30th September 2009, which is the date the audit report was signed, on the financial statements of D&L Properties Limited for the year ended 31 December 2008, the directors determined to make full provision for the loan in its accounts as there was serious concern by then that the advance would not be repaid. This provision is referred to in the Audited Accounts of D&L Properties Limited for the year ending 31st December 2008."

42. While the accounts of D & L do record an advance by Mr O'Leary to that company of €2.26 million during the period in question, which was repaid, and the acquisition by D & L of a 12.5% shareholding in Elgin for €30 is also reflected in the relevant accounts, Mr Lernihan's affidavit fails to show how the onward transmission of the money advanced to Yolanda by Derek O'Leary allegedly for D & L's benefit is recorded in the accounts. It is not included in the debtors figure on the abridged balance sheet in either year and the notes to the accounts make no mention of any agreement with Yolanda or any payment to Yolanda by Mr O'Leary for or to the benefit of D & L.

43. In the second of his affidavits Mr Lernihan states that in November 2008 he was asked by Mr O'Leary, in circumstances where the money had already been paid over to Yolanda who had required it immediately, to advise on how best to structure the investment and he had agreed to give that advice. He exhibited an e-mail dated 5th January 2009, with file note annexed, addressed to Mr Gerry Higgins of Cooney Carey setting out his understanding and expectation. The file note includes comments by him under a heading "Issues on which PGL might advise Derek and Linda" as follows: "*Who makes the loan to Elgin Limited - i.e., who receives the interest and how is it taxed in Ireland? The corporate tax rate would be 12.5%. As far as I am concerned D&.L is making this loan and will pay tax at 12.5%."*

44. Mr Lernihan goes on to state that deferral of a decision on the most tax efficient structure is "*a feature of investments of this nature particularly where the legal documentation is lagging behind the commercial transactions. In the instance of the loan the subject matter of these proceedings, this process continued until March 2009*."

45. Mr Lernihan suggests that Yolanda's representatives knew at all stages that the structure was yet to be determined and he contends that "*[a]t no time was the structure or the fact that there was to be a structure contentious*" and that "[*t]o my knowledge the first time it was ever suggested that the Plaintiff did not make the loan to the Defendant was when the proceedings for the recovery of the loan were initiated by the Plaintiff in Guernsey in 2014*."

Submissions on behalf of the appellant and moving party (Yolanda)

46. The Court was referred to the judgment of the High Court in *Barry v Buckley* [1981] I.R 306 in support of a submission that the

inherent jurisdiction to strike out proceedings goes well beyond that provided for in Order 19, Rule 28 RSC. As Costello J stated in that case the jurisdiction, which is to be exercised sparingly, exists to ensure that an abuse of the process does not take place. He added:

> *"So if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail."*

47. The Court was also referred at some length to extracts from the judgment of McCarthy J in *Sun Fat Chan v Osseous Ltd* [1992] 1 I.R. 425 endorsing the views expressed by the High Court in *Barry v Buckley* as to the existence of the jurisdiction, and offering certain further observations including that the High Court should be slow to entertain and grant relief in an application to dismiss an action on the basis that, on admitted facts, it cannot succeed; and further that, in such an application brought at the statement of claim stage, the action should not be dismissed if the statement of claim admits of an amendment that would save it, and the action founded on it.

48. It was further submitted that while it has been said that the inherent jurisdiction to strike out proceedings is to be exercised sparingly, it has also been acknowledged that it has a particular application and utility in respect of contractual claims where the case will stand or fall on the existence or interpretation of documentation.

49. The Court was referred in that regard to the judgment of Clarke J in *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207 and particularly to his observations (at para 3.9) that:

> *"3.9 It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established. Likewise, a defendant in a specific performance action may be able to persuade the court that the only document put forward as being a note or memorandum to satisfy the Statute of Frauds, could not possibly meet the established criteria for such a document. More difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.*
>
> *3.10 However, it is important to emphasise the different role which documents may play in proceedings. In cases, such as the examples which I have given earlier, involving contracts and the like, the document itself may govern the legal relations between the parties so that the court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned.*
>
> *3.11 However, there are other cases where documents are not vital in themselves save that they may cast light on the underlying facts which may be at the heart of the proceedings concerned. Correspondence, minutes of meetings, memoranda and the like, do not, of themselves, create legal relations between the parties. Rather they purport to reflect facts such as what was said at meetings, what was communicated from one party to another or the like. Parties may explain or seek to clarify what might otherwise appear to be the natural meaning of such documents. At the end of the day, it will be what view the court takes as to what actually happened that will determine the facts on the basis of which the court will come to its judgment. Contemporary documentation is often a very valuable guide to such facts, but such documentation is not necessarily determinative. It is important, in that context, not to confuse cases which are dependent on documents themselves with cases where documents may be a guide, albeit often a most important guide, to the underlying facts which need to be determined in order to resolve the issues between the parties."*

