APPROVED JUDGMENT

THE COURT OF APPEAL

Edwards J.
Faherty J.
Binchy J.

Neutral Citation Number [2023] IECA 177

Court of Appeal Record No: 2021/40
High Court Record No: 2018/8210P

KEN FENNELL

Respondent/Plaintiff

V

DENIS SLEVIN, DANNY MCMENAMIN, AND SIOBHAN GALLAGHER

Appellants/Defendants

JUDGMENT delivered by Mr Justice Edwards on the 12th of July 2023.

Introduction

1. For simplicity the respondent/plaintiff will hereinafter be referred to throughout this judgment as "the plaintiff". Similarly, the appellants/defendants will hereinafter be referred to throughout as "the defendants".

2. This is an appeal against the judgment of the High Court (Sanfey J.) dated the 18th of December 2018, the subsequent costs judgment of the High Court (Sanfey J.) dated the 11th

of February 2021, and the Order of the High Court drawn on the 11th of February 2021 and perfected the same day reflecting the High Court's decisions as conveyed in both of the said judgments. The said judgments relate to an interlocutory application for injunctive relief by the plaintiff, the receiver appointed by a financial institution holding the mortgagee's interest in two residential investment properties over which he had been appointed receiver, in support of attempts by him, which were being resisted, to enter upon and take possession of the properties and to collect the income thereof.

3. The Order of the 11th of February 2021 reflects that the plaintiff had sought and was granted the following orders in relation to the properties described in the schedule to the Order (the two residential investment properties in question, being those properties comprised in Folios 8095F and 54840F, respectively, of the Register of Freeholders for the County of Donegal):

> "*IT IS ORDERED that the Defendants and each of them their servants or agents or any other person having notice of the said Order be restrained pending the trial of this action from*
>
> 1) *preventing, impeding and/or obstructing the Plaintiff his servants or agents, from taking possession of getting in and collecting the properties described in schedule hereto (hereinafter 'the Properties');*
> 2) *preventing, impeding and/or obstructing the plaintiff his servants or agents from securing the Properties;*
> 3) *preventing, impeding and/or obstructing the Plaintiff his servants or agents from collecting the rent or other income of the Properties;*
> 4) *trespassing upon entering upon or otherwise attending at the Properties;*

And IT IS FURTHER ORDERED that the Defendants and each of them their servants or agents or any other person having notice of the said Order

1) *do deliver up to the Plaintiff forthwith any keys, alarm codes, locks and any other security and access devices and equipment in respect of the Properties pending the trial of this action;*
2) *do deliver up to the Plaintiff forthwith all title documents, books and records held in relation to the Properties pending the trial of this action;*"

4. The Order further goes on to provide for a stay of execution as against any person in occupation of the said properties at the date of the Order until the 30th of September 2021, in the case of the property comprised in Folio 8095F, and until the 31st of May 2021, in the case of the property comprised in Folio 54840F. It also made provision for service of the Order on the occupants, gave directions as to the payment of future rent by the occupants, gave directions as to the provision of certain information to the occupants, granted liberty to the occupants to apply, and awarded the costs of the application (to be adjudicated in default of agreement) to the plaintiff against the defendants, with a stay of execution on the order for costs pending determination of the proceedings.

Background to the Matter

5. The facts of this case are set out *in extenso* in the High Court judgment delivered by Sanfey J. on the 18th of November 2020 (see [2020] IEHC 677), and I do not find it necessary to reiterate them in detail here. A short summary will suffice in circumstances where the reader can have recourse to the High Court's judgment for greater detail.

6. In summary, all three defendants had executed a deed of mortgage and charge in respect of the property in Folio 54840F on the 30th of July 2004. The first and second named defendants had also executed a deed of mortgage and charge over the property in Folio 8095F on the 1st of August 2006. Each of these deeds was executed in favour of Ulster Bank

(Ireland) Limited (i.e. "Ulster Bank"), and the defendants concerned with each loan received, as joint mortgagors, loans of €185,000 and €225,000 in relation to the respective properties.

7. The defendants accepted before the High Court that no payments in respect of monies borrowed had been made since October 2010, and the High Court heard evidence that on the 10th of July 2013, letters of demand were sent to all three defendants in respect of both loans (although it was later disputed that they had received these letters). In any event, no payment was made on foot of any such demands, and two receivers were appointed on the 23rd of December 2013.

8. The bank's interest in the relevant loan facilities and mortgages was assigned to Promontoria (Finn) Limited (i.e. "PFL") by way of Loan Sale Deed dated the 23rd of July 2015, and Deed of Novation dated the 14th of September, 2015, of which assignment the defendants were placed on notice. PFL discharged the previous receivers on the 27th of January 2016, appointing the plaintiff, Mr. Ken Fennell, in their place.

9. The plaintiff sought to take steps to take possession of the properties with a view to realising the income thereof but was met with resistance and non-co-operation from the defendants. He then issued proceedings against them in the High Court and sought interlocutory injunctive relief by way of a motion returnable for the 25th of October 2017.

10. In a replying affidavit filed by the first named defendant on behalf of all three defendants, it was contended that the defendants had never received the demand letters from Ulster Bank. The plaintiff concluded that he could not contest this.

11. PFL then issued fresh letters of demand dated the 28th of June 2018 and the 4th of July 2018, respectively, for the full repayment of principal and interest owed by the defendants on the relevant loans as of the date of the applicable letter of demand in each case.

12. The plaintiff then discontinued his High Court proceedings on the 9th of July 2018. Having done so, and by Deeds of Discharge of the same date, PFL then discharged him from

his initial appointment as receiver in respect of each of the properties. The defendants were advised of these developments by letters from the plaintiff's solicitors dated the 10th of July 2018 and were further apprised that in the event of non-payment of the sums demanded the plaintiff would be re-appointed as receiver and would take all necessary steps to realise the properties, and to recover any rents and profits accruing in respect thereof, for the benefit of the receivership.