50. It was submitted on behalf of Yolanda that the case that D&L has chosen to advance is, by virtue of section 2 of the Statute of Frauds (Ireland) 1695, necessarily dependent on the existence of a document. As no such document exists, the case must inevitably fail and so it is just and appropriate that it should be struck out at this stage in the proceedings.

51. Yolanda makes the point that because the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) only came into effect on the 1st of December 2009 the alleged contract in this case which, according to D & L, was entered into on the 4th of November 2009 is governed by s. 2 of the Statute of Frauds in the form in which it was enacted before the Act of 2009 repealed certain clauses within it.

52. S. 2 of the Statute of Frauds, as applicable in the circumstances, provides:

> *"... no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage,* ***or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof****, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to he charged therewith, or some other person thereunto by him lawfully authorized." [emphasis added]*

53. Yolanda contends that s. 2 is engaged in one of two ways. First, the alleged contract related to the sale of lands or an interest in lands. Secondly, even if that were held to be not so (e.g., if this Court considered that it was in truth just a loan agreement), it was nonetheless an agreement that was not to be performed within the space of one year. In either instance a note or memorandum is required.

54. Relying on *Godley v Power* (1961) ILTR 135 at 145, Yolanda contends that "*A memorandum must contain all essential terms. The parties, the property, and the consideration must always be ascertainable from it, but it need not contain any terms which the general law would imply. "*

55. It was submitted that in addition to identifying the parties, the consideration, the property (where the contract pertains to land) and all of the other essential terms, s. 2 of the Statute of Frauds requires that the document said to constitute the contract, or a memorandum or note thereof, should be signed by the party against whom enforcement is sought (here Yolanda) or its agent.

Yolanda, however, denies that it ever entered in to any such agreement with D & L., and claims there is no document signed on its authority that could evidence such agreement.

56. Counsel for Yolanda acknowledges that for the purpose of assessing whether the inherent jurisdiction to strike out ought to be exercised the Court has to consider the plaintiff's claim at face value and at its high water mark. Nevertheless, it is clear, he says, that D & L cannot demonstrate compliance with the Statute of Frauds and is bound to fail.

57. Counsel for Yolanda has further submitted D & L could not rely on and avail of part performance in circumstances where specific performance would never be available in respect of the agreement alleged.

58. It is further contended on behalf of Yolanda that D & L's subsidiary claims that are advanced in the alternative in the Statement of Claim amount to nothing more than the dressing up of a claim on foot of an alleged agreement with, by way of supposed embellishment, references to obligations of a fiduciary nature, a trust or a principle of good faith (paragraph 7), a duty of care, a statutory duty (albeit that no statute is identified) and/or a fiduciary duty co-extensive with what was pleaded in paragraphs 5 and 7 of the Statement of Claim (paragraph 8) and the making of representations as to the matters pleaded in paragraphs 5 and 7 that induced D&L to enter into the alleged agreement and make the alleged investment (paragraph 9). All of this, it is said, turns on precisely the same alleged transaction, a transaction that the Statute of Frauds requires to be in writing or to be evidenced in writing and signed by the party against whom enforcement is sought.

59. It is submitted, citing *Actionstrength Ltd v International Glass Engineering SpA* [2003] 2 A.C. 541, that claims of this nature cannot be permitted to render the evidential requirements of the Statute of Frauds nugatory.