13. Again, notwithstanding the fresh letters of demand, no payments were made, and in those circumstances PFL made a fresh appointment of the plaintiff as receiver over the relevant property in each case, by Deed of Appointment of Receiver dated the 13th of July 2018.

14. Steps taken by the plaintiff as receiver to attempt to enter, take possession of, and collect the income of the properties were met with hostility. The defendants notified the plaintiff of their intention to resist the receivership. Fresh High Court proceedings (i.e. the present proceedings) were then initiated by the plaintiff on the 17th of September 2018, and shortly thereafter the plaintiff successfully applied for interlocutory injunctive relief, resulting in the orders currently the subject matter of this appeal.

15. At the hearing of the interlocutory motion before the High Court, the defendants raised the following points:

a) That the validity of successive receiverships and of the various receivers that had been appointed, including the plaintiff as the present receiver, had never been established, and that necessary formalities in their appointments had not been observed.

b) That the transference of loans and securities from Ulster Bank to PFL was flawed, and that the proceedings were statute barred due to the loans falling into arrears on the 1st of October 2010.

c) That as there was no evidence that the appropriate stamp duty had been paid on the alleged sale of the relevant loan facilities and securities by Ulster Bank to PFL, the relevant documents were, by virtue of s. 127(4) of the Stamp Duties Consolidation Act 1999, inadmissible as evidence.

d) That the mortgages were impacted under the "*Tracker Review Process*", which the defendants claimed meant that repossessions could not occur until the review was completed.

e) That as PFL did not register a charge in their own name over the properties, but rather had been registered as "*owners*" of the Ulster Bank Ireland Limited charge, they therefore had no right to recover possession, appoint receivers or sell the properties.

Treatment of the Issues in the High Court

Hearsay

16. It was claimed that the plaintiff was not an employee of Ulster Bank or PFL and did not have control of their records, thus references by him to occurrences involving, and production by him of exhibits generated by, Ulster Bank or PFL, prior to his appointment, constituted inadmissible hearsay. As the defendants put it, he was saying "*in effect what someone else told him* […]"

17. The defendants criticised an affidavit sworn by the director of PFL, Mr. Donal O'Sullivan, on the 10th of October 2018, which confirmed that the relevant evidence adduced by the plaintiff was true to the best of his knowledge. The defendants were critical that Mr. O'Sullivan had not specifically confirmed that the records were true copies, and maintained that there was no credible evidence of any loan offers or accounts in the defendants' name with either Ulster Bank or PFL.

18. In response, counsel for the plaintiff submitted that the evidence in the affidavit was permitted by Order 40, Rule 4 of the Rules of the Superior Courts, which states that, "*[a]ffidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted.*"

19. It should be noted that since the hearing in the High Court the iteration of Order 40 which was then in force has been substituted in full by the Rules of the Superior Courts (Affidavits) 2021 (S.I. 127 of 2021) and that in the latest iteration of the Rules of the Superior Courts (i.e., that current at the date of this judgment) the relevant rule has been re-acted with no change but is re-numbered as Rule 8).

20. Sanfey J. clarified that the relaxation of the hearsay rule granted by O. 40, r. 4 served a practical purpose for all parties, noting that in circumstances where applications for interlocutory injunctions often involve a degree of urgency, insisting on the same standards in relation to proof of facts as would be required at a full plenary hearing could result in the court not having before it all the facts relevant to its consideration of the issues. Sanfey J. insisted that the court was well equipped to recognise and prevent potential abuse from relaxation of the hearsay rule .

21. The defendants had placed reliance on the decision of the Court of Appeal in *Promontoria (Aran) Limited v. Burns* [2020] IECA 87, which dealt with the admissibility of evidence in summary proceedings. Sanfey J. cautioned against assuming that the jurisprudence relating to the use of evidence in summary proceedings and motions for liberty to enter final judgment would govern the use of evidence in interlocutory applications for an injunction. A money judgment in summary proceedings is a final determination and thus requires significant safeguards against judgment being ordered in circumstances other than where there is no fair or reasonable probability that the defendant has a *bona fide* defence.

22. In contrast, an interlocutory application in which injunctive relief is sought pending the full hearing of the action is not a final determination. The court applies well established principles to such an application, typically considering whether there is a fair question to be tried, the balance of convenience and the balance of justice.

23. Sanfey J. concluded that the wording of O. 40, r. 4 "*envisaged a situation where the court can have regard to evidence which might not be admissible in a trial where the full rigours of the hearsay rule might apply*". Thus, under O. 40, r. 4, the court had a discretion as to whether the evidence will be admitted. The court would, however, balance the interests of both parties in coming to its decision.

24. The defendants had claimed that the plaintiff had not stated the grounds for his belief, and thus had not fulfilled the requirements of O. 40, r. 4. Sanfey J. was satisfied that the plaintiff had made clear the grounds for his belief and had not omitted any documentation which would have benefitted the defendants' case.

25. Sanfey J. opined that the defendants' approach of scouring for some technical ground on which the plaintiff's case could be invalidated was not an appropriate way for the court to deal with an interlocutory application for an injunction.

26. In conclusion on this issue, Sanfey J. rejected any suggestion that the plaintiff's application had been tainted with excessive use of hearsay.

Failure of receiver to discharge costs of 2017 proceedings

27. The defendants requested a stay of proceedings under O. 26 of the Rules of the Superior Courts on the basis that the plaintiff must first pay their costs in relation to the 2017 proceedings, citing his undertaking as to potential damages.

28. Sanfey J. clarified that the undertaking related to potential damages which might be ordered in the event that a full hearing finds that interlocutory relief should not have been granted, which was an entirely separate issue to the liability for costs in a discontinued action.

Further, the plaintiff had cited several grounds on which he might reasonably refuse to pay the sum sought, leading Sanfey J. to conclude that the defendants' claim was "*utterly disputed, at least as regards quantum*", on what appeared to be substantial grounds.