60. In *Actionstrength* it had been alleged that the claimant's continued supply of labour to the first named defendant (Inglen) in respect of the construction of a factory for the second named defendant (St-Gobain) was procured by a promise that, if the first named defendant defaulted in making payments to the claimant, the second named defendant would retain monies that it owed to the first named defendant and pay the claimant the money that it was owed by the first named defendant. However, when the claimant sued the second named defendant on foot of this arrangement, the latter pleaded that what was alleged was a guarantee which was unenforceable due to the absence of a written note or memorandum as required by section 4 of the Statute of Frauds 1677 (which is equivalent to section 2 of the 1695 Statute pertaining to Ireland). The claimant attempted to get around this by claiming that the second named defendant was estopped from relying on section 4 because its promise to pay had induced the claimant to refrain from terminating its contract and withdrawing its labour as it was entitled to do by reason of the first named defendant's non-payment. This was rejected by the House of Lords. Lord Bingham (with whom Lords Woolf and Walker concurred) identified the core reason as follows:

> *"... in seeking to show inducement or encouragement Actionstrength can rely on nothing beyond the oral agreement of St-Gobain which, in the absence of writing, is rendered unenforceable by section 4. There was no representation by St-Gobain that it would honour the agreement despite the absence of writing, or that it was not a contract of guarantee, or that it would confirm the agreement in writing. Nor did St-Gobain make any payment direct to Actionstrength which could arguably be relied on as affirming the oral agreement or inducing Actionstrength to go on supplying labour. If St-Gobain were held to be estopped in this case it is hard to see why any oral guarantor, where credit was extended to a debtor on the strength of a guarantee, would not be similarly estopped. The result would be to render nugatory a provision which, despite its age, Parliament has deliberately chosen to retain.'*

61. Returning to the present case, it was further argued that the High Court judge's reasons for rejecting the argument based on the Statute of Frauds were *"flawed, opaque and unduly lenient to D & L."* It has been suggested that he erred in failing to examine whether there actually were any documents capable of satisfying the Statute of Frauds. It is said that it was not appropriate for him to have approached the matter in a generalised or generic way, which, it is contended, is how he in fact approached it.

62. It has been further submitted that it was incumbent on the High Court judge to review the evidence in order to ascertain whether, as Yolanda had maintained, there was in fact no documentation capable of constituting a sufficient note or memorandum in respect of the contract alleged by D & L. This he had failed to do.

63. The High Court judge's approach to whether part performance could be availed of by D & L is similarly criticised. Moreover, it is contended, to the extent that the High Court judge was not prepared to accede to Yolanda's application because D & L had asserted that *"… it was understood between the parties that Mr. O'Leary was only making a loan on behalf of the plaintiff …"*, the point is made that that was not the case pleaded by D & L, and indeed it is inconsistent with the case made by that party. Accordingly, it has been submitted, the trial judge erred in finding that a claim that had not been pleaded by D & L and which was inconsistent with the case actually made by it, could provide a basis to enable D & L to assert and rely upon part performance.

64. It is asserted in the appellant's written submissions that to the extent that D & L had relied in the High Court on *Mackie v Wilde (No 2)* [1998] 2 I.R. 578, and it was anticipated would seek to do so again before this Court, in support of its claim to be able to rely on part performance, the decision in *Mackey v Wilde (No 2)* *"is not authority for the proposition that the doctrine of part performance can be applied here"*. This contention appears to be based on a belief, alluded to in the judgment of Fennelly J in *Dakota Packaging Ltd v AHP Manufacturing BV* [2005] 2 I.R. 54 as being, or certainly having been, held in certain quarters, that part performance could only arise in relation to a contract where specific performance was capable of being granted, and that the contract here was not capable of being specifically performed.

Submissions on behalf of the respondent and opposing party (D & L)

65. The respondent accepts the law on the jurisdiction to strike out proceedings pursuant to the inherent jurisdiction of the Court, as advanced by the appellant but points to certain details and nuances in the jurisprudence which it considers to be important.

66. The court was referred to *Lac Minerals v Chevron Corporation* (Unreported, High Court, Keane J, 6th August 1993) as being authority for the proposition that the jurisdiction should not be exercised unless the court concerned is confident that no matter what may arise on discovery or at the trial of the action the plaintiff's claim cannot succeed.

67. We were again referred to the *Salthill Properties* case (cited earlier by counsel for Yolanda), this time in support of the points (i) that a plaintiff is not required to put forward a *prima facie* case, and also (ii) that the burden of proving, on any such application to strike out, that the plaintiff's claim is bound to fail, rests on the defendant.