29. Sanfey J. ruled that in such circumstances, he would not stay the proceedings.

Alleged Invalidity of demands

30. The defendants claimed that the demand letters did not stipulate a date by which payment should be made, and that consequently there was "*no default*", which they asserted was a prerequisite under the terms of the mortgages. Sanfey J. interpreted those terms to the effect that default was not in fact necessary in order for repayment to be demanded. Rather, demand simply had to be made by the mortgagee, after which any receiver appointed by the mortgagee was empowered to take possession of the properties.

31. Sanfey J. held that the letters of the 28th of June and the 4th of July 2018, were clearly unequivocal demands for repayment of the monies outstanding and set out the amounts due. The letters were of a peremptory character and unconditional, and, having regard to the dicta of Nourse J. (as he then was) in *Re A Company* [1985] BCLC 37 at p. 41 as approved in this jurisdiction by Dunne J. in *GE Capital Woodchester Home Loans Limited v. Madden* [2013] IEHC 540, they were regarded by Sanfey J. as constituting a demand as contemplated by the terms of the mortgages.

32. It was further held that while the letters of demand of the 28th of June and the 4th of July 2018 were sent to the defendants with the letters of the 10th of July 2018, from the receiver's solicitors, a date which was between the plaintiff's discharge and subsequent reappointment as receiver, they nonetheless constituted a sufficient demand, assuming PFL had validly succeeded to the interest of Ulster Bank, in circumstances where it was made clear that failure to meet the demands would trigger the plaintiff's reappointment.

Entitlement to the Charge

33. It was argued before the High Court that the plaintiff had not demonstrated PFL's entitlement to the charge pursuant to the Loan Sale Deed of the 23rd of July 2015, and the Deed of Novation of the 14th of September 2015.

34. The High Court judge noted that the defendants had made extensive reference to the published accounts of PFL for the period up to the 21st of December 2015. The defendants contended that the accounts suggest that PFL enjoys a "*tax designation*" under s. 110 of the Taxes Consolidation Act 1997, and acknowledge the acquisition by PFL from Promontoria BV, its parent company, of "*non-performing real estate loans secured on property and development land in Northern Ireland and the Republic of Ireland*", by means of the Deed of Novation of 14th of September 2015 referred to at para. 8 above.

35. The defendants complained that the level of redactions in the Loan Sale Deed of the 23rd of July 2015 and the Deed of Novation of the 14th of November 2015 "[…] *make it impossible for this Court to determine if this is a sham sale or not* […]". They went on to refer to a charge of 29th of September 2015 by PFL in favour of U.S. Bank Trustees Limited, which the defendants alleged effected an "*absolute assignment*" of a range of assets but which they say clearly included the loans and securities the subject of this action. They submitted that this charge was a device for ensuring that PFL, which "*cannot hold any real estate assets, or any assets that derive their income from real estate* […]", did not risk losing its s. 110 tax status. They went on to submit to the High Court that "[…] *if we are to believe that they still hold the benefits and receivables from these property related assets, then Prom Finn are making false submissions to the Revenue and are not entitled to their Section 110 status*".

36. It was alleged that the registration by PFL of ownership of the charges in these circumstances was done dishonestly and should be considered a fraud. The defendants

submitted that in such circumstances s. 30(2) of the Registration of Title Act 1964 (i.e. "the Act of 1964"), would prevent the plaintiff from relying on s. 31 of the Act of 1964.

37. Responding to this, counsel for the plaintiff relied squarely on the fact that PFL was the registered owner of the charge on the properties, and contended that no fraud had been established such as would engage s. 30(2) of the Act of 1964.

38. Citing *Tanager DAC v. Kane* [2018] IECA 352, Sanfey J. agreed with the plaintiff that PFL's registration as owner of the charge on the properties constituted conclusive evidence on which the Court was entitled to rely under s. 31(1) of the Act of 1964.

39. The defendants had made no application to rectify the register, and Sanfey J. held that the "*nebulous assertion that the registration in the present case is based on actual fraud is no more than speculation*". Further, whether PFL, which was not a party to the proceedings, was in compliance with the requirements of s. 110 of the Act of 1997, was not something that the court was concerned with on the application before it.

40. The High Court judge concluded: "*[g]iven that the registration of the charge is conclusive proof of PFL's ownership, I am satisfied that it was entitled to appoint Mr Fennell as receiver.*"

Whether the proceedings were statute barred

41. It was asserted by the defendants at the hearing of the motion that the "*alleged loans*" fell into arrears on 1st of October 2010, and that "*as the loans have not been acknowledged by payment since that date, they exceed the six-year time limit for simple contracts and any action is statute barred*".

42. Sanfey J. dismissed this contention, noting that the defendants had not pleaded the Statute of Limitations in their defence and counterclaim. Further, and in any case, the plaintiff was not suing for a simple contract debt but rather was relying on powers given to him pursuant to the charge over the properties.

43. It was further noted that even if the proceedings were to recover a contract debt, s. 36 of the Statute of Limitations provides that while the defendants had claimed a 6-year time limit would apply, a 12-year limit applies to the recovery of money secured by a mortgage or charge, meaning that the argument that the plaintiff's claim is statute barred was misconceived.

Claim that there was no evidence that stamp duty was paid on charge

44. It was argued before the High Court that the plaintiff was required to provide evidence of either payment of the stamp duty on the transference of the loans and security by Ulster Bank to PFL, or an appropriate exemption under S.I. No. 234 of 2012 - Stamp Duty (E-stamping of Instruments and Self-Assessment) Regulations 2012 (i.e. "the Regulations of 2012"), in order to be able to adduce in evidence and place reliance on items such as loan offer letters or security documents.

45. In that regard the defendants relied upon s. 127(4) of the Stamp Duty Consolidation Act 1999 (i.e. "the Act of 1999"), which provides:

> "*Except as provided for in this section, an instrument executed in any part of the State, or relating, wherever executed, to any property situated, or to any matter or thing done or to be done, in any part of the State, shall not, except in criminal proceedings or in civil proceedings by the Commissioners to recover stamp duty, be given in evidence, or be available for any purpose, unless it is not chargeable with duty or it is duly stamped in accordance with the law in force at the time when it was first executed.*"

46. Rejecting the defendant's contention in that respect, Sanfey J. quoted from remarks of Barrett J. in *Healy v. Ulster Bank Ireland Limited and Promontoria (Aran) Limited* [2018] IEHC 12, in which that judge had noted that under s. 90(2) of the Act of 1999, stamp duty is not chargeable on a debt factoring agreement, the definition of which in s. 90(1) of the Act of

1999 includes "*an agreement for the sale, or a transfer on sale of a debt or part of a debt where such sale occurs in the ordinary course of the business of the vendor or the purchaser*", such as had occurred in the transaction between Ulster Bank and PFL. Agreeing with Barrett J.'s reasoning and applying it in the present case, Sanfey J. held that stamp duty had not been chargeable on the type of sale in issue in these proceedings.

Possible breach of s. 198 Companies Act, 2014

47. The defendants asserted that a resolution effected by the Board of Directors of PFL on the 5th of November 2015, which enabled a single director to sign various documents, was invalid under s. 198 of the Companies Act 2014, as it was a constitutional amendment which had not been notified to the Registrar of Companies.

48. Sanfey J. held for the plaintiff in finding that the resolution did not in fact involve amending the constitution of PFL.

49. Sanfey J. also noted that that a separate proposal had been passed and adopted by resolution, which approved and ratified all documents entered into by PFL prior to the 5th of November 2015. Sanfey J. held that it appeared to apply to all of the documentation relating to the sale, including that exhibited by the receiver.

50. In any case, Sanfey J. held that s. 198 was a regulatory requirement which had no bearing on the matter. Even if the resolution had purported to amend the constitution of PFL, a failure to comply with s. 198, while it might constitute an offence, would not serve to invalidate it.

51. Sanfey J. further pointed out that this ground was based entirely on the defendants' speculation that the constitution of a body which was not a party to the action had been altered, and such speculation could not constitute a ground for objecting to the injunctions being sought.

Authority of Signatories

52. The defendants also claimed before the High Court that the plaintiff was required to provide proof that the signatories of various documents that he was seeking to rely upon in evidence had been duly authorised to sign those documents, and that absent the provision of such proof the court should not permit him to rely upon them.

53. Responding to this, counsel for the plaintiff cited the ruling of Costello J. in *O'Donnell v. Lehane & Bank of Ireland* [2015] IEHC 228 to the effect that it was not necessary to rebut a general allegation of lack of authority made in the absence of evidence of a specific infirmity in capacity or lack of authorisation.

54. Agreeing with the plaintiff, Sanfey J. held that:

> "*88. It has always been permissible for a party to point out a lack of authority on the part of a deponent or the author of a crucial document, if that lack of authority has a bearing on the issues before the court. What is not permissible is that a party purports to insist, without adducing any evidence that there is any specific infirmity in the capacity or authorisation of a deponent or author of a document, that such deponent or author produce evidence of his authorisation as a precondition of the admissibility of the document in question. As Costello J. rightly points out, there is no authority for such a proposition.*"

55. The defendants also took specific issue with the Deed of Appointment of the receiver having been signed by one director only, and relied in that regard on *McGarry v. O'Brien* [2017] IEHC 740, in which Stewart J. had found that there was a fair question to be tried as to whether a receiver had been validly appointed, where a sole director of the appointing company had signed the Deed of Appointment and no evidence had been provided that the Board of Directors had approved the appointment.

56. This argument was also rejected by Sanfey J., who pointed to evidence in the minutes of a meeting of the Board of Directors of PFL on the 5th of November 2015 that it had been

resolved "*that the Company approve and ratify all documents entered into by it prior to the date of these minutes*", and that it had been further agreed that any one director acting alone be empowered and authorised to enter into those documents "*from time to time*". In Sanfey J.'s view, "*documents*" as defined in the minutes included all of the documentation relating to the sale from Ulster Bank to PFL and included the documentation exhibited by the receiver.

57. The defendants further complained that reliance on the resolutions by the receiver constituted unacceptable hearsay evidence. However, Sanfey J. held that it was permissible for the receiver to exhibit minutes of meetings of PFL's Board of Directors in the context of an interlocutory application, as no grounds had been advanced by the defendants sufficient to justify the court in refusing to treat such minutes as an authentic document reflecting the resolutions passed by the Board on the date in question.

Effect of assignment on PFL's interest

58. S. 408 of the Companies Act 2014 (i.e. "the Act of 2014") defines a charge in relation to a company as meaning (subject to certain exclusions which are not material to the case under consideration) "*a mortgage or a charge, in an agreement (written or oral), that is created over an interest in any property of the company*". Under s. 409 of the Act of 2014 every charge created, after the commencement of the section, by a company shall be void against the liquidator and any creditor of the company unless it has been registered with the Companies Registration Office (i.e. "CRO") by one of two specified procedures. The first of those procedures is described as the "*one stage procedure*" and requires the taking of steps so that there is received by the Registrar, not later than 21 days after the date of the charge's creation, the prescribed particulars, in the prescribed form, of the charge.

59. Under s. 411 of the Act of 2014 where a company acquires any property which is subject to a charge that, if it had been created by the company after the acquisition of the

property, would have given rise to a duty to register it with the CRO under s. 409, then it must be similarly registered with the CRO.

60. The prescribed form for registration of a charge with the CRO using the one stage procedure is *Form C1 - "Registration of a Charge"*. In the High Court the defendants pointed to a *Form C1 - "Registration of a Charge"* relating to the creation of a charge by PFL on the 29th of September 2015 in favour of U.S. Bank Trustees Limited, described in the form as "*the Security Agent*". They maintained that the details on the form suggested that the charge extended to "*loan assets*" which might include the loans to the defendants.