68. The judgment of Dunne J in the Supreme Court in *Keaney v Sullivan* [2015] IESC 75 (unreported Supreme Court, 23rd July 2015) was commended to us as containing a very recent distillation and summary of the applicable principles based on a review of the

relevant jurisprudence up to that point, and I have had due regard to that.

69. It was submitted by counsel for D & L that it was apparent from the judgment of the High Court that Yolanda had failed to discharge its burden of proving that no sufficient note or memorandum exists, and that one was required. It was not for D & L to establish that it has a *prima facie* case. Rather it was for Yolanda to demonstrate that the plaintiff's case was bound to fail. It could, in theory, do that by proving that no sufficient note or memorandum exists, and that there was no basis on which s.2 of the Statute of Frauds might potentially be disapplied. However, in regard to the former it had to be borne in mind that the D & L had not yet secured discovery from Yolanda, and in regard to the latter there were in fact a number of mechanisms by means of which the strict requirements of s. 2 of the Statute of Frauds might be disapplied. These were identified as the doctrines of part performance and of acquiescence and estoppel. It was in those circumstances that the High Court had concluded, in effect, that Yolanda had failed to discharge its onus and burden of proof and so, it is suggested, it was right and proper that the case should have been allowed to proceed.

70. In support of D &L 's claim that it might be able to avail of part performance, we were referred to *Mackie v Wilde (No 2)* [1998] 2 I.R. 578 and in particular reliance was placed on the Supreme Court judgment of Barron J in that matter where he quotes with approval (at p.584) the following passage from the speech of Lord Simon of *Glaisdale in Steadman v Steadman* [1976] AC 536 at 558:

> *". . . almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." This became known as the doctrine of part performance - the "part" performance being that of the party who had, to the knowledge of the other party, acted to his detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract."*

71. Barron J had then gone on to observe:

> *"The basis of this principle was that the contract by reason of its part performance passed from being a purely executory contract and might create equities which would justify the court enforcing it specifically, something it would not have done while it remained purely executory because of the absence of writing to satisfy the statute."*

72. D & L claims it could rely on the lender side of the alleged agreement having been part performed in as much as it is not disputed that €2.2 million was advanced to Yolanda. It has been submitted that this manifestly amounts to part performance and at that time the agreement ceased to be "*purely executory*" in nature. In the words of Barron, J in the Supreme Court, this "*might create equities which would justify the court enforcing it specifically, something it would not have done while it remained purely executory because of the absence of writing to satisfy the statute*". The circumstances in which this performance "*might*" create equities is a matter that can only be resolved upon the hearing of the full case and the determination of the complete background and the equities of the case.

73. The point is further made in support of a claim of acquiescence and estoppel that, whilst the respondent maintains that it, and not Mr O'Leary, was the person entitled to the 12.5% shareholding in Elgin, it is clear that the appellant, in setting in motion the transfer of the said 12.5% shareholding (albeit to the incorrect person) was taking steps to perform an agreement to which it considered itself bound.

74. D & L contends that the equity of the case leans strongly in its direction, not least because Yolanda has had the benefit of the monies advanced, and has profited from the investment to which they were applied, without accounting to the party that lent them.

75. It was further argued that even on the basis of *Actionstrength Ltd v International Glass Engineering SpA*, relied on by the appellant, the provisions of the Statute of Frauds ought not to be applicable in the particular circumstances of this case. The respondent seeks to distinguish *Actionstrength* on the basis that Lord Bingham (in the quotation set out earlier in this judgment at para 60) had qualified application of the principle he was enunciating in a number of respects. Amongst the reasons given by him as to why an estoppel could not arise in the circumstances of that case was that *"[t]here was no representation by St-Gobain that it would honour the agreement despite the absence of writing, or that it was not a contract of guarantee, or that it would confirm the agreement in writing*" [my emphasis]. It is contended on behalf of D &L that even if such documentation as exists is not fully sufficient to constitute a note or memorandum it does contain a representation on the part of Yolanda that it would confirm the agreement in writing. In that regard the respondent specifically relies on the e-mail exhibited by Mr O'Leary in his "First Supplemental Affidavit" (and previously referred to at para 36 of this judgment), which was sent on the 5th of November 2008 at 18:35 by Mr Carey to Mr McIntyre.