61. In reply to the defendants' contention, counsel for the plaintiff while making no concession that the "*Loan Assets*" referenced in the *Form C1 – "Registration of a Charge"* included the loans to the defendants, argued that even if there had been such an assignment the defendants would, in any case, still be liable in law to repay their loans to PFL. In support of this argument, counsel cited *Pepper Finance Corporation DAC v. Jenkins* [2018] IEHC 485, in which Binchy J. had held that a debtor who has not been put on notice of an assignment of their debt is "*not just entitled to but is obliged to continue making repayments of the loan to the* [assignor]. *As long as the* [debtors] *have not been put on notice of the assignment, the assignee* […] *cannot make any claim against the* [debtors] […]".

62. In considering the respective arguments that had been presented to him, Sanfey J. took note of s. 28(6) of the Supreme Court of Judicature Ireland Act 1877 which emphasises the importance of notice in the context of assignment. He remarked that it was not suggested by the defendants that they had ever received any express notice of an assignment from PFL to US Bank Trustees Ltd. Ultimately, he ruled as follows:

> "*97. I should say that the only documentation presented to me in respect of the transfer to U.S. Bank Trustees Limited is the form C1 registering the charge, which gives "short particulars of the property charged", but not much else. I am unaware of*

the terms of any such transfer, or what if any interest remains in PFL in the property charged. In such circumstances, I do not consider that I am in a position to form any judgment as to the division of rights and interests between PFL and its assignee.

98. It does seem clear however that, in the absence of express notification of the assignment to the defendants, their obligation is to comply with the terms of the loans and securities which remain enforceable only by the owner of the charge. As PFL is the registered owner of the charge, it is entitled to enforce those terms, and any securitisation agreement – if that is what the agreement with the U.S. Bank Trustees Limited is – does not affect the defendants' obligations in this regard."

Other arguments

63. Concerning an assertion by the first-named defendant in written submissions that repossession of the property comprised in Folio 8095F could not occur as the mortgage was impacted by the Tracker Review Process, in circumstances where it was Central Bank policy that "*repossessions are not to occur while individual cases are being assessed under the Examination to determine if they are affected*", it emerged before the High Court that that process was no longer on-going in respect of the mortgage on the aforesaid property, the mortgagors having been notified of the end of the review in a letter dated the 27th of March 2019. That letter had informed them that an overcharge was being rectified and it was accompanied by a cheque for the full amount owed. It remained the case, however, that the fact that there had been such a refund meant that the relevant letter of demand had overstated the amount due.

64. Sanfey J. held that a letter of demand which overstates the amount due is still a valid demand, citing *Flynn v. National Asset Loan Management Limited* [2014] IEHC 408 and *Vivier Mortgages Limited v. Lehane* [2017] IEHC 605. Further, Sanfey J. did not consider

that this complaint represented a credible ground on which to impugn the appointment of the receiver "*given that they have not made a payment against the original loans in over ten years.*" The High Court judge noted that the defendants had not pressed this ground in their oral submissions.

The appropriate test

65. Sanfey J. considered the observations of Clarke C.J. in *Charleton v. Scriven* [2019] IESC 28, as to the appropriate test to be applied in considering whether or not to grant an injunction to a receiver, where the grant of relief is being opposed primarily on the basis that the receiver was not validly appointed in accordance with the mortgages. Clarke C.J. had sought to distinguish between reliefs sought which would maintain the receivers' ability to collect rent, and reliefs which would allow the receivers to sell the property. Clarke C.J. felt that, unlike in situations where the receivers simply wished to maintain the *status quo* pending a trial, if it was the situation that the substance of the interlocutory order would, in effect, bring the proceedings to an end, it was incumbent on a receiver to make out a strong case for the appropriateness of the order(s) being sought.

> "*6.12* […] *[f]or example, a receiver who wished to obtain possession of residential property or a family farm so that it could be sold would need to make out a strong arguable case for it to be appropriate, having regard to the greatest risk of injustice test, to allow such an order to be made. On the other hand, where the matters are essentially financial or where there are strong grounds for believing that a receiver is necessary to ensure the property is properly managed and maintained pending a trial, very different considerations may apply.*"

66. Sanfey J. considered the reliefs being sought by the plaintiff to be essentially mandatory orders, requiring the vacation of the properties in order to facilitate possession,

and that in such a case the plaintiff was required to show that he had a strong case likely to succeed at trial.

67. Sanfey J. was of the opinion that the receiver had established that he had a strong arguable case. He was careful to point out that this did not mean definitively that the defendants could not ultimately succeed at trial. After due consideration of the points raised by the parties, Sanfey J. was satisfied that the receiver had satisfied the first element of the test for a mandatory interlocutory injunction. Citing O'Donnell J. (as he then was), in *Merck Sharp and Dohme Corporation v. Clonmel Health Care* [2019] IESC 65, para. 64(3)–(4), he then went on to consider "*how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice* […] *The most important element in that balance is, in most cases, the question of adequacy of damages* […]."

The balance of convenience

68. At the time of the High Court decision, the receiver was unaware as to the physical state or the occupancy of the properties, as his attempts to ascertain the position in both respects were met with hostility.

69. The plaintiff argued that damages were not an adequate remedy, and it was suggested that the defendants might not have sufficient means to account to the receiver for any damages sustained.

70. Sanfey J. emphasised that the properties were not the family homes of the defendants, and that the loans were only ever intended to facilitate "*buy to let*" investments. He held that it could be assumed that the defendants had been letting the properties since their acquisition, and that the defendants had no intention of using that income to discharge the loans.

71. The High Court judge was of the opinion that the balance of convenience heavily favoured the granting of the interlocutory reliefs sought by the receiver. Consideration was

given to the inordinate amount of time it had taken since the default in repayment commenced in 2010 to bring about a situation whereby effective procedures were adopted by means of the appointment of a receiver to recover possession of the properties. However, he did not consider that the length of time taken to get to that point would justify a view that things should remain as they were pending the trial.

72. Sanfey J. considered that the plaintiff was likely to succeed at trial, and that the defendants had made no proposals in relation to the discharge of the loans, nor had they placed funds in escrow pending the determination of the court. Further, the defendants had made no application for rectification of the Register. Sanfey J. concluded that the defendants were fending off the possession for as long as they could in order to derive maximum income from the properties without repaying the loans.

73. Having no indications as to the means of the defendants, and taking into account the amount owed in respect of the loans, and that the condition and occupation of the premises were unknown, Sanfey J. concluded that damages would not be an adequate remedy, and that the receiver was entitled to secure the assets and ensure their protection and maintenance. He noted that should the defendants ultimately be successful at trial, they could rely on the receiver's undertaking as to damages.

74. Sanfey J. therefore granted the orders sought by the plaintiff but with the stipulation that the plaintiff notify the occupants of the properties of the High Court's orders, in the hope that the position of any *bona fide* tenants might be regularised.

Grounds of Appeal

75. The defendants have now appealed against the High Court's said judgments and Order, on the following grounds as set out in their Notice of Appeal, which states:

"*1. Judge erred in fact and in law in granting the orders given;*

2. *Judge failed to properly recognise legitimate documented defence of the defendants' evidence clearly showing the plaintiff was not entitled to the orders sought, while relying on the plaintiff's evidence which is made up of almost entirely unsubstantiated hearsay;*
3. *Judge failed to acknowledge or rule on clear evidence of potential fraud in relation to the plaintiff's claims, and decided not to rule on same, yet continued to accept plaintiff's hearsay;*
4. *Judge failed to recognise that plaintiff did not meet the requirements of establishing a prima facie case to warrant the granting of the interlocutory orders sought.*
5. *The judge's written interim judgement misrepresents the defendants' case making no mention of a number of key defences raised supported by clear documentary evidence.*"

76. A Notice of Opposition to the appeal filed by the plaintiff pleads by way of preliminary objection that the appeal is frivolous and/or vexatious and/or an abuse of process in that the grounds of appeal are vague and generic in nature. Without prejudice to that preliminary objection, issue has been joined with every ground of appeal pleaded and each specific complaint made is expressly denied. Further, substantive responses are pleaded to the effect that the trial judge applied the well-established principles pertaining to the grant of an interlocutory injunction, and that evidence which is said to have constituted inadmissible hearsay was in fact admissible pursuant to O. 40, r. 8 of the Rules of the Superior Courts; alternatively some or all of the said evidence was admissible in accordance with the principles set out in Part 3, Chapter 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (i.e. "the Act of 2020"). It is further complained in the Notice of Opposition with specific reference to Ground of Appeal no. 3 that the complaint made therein

is vexatious and/or an abuse of process in circumstances where the defendants have failed to identify with particularity what fraud is alleged against the plaintiff.

77. Finally, the Notice of Opposition contests the suggestion in the Notice of Appeal that the trial judge made a reserved costs order. It is pleaded that the plaintiff was granted the costs of the application against the defendants, with a stay on the execution of that costs order until the determination of the proceedings. To the extent that the costs ruling was appealed, it was contended that no basis for such an appeal was disclosed in the Notice of Appeal.

78. It was agreed between the parties that the appeal hearing could be determined upon documents and that an oral hearing was not required.

Submissions on the Appeal by the Parties

79. Both sides have furnished written submissions to the court in regard to the appeal. The defendants, in their capacity as defendants, rather than addressing the individual grounds set out in their Notice of Appeal in an itemised way, have sought instead to address what they perceive to be the issues on the appeal under the following headings:

- "*The C1 Charge, and Invalid Demand Letters*"
- "*The Stamp Duty Issue*"
- "*Hearsay and the application of Order 40 Rule 4 at the hearing*"
- "*Fraud, and Section 31 and Section 30 of the Registration of Title Act*"
- "*Other issues arising from this case*"

80. It is necessary to say at this point that in regard to the submissions advanced under the last heading there is considerable overlap with the issues falling to be addressed under the first four headings. However, there are also issues raised under this heading that are simply non-justiciable in the context of the action as it is presently framed and pleaded, relating as they do to issues which are either not pleaded correctly or at all (and which for that matter are unsupported by concrete evidence as opposed to suspicion and speculation), and/or relating to

the legal relationships between, and transactions involving, parties who are not before the court (e.g., claims of alleged fraudulent conduct/misrepresentation by persons whom the defendants have not sued and who are not parties to the action), and which were not issues that fell for adjudication by the trial judge and which therefore form no part of the decision under appeal.

81. In his replying submissions, the plaintiff seeks to expressly engage with the first four of the issues identified by the defendants, although not in the same order as they do. The plaintiff has (deliberately, it may be assumed) not chosen to engage expressly with the non-justiciable issues raised under the defendants' fifth heading to which I have just alluded.

82. It is proposed to review the submissions made by both sides in regard to the appeal, using as a framework the first four of the defendants' headings.

"The C1 Charge, and Invalid Demand Letters"

"The C1 Charge"

The Defendants' Submissions

83. The defendants contend, in substance, that because what is described *as* "*the C1 Charge*" is referenced in affidavits sworn by the first named defendant, and indeed a copy of it is exhibited with Mr Slevin's affidavit of the 17th of July 2019, that they have sufficiently pleaded, and supported with evidence, an objection that the plaintiff ought not to be granted the interlocutory injunctive relief that he seeks because, they contend, he has failed to prove that the company that purported to appoint him as receiver, namely PFL, has a continuing and existing interest in any loans to the defendants which may have been acquired by that company. They suggest that "*the C1 charge creates enough prima facie evidence that PFL had no right to make demand, or to appoint the plaintiff as receiver over our properties, as they had given up that right absolutely to a third party US Trustees.*" Further, they say that the plaintiff has failed to engage with their objection.