76. In the circumstances the respondent says that the High Court Judge was correct to find that the matter must be permitted to proceed.

Analysis and Decision

77. It is clearly the law that, on the hearing of an application to strike out proceedings under the inherent jurisdiction of the court as being bound to fail, the plaintiff does not have to demonstrate a *prima facie* case, much less establish as a matter of probability that he will succeed. Rather it is for the defendant to satisfy the court that the plaintiff "is bound to fail". The respondent is correct in saying that this is a legal burden that the defendant must discharge.

78. It is possible to conceive in the abstract of many ways in which a defendant might seek to discharge that onus. However, in the context of the present case Yolanda has elected to seek to do that : (i) by disputing in evidence that it had any contract with D & L, thereby requiring that party to prove the existence of the contract on which it relies; (ii) by contending that the alleged contract was in any case one that engages s. 2 of the Statute of Frauds such that D & L must be in a position to demonstrate the existence of a sufficient note or memorandum of it in order to sue upon it for its enforcement, and (iii) by contending that no sufficient note or

memorandum in fact exists.

79. The first substantive question therefore to be addressed in this judgment is whether Yolanda's contention that the alleged contract was one that engages s. 2 of the Statute of Frauds is correct. Yolanda has suggested that s. 2 was necessarily engaged in one or other of two ways. It is suggested in the first instance it was engaged because the contract was properly to be regarded as one for the sale of lands or an interest in lands. In the alternative to that, it is suggested that it was engaged because the contract was one that was not to be performed within the space of one year.

80. I am satisfied on the evidence that the essential nature of the arrangement on foot of which the sum of €2.2 million was advanced to Yolanda, regardless of whether it involved an agreement between D & L and Yolanda as the respondent contends, or between Derek O'Leary and Yolanda as the appellant contends, was that it was a loan agreement. Notwithstanding that it was a loan intended to facilitate the progression of a stalled property development project, involving the construction of apartments, being undertaken by Yolanda, and that there was also a collateral agreement on foot of which the lender was to acquire an equity stake in Yolanda's parent company, Elgin, it does not seem to me that the mere existence of those circumstances is sufficient to justify the agreement being characterised "*as a contract for sale of lands, tenements or hereditaments, or any interest in or concerning them*". The agreement did not directly envisage or provide for the passing of any estate or interest in the lands the subject matter of the development project to the lender. No estate was in fact passed and there was no mortgage, legal or equitable, created in the course of the transaction. Rather the transaction in its essentials involved little more than a loan agreement whereby monies were advanced in consideration of a commitment to repay them with interest following sales of the apartments under development and the repayment of certain other borrowings.

81. On the basis that the transaction did not involve "*a contract for sale of lands, tenements or hereditaments, or any interest in or concerning them*" I am satisfied that s. 2 of the Statute of Frauds could never have been engaged on that basis.

82. However, the second basis on which it is claimed that s. 2 of the Statute of Frauds could potentially have been engaged is that the alleged contract represents an "*agreement that is not to be performed within the space of one year from the making thereof*". It is common case that the monies were advanced, by whomever they were advanced, on the basis that the borrower would pay interest to the lender "*of 20% per annum on sums drawn down for a period of 12 months and, thereafter, would pay a rate of 2% monthly on sums drawn down and remaining outstanding*." It was therefore clearly envisaged that the contract was not to be performed within one year. Accordingly, I am satisfied that Yolanda has demonstrated that s. 2 of the Statute of Frauds was engaged in principle on that basis.

83. The effect of Yolanda having demonstrated that the requirements of s. 2 are engaged in principle, is that it placed an evidential burden on D & L to point to whatever document or documents they contend constitutes a sufficient note or memorandum for the purposes of the Statute, alternatively to advance a legal basis, supported by cogent evidence, for contending that s. 2 should be disapplied. However, in either event the legal or persuasive burden of demonstrating that D & L's action is bound to fail remains on Yolanda.

84. That burden would have been readily discharged if D & L had put nothing forward under either heading.

85. However, if either a purported note or memorandum, alternatively a basis for disapplying the Statute, was in fact advanced, it would become incumbent on Yolanda at that point to demonstrate to the court that what had been put forward was manifestly insufficient if it hoped to succeed. Any such assessment by the court would, of necessity, require a rigorous appraisal of the documentary evidence being relied upon. However, I consider that a plenary hearing would not be required to reach a determination on such issue, as the contents of the documents to be scrutinised would speak for themselves and be readily amenable to assessment by application of established jurisprudence as to whether or not they comprise an adequate note or memorandum of the alleged agreement.