84. The defendants say the evidence points clearly to "*an absolute assignment of particularly the Loan Assets 3.1(g) of this C1 charge*"; In that regard, they say that per the document "*Loan Assets*" are defined as comprising "*(i) the Portfolio Loans, Portfolio Loan Agreements and Portfolio Rights, (ii) any agreement creating any security interest in favour of the Chargor in connection with the Properties or the Portfolio Loans (iii) each Portfolio Hedging Agreement to which the charger is a party (iv) any letter of credit issued in the Chargor's favour in connection with the Property or the Portfolio Loans* […]."*,* and must be understood as such. Further, "*there can be no question that PFL who made demand and appointed the plaintiff are the chargor in this C1 charge, with UST the chargee.*"

85. The defendants are critical of Sanfey J's characterisation of "*the C1 Charge*" as providing merely "*a suggestion that what may or may not be a securitisation agreement – which neither the defendants nor the court has seen - has deprived PFL of any interest in the charge on which the receiver relies*". They say there was absolutely no evidence before the court to justify the High Court judge "*appearing to in some way accept that this C1 charge is part of some bigger securitisation scheme or is subject to some trust arrangement.*" Rather, they say, "*the only evidence before the High Court, was the C1 charge which clearly creates an absolute assignment and is proof of an instrument of transfer of the Loan Assets by PFL in favour of UST. Based on the evidence, there is no other conclusion the High Court* [could] *come to.*"

86. While not disputing that the law with respect to notice as was stated by counsel for the plaintiff, the defendants contend that the plaintiff's reliance on *Pepper Finance DAC v. Jenkins* [2018] IEHC 485 was misconceived, and that it ought to have been distinguished by the High Court judge on various grounds.

87. The defendants take serious issue with para. 97 of the High Court judgment, wherein Sanfey J. stated:

> "*I should say that the only documentation presented to me in respect of the transfer to U.S. Bank Trustees Limited is the form C1 registering the charge, which gives "short particulars of the property charged", but not much else. I am unaware of the terms of any such transfer, or what if any interest remains in PFL in the property charged. In such circumstances, I do not consider that I am in a position to form any judgment as to the division of rights and interests between PFL and its assignee.*"

They say, "*It is in this last sentence we in the first instance say the judge erred in fact and in law. In evidence before the judge was an instrument of transfer (the C1) which creates an absolute assignment of the Loan assets. This evidence was not rebutted in any way. It was the only evidence before the court in this regard.*"

88. On the issue of notice, or lack thereof, this Court was asked to have regard to the decision of Baker J. in *AIB Mortgage Bank v. Thompson* [2017] IEHC 515.

The Plaintiff's Submissions

89. The plaintiff points out that the C1 document the defendants seek to rely on is not in fact a charge or debenture, but is rather a certificate recording particulars of the property charged pursuant to a debenture between PFL and US Bank Trustees Ltd.

90. The plaintiff maintains that s. 31 of the Act of 1964 still applies and that the Register offers conclusive evidence of PFL's interest and *locus standi* to appoint the receiver. The effect of the debenture was not such as to constitute an assignment of PFL's interest.

91. Further, the defendants concede in their submissions that they were not given notice of the alleged assignment, which would render any such assignment invalid under s. 28(6) of the Act of 1877. PFL retained sufficient interest in the Mortgages and Loan Facilities to demand repayment and to appoint the plaintiff.

The (allegedly) Invalid Demand Letters

The Defendants' Submissions

92. The defendants refer to paras. 57 – 65 of the High Court judgment and say that there is a serious error within this section of the judgment in terms of fact and law. This assertion is based on a contention that the demand letters relied upon by the plaintiff were based on equitable, rather than legal, entitlement. They say there can be no doubt the demands relied on by PFL prior to appointing Mr. Fennell as a receiver over the properties in question are invalid because "*[t]hey are demands based on equitable entitlements, and as is clear from the unrebutted evidence of the C1 charge, as of the 29th of September 2015, PFL by way of an instrument under their own hand made an absolute assignment of the equitable rights to the Loan Assets to UST.*"

The Plaintiff's Submissions

93. In response, the plaintiff again contends that the C1 document is not in fact a charge or debenture, but is rather a certificate recording particulars of the property charged pursuant to a debenture between PFL and US Bank Trustees Ltd. He argues that the C1 document does not establish that the that the loans granted to the defendants by Ulster Bank and secured on the properties comprised in Folios 8095F and 54840F, and subsequently acquired by PFL, were included amongst any Loan Assets charged by any debenture that may have been entered into between PFL and UST; and he relies on s. 31 of the Act of 1964.

"The Stamp Duty Issue"

The Defendants' Submissions

94. The defendants, in effect, complain that the High Court judge failed to properly appreciate and engage with what was a nuanced argument presented by them with regard to the admissibility of documentary evidence on which the plaintiff sought to place reliance, namely documents relating to the transfer of the interest in the loans by Ulster Bank to PFL, by way of loan sale deed of the 23rd of July 2015 (headed "*Mortgage Sale Deed*") and Deed of Novation dated the 14th of September 2015. They contend that their argument as presented

to the court below was not solely about whether stamp duty was payable, but rather with specific reference to s. 127(4) of the Act of 1999 as amended (the defendants say) by the the Regulations of 2012, whether in the present proceedings the plaintiff could rely on documents which may be exempted from stamp duty without evidence of the said documents "[…] *being duly stamped in accordance with the law in force at the time it was first executed"* as is stated in the final line of s. 127(4) of the Act of 1999.

95. They say that their argument was not the one advanced in *Healy v. Ulster Bank Ireland Limited and Promontoria (Aran) Limited*, previously cited, and that Sanfey J. erred in law and in fact in concluding that "*[t]he necessity to demonstrate payment of exemption does not arise, as stamp duty is not chargeable on the type of sale in issue in these proceedings*".

96. The essence of the defendants' case was rather that there are obligations with regard to s. 127(4) of the Act of 1999 even where transactions fall under an exemption. They ask that this Court should examine the actual wording of s. 127 (4) of the Act of 1999, and in particular the last clause thereof. The provision states:

> "*Except as provided for in this section, an instrument executed in any part of the State, or relating, wherever executed, to any property situated, or to any matter or thing done or to be done, in any part of the State, shall not, except in criminal proceedings or in civil proceedings by the Commissioners to recover stamp duty, be given in evidence, or be available for any purpose, unless it is not chargeable with duty or it is duly stamped in accordance with the law in force at the time when it was first executed.*"

The defendants place emphasis on the words "*unless it is not chargeable with duty or it is duly stamped in accordance with the law in force at the time*".