86. It is stated at paragraph 21 of the written submissions filed on behalf of D & L that *"[f]or the avoidance of doubt, the respondent does not accept that no written memorandum of the agreement sufficient to comply with the Statute of Frauds exists*." However, be that as it may, D & L has not in fact pointed to any particular document or suite of documents as purportedly constituting a sufficient note or memorandum beyond the reference, quoted by the High Court judge, to it being "*patently evident from emails both before and after the money was paid*" that the requirement was met. While certain e-mails and other documents have been exhibited to affidavits filed on behalf of D & L, and indeed on behalf of Yolanda, the respondent has not engaged with these to suggest on any cogent basis how they could constitute a sufficient note or memorandum.

87. The High Court judge characterised any evidence suggestive of a note or memorandum as being of the most tenuous nature. While there is nothing in the judgment to suggest a close examination of what was being put forward, this remark does on the face of it indicate an acceptance on his part that there was arguably some evidence, albeit tenuous, suggestive of a note or memorandum. He concluded that that was enough. Was he correct in so concluding?

88. It seems me that he was not. As stated earlier, once some evidence was being put forward of a purported note or memorandum it then fell to Yolanda to demonstrate to the court that what was being advanced was manifestly insufficient, and any assessment by the court of the sufficiency or otherwise of what was being put forward would, of necessity, have required a rigorous scrutiny of the evidence relied upon. While the judgment is silent as to the exact arguments that may have been put forward by the protagonists before the High Court concerning the sufficiency or otherwise of the e-mail correspondence relied upon, there is no evidence of any detailed analysis having been engaged in by the High Court judge concerning whether the documents relied upon adequately state all essential terms of the alleged agreement, whether they exhibit sufficient evidence of execution and authenticity in terms of being signed by the party against whom execution is sought or its agent, whether they were executed ante, contemporaneously with, or post the alleged contract, and so on. Yolanda advanced criticisms under all of these headings in the course of this appeal, and it was not suggested by D & L that these were novel arguments that had not been made before the High Court. It seems to me therefore that before the High Court judge would have been justified in concluding that such evidence as existed was "*enough*" he would have been obliged to engage in a rigorous and detailed scrutiny of that evidence. The kind of analysis called for does not appear to have been engaged in.

89. In so far as D & L sought to argue before the High Court, in the alternative, that s. 2 of the Statute of Frauds could be disapplied, it appears from the judgment of the High Court judge that this was based on the doctrine of part performance. Before addressing the remarks of the High Court judge with respect to that alternative argument, it is appropriate to observe that while a further alternative argument was advanced before us (the Court of Appeal) relating to alleged acquiescence / equitable estoppel there is no express reference in the judgment of the High Court judge to any such argument having been made before him That having been said, *Mackey v Wilde (No 2)*, was, it is understood, opened to the High Court which, while enuciating a principle framed in terms of the doctrine of

part performance, was also concerned with the concept of equity operating to prevent unconscionable reliance on the Statute of Frauds.

90. In relation to part performance, the judgment merely refers to "the plaintiff's argument on part performance" without stating what that argument was. However, I am prepared to infer that the same argument as was advanced before us in that regard was made before the High Court, namely an argument based on the passage quoted earlier in this judgment (at para 70) from the judgment of Lord Simon in *Steadman v Steadman* as approved in *Mackey v Wilde (No 2).*

91. It has been argued on behalf of Yolanda that *Mackey v Wilde (No 2)* cannot apply in the circumstances of this case, as part performance is only available in respect of contracts that are capable of specific performance. It is said the alleged contract in this case is incapable of specific performance, first, because it is not a contract in relation to the sale of land, and, secondly, and in any event, because the plaintiff's claim is framed as a claim for damages, alternatively a claim for monies had and received, and specific performance is not sought.

92. Yolanda's claim that part performance is only available in respect of contracts for the sale of land is based on certain remarks of Fennelly J in *Dakota Packaging Ltd v AHP Manufacturing BV* [2005] 2 I.R. 54.

93. In that case the facts were that, from 1993, the plaintiff had supplied the defendant with specialised packaging for its products. It was subsequently awarded the status of preferred supplier and from 1998 the level of business between the parties increased considerably. In 2003, having put in place alternative sourcing plans for the plaintiff's product, the defendant informed the plaintiff that it would cease to place orders with it and gave it six months notice of termination of business during which time it would place such orders so as to use up any materials which the plaintiff had already in stock. The plaintiff instituted proceedings claiming, *inter alia* , a declaration that it was entitled to a minimum of 18 months notice of termination and asking the court to imply same into the business relationship between the parties. The defendant submitted that there was no contract between the parties containing either express or implied terms of the kind contended for by the plaintiff. However, it also argued in the alternative that, on the basis of s. 1 of the Statute of Frauds 1695, the contract which the plaintiff claimed to exist was unenforceable, it not being in writing. The plaintiff in turn asserted that the Statutes of Frauds did not operate to defeat its claim as it was entitled to rely on the doctrine of part performance.

94. The plaintiff succeeded in the High Court. The defendant appealed to the Supreme Court. The Supreme Court allowed the appeal finding an error on the part of the trial judge who having found there was no contract had nevertheless gone on to imply a term requiring notice into what he had referred to as the "arrangement" or "relationship" between the parties. Having so found, Fennelly J, with whose judgment Murray C.J., and Hardiman J indicated agreement, indicated that *"[s]ince that is sufficient to determine the appeal it is not strictly necessary to comment further*" However, he did nevertheless proceed to briefly consider the other defences that had been advanced by the defendant, and in relation to the contention that the plaintiff's claim would in any event have been defeated by the provisions of Statute of Frauds, he observed *(obiter dictum)*:

> *"There was an interesting discussion as to the status, in Irish law, of the doctrine of part performance in the cases of contracts of this type. English caselaw, before the requirement was abolished, appeared to hold that the doctrine applied only to contracts for the sale of land (see Britain v. Rossiter (1879) 11 Q.B.D. 123; Maddison v. Alderson (1883) 8 App. Cas. 467). Palles C.B., on one view, declined to follow these cases in Crowley v. O'Sullivan [1900] 2 I.R. 477. More recently, however, Barron J., speaking for this court, and referring to Maddison v. Alderson, stated in Mackey v. Wilde (No. 2) [1998] 2 I.R. 578 at p. 587 that in "all the earlier cases, it was assumed that the acts of part performance must necessarily relate to and affect land." The conclusion in the present appeal is that there was no contract, so the question of the need for writing does not arise. Accordingly, it seems better to leave that, as well as a point concerning the absence of writing to satisfy the Sale of Goods Act 1893 for debate on another day."*

95. It seems to me that what this indicates is that the law is at present uncertain on the point at issue. Yolanda might well be correct in the position they contend for, but that is not to say that the position that D & L contends for, namely that it is in fact legally possible for it to rely on part performance, is not at least capable of being argued. In the absence of any clear modern Irish authority on the point I could not predict with confidence and certainty that D & L would be precluded from relying on part performance for the legal reason just advanced.

96. The law is also far from clear on whether the possibility of relying on part performance is to be confined to only those cases where the contract is capable of specific performance.

97. These issues require to be argued fully and properly, and determined, and a motion invoking the inherent jurisdiction of the court for the purpose of seeking to have proceedings struck out provides an inappropriate vehicle within which to do so.

98. Indeed, the undesirability of using summary procedure for difficult points of law was emphasised by Keane J stated in Irish *Permanent Building Society v. Caldwell* [1979] ILRM 273, when he stated (at 276/277):