97. They say that in 1999, and prior to that, there were, in the main, only two potential scenarios in relation to the payment of stamp duty on documents. Either duty was chargeable

on the transaction and had to be paid, and the relevant instrument stamped accordingly under relevant legislation, or; the transaction, and the instrument reflecting it, would be exempt. They say that at that time there was no requirement to stamp documents that were exempt. However, the wording of s. 127(4) requires documents must be stamped "[…] *in accordance with the law in force at the time*". The defendants urge upon us that it does not state that documents must be stamped solely for the purposes of proving the required duty was paid. The defendants argue that s. 127(4) of the Act of 1999 was carefully worded by the legislature, potentially to allow for future change with regard to the stamping of instruments and the application of s. 127(4) in terms of court proceedings.

98. The defendants argue that s. 127(4) of the Act of 1999 was in effect amended by the Regulations of 2012. Regulation 3 provides that "*[s]ubject to paragraph 2 of Schedule 1, any instrument described in paragraph 1 of that Schedule shall be stamped by means of the e-stamping system.*" The defendants further point, *inter alia*, to regulation s. 11 entitled "*Stamp Certificates*", and to clause (2) thereof which describes how the Revenue will issue a "*stamp certificate*" (which the defendants contend is the same as "*stamped in accordance with the law in place at the time* […]"); and to clause (3) (ii) thereof wherein it is stated that the stamped certificate will denote, that "*the instrument is not chargeable with stamp duty*". Further, they point to clause (4) thereof, which again defines the certificate issued as a "*stamp certificate*" and that it will bear "*a certificate identification number and such other particulars as the Commissioners think fit.*"

99. They say that after 7th of July 2012, when the Regulations of 2012 came into force, there were in effect three types of instruments or documents, namely, those on which duty was due and paid and stamped accordingly, those which qualified for an exemption and required no return, and a third set of instruments or documents, on which an exemption was available under the Act of 1999, but in respect of which such exemption could only be

claimed based on a newly introduced (by the Regulations of 2012) system of self-assessment return and e-stamping, with a duly stamped exemption certificate issuing to the party claiming such exemption in his/her/its self-assessment return.

100. In substance, the defendants argue that by virtue of the Regulations of 2012 there was, following its coming into force on the 7th of July 2012, a requirement on the plaintiff, if he was seeking to rely on s. 127(4) of the Act of 1999 for the purpose of relying on the documents in controversy, to produce to the High Court, notwithstanding that the transaction in question might have been stamp duty exempt, a duly stamped stamp duty exemption certificate. They say that as the plaintiff failed to do so, the instruments on which he was seeking to rely were inadmissible, and were wrongly received in evidence by the High Court judge.

101. In support of their argument the members of this Court were invited to consider, and I confirm that I have considered, various Revenue publications exhibited/cited by the defendants including a document entitled "*Stamp Duties Consolidation Act 1999 - Notes for Guidance*", and Chapter 2 of the Revenue's "*Tax and Duty Manual: Filing and paying Stamp Duty on Instruments*", June 2020 edn, entitled "*Chapter 2:Obligation to file a Stamp Duty Return*."

The Plaintiff's Submissions

102. In reply on "*the Stamp Duty issue*", the plaintiff makes two points. First, he says that, in circumstances where the relevant Folios comprised conclusive evidence of PFL's ownership of the mortgages, proof of relevant underlying transfer documents was not necessary to demonstrate that PFL had *locus standi* to appoint the plaintiff as receiver.

103. Secondly, and perhaps more importantly, he says there is no arguable basis for the interpretation of s. 127(4) of the 1999 Act urged by the defendants. The plain meaning of the

statutory provision cannot be amended by a subsequent statutory instrument. In any event, the Regulations of 2012 do not purport to effect an amendment to s. 127(4) of the 1999 Act. S. 127(4) of the 1999 Act clearly permits a document to be admitted into evidence where "*it is not chargeable to duty*". The plaintiff submitted that as the defendants now appear to concede that the relevant documents were not chargeable to duty, there is simply no basis for introducing a requirement (that appears nowhere in the legislation) that a stamp certificate must be adduced in evidence in order for the documents at issue in this case to be proved.

"Hearsay and the application of Order 40 Rule 4 at the hearing"

The Defendants' Submissions

104. The defendants commenced their submissions under this heading by indicating their full acceptance of the intention and necessity of O. 40, r. 4 in terms of the use of hearsay evidence during injunctive proceedings. They commend Sanfey J.'s explication of the rationale for the rule, pointing to his identification that certain injunctive proceedings need to be brought before the court as a matter of urgency and deponents may not be available to swear affidavits at short notice. Further, they note his assurance at para. 42 of his judgment that a court will be astute to ensure no abuse results from the relaxation of the hearsay rule, and (ensure) it is not used as a means by which litigants can sidestep issues of genuine contention.

105. Notwithstanding their acceptance of Sanfey J.'s exposition (at paras. 40 – 42 of his judgment) of the remit of O. 40, r. 4, the defendants argue forcefully that the judge erred in his application of the rule.

106. Firstly, they contend that the matter was not urgent and have pointed to the fact that the injunction application was not heard until 22 months after the proceedings had been issued. Further, this was against the background of the discontinuation of the previous proceedings instigated in 2017.

107. Secondly, they say that the plaintiff, despite the defendants' affidavit challenges to him to do so, has not adverted at any point to there not being relevant deponents available to him.

108. Thirdly, the defendants make a finality of proceedings point. They allude in their submissions to the distinction acknowledged by Sanfey J. between interlocutory proceedings which are likely to be dispositive of the main controversy in the case, rendering it unlikely that the case will ever proceed to trial; and interlocutory proceedings which are not likely to bring an end to the matter. The defendants say that the proceedings herein fall into the former category, and they claim that the plaintiff's submissions make it clear that it is his intention