> *"The question I have to decide is as to whether the proceedings should be struck out in limine at this stage. It has been said on high authority that the procedure sought to be invoked in the present case should not be applied 'to an action involving serious investigation of ancient law and questions of general importance: per Cozens-Hardy MR in Dyson v Attorney General [1911] 1 KB 410 at 414. The issues raised by the present proceedings involve difficult questions as to the relationship of the present Constitution to the pre-existing law concerning the assertion of public rights by a person other than the Attorney General. It can, of course, be said, as is urged with much cogency by Mr O'Neill SC on behalf of the applicants, that such questions can be resolved on the present application adversely to the plaintiffs simply on the pleadings as they stand. But, if one has regard to the practicalities of litigation in our courts, it seems to me undesirable that such a question should be finally resolved, at least so far as the High Court is concerned, in a summary manner on an application of this nature. I do not overlook the fact that the English procedure is different to this extent, that an application of this nature is made in chambers and cannot be the subject of an appeal. By contrast, under our procedure, the decision of the court on an application of this nature would, I think, be manifestly susceptible to an appeal to the Supreme Court. Despite these considerations, I am not satisfied that, on an application of this nature, the High Court should finally determine the difficult and complex question of law involved. I think that the plaintiffs are entitled to a full and unhurried consideration of the questions they have posed for a resolution by the High Court and that this cannot, in a practical manner, be achieved within the limitations of a motion such as the present."*

99. In so far as the second point, based on the manner in which the claim has been pleaded, is concerned it seems to me that, while D & L might well have something of an uphill battle to persuade a court to do so, and also for its own reasons might very well not wish

to do so, it would nonetheless be theoretically open to it to seek an amendment to its statement of claim to include a claim for specific performance such as would allow it to overcome the objection being made. There is authority, previously alluded to (at para 47 ante), for the proposition that an action should not be dismissed if the statement of claim admits of an amendment that would save it, and the action founded on it.

100. Proceeding therefore on the basis that it might be legally possible, at least in principle, for D & L to seek to rely on part performance, it is necessary to consider how the High Court judge in fact approached and dealt with that issue.

101. Once again, the High Court judge considered that the evidence suggestive of part performance was "enough" to justify refusal of the application to strike out under the inherent jurisdiction of the court on the basis that the action was bound to fail. The alleged part performance was the advancement of the sum of €2.2 million to Yolanda, which undoubtedly occurred, although a major factual dispute still exists as to whether those monies were advanced by Derek O'Leary on his own behalf as lender or, as is now claimed, effectively as an agent for D & L.

102. In this instance I find it hard to see how such a factual dispute could be resolved other than in the context of a plenary hearing, and if that be so then the High Court judge taking, as he was obliged to, the plaintiff's case at its height was ostensibly justified in concluding that "*enough*" (as he put it) had been put forward in support of the plaintiff having at least an arguable case that the Statute of Frauds could be disapplied in the circumstances of the case. That being so, it could not be said that D & L's case was "bound to fail". It seems to me, therefore, that the High Court judge was correct in asserting:

> *"If there was part performance there is an issue as to whether it was by the plaintiff or by Mr. O'Leary, who is not a party to these proceedings. But in the light of the plaintiff's assertion that it was understood between the parties that Mr. O'Leary was only making a loan on behalf of the plaintiff and that this was understood by the parties, I believe that this is a matter which should be permitted to go to trial and be tested in the light of the evidence produced in court."*

103. It also seems to me that at least an arguable case is capable of being advanced by D & L based upon acquiescence and (promissory) estoppel; although in truth it might be characterised as just another facet of the case based on part performance. Nevertheless, regardless of how one characterises it, in circumstances where the possibility that D & L could persuade a court of trial that the Statute of Frauds should be disapplied on equitable grounds amounting to an estoppel cannot be discounted, once again it cannot be said that the plaintiff's case is bound to fail.

104. In arriving at these conclusions I have fully taken on board all of the criticisms made by Yolanda concerning the evidence relied on in support of D & L's contention that it was understood that Mr O'Leary was acting merely as an agent for D & L, and not least in that regard the fact that in much of the documentation Mr O'Leary is expressly described as being the lender, and also the fact that nowhere in the accounts of D & L is a loan by that company to Yolanda reflected. Nevertheless, while the weight of the evidence might appear to be against D & L on this issue at this point in time, it cannot be said that D & L's case is unstateable. It is also relevant that D & L has yet to obtain discovery from Yolanda, albeit that no deponent on behalf of D & L has expressed any optimism that discovery is likely to advance matters materially. While it is probably fair to characterise D & L's position as being more one of hope than of expectation that something to assist it's case will turn up on discovery, it cannot be gainsaid that as a matter of likelihood D & L will be entitled to discovery of relevant documents, and nothing can be taken for granted in circumstances where discovery has not yet been made.

Conclusions

105. In all of these circumstances I believe the High Court was correct not to strike out the proceedings as being bound to fail, and I would dismiss the appeal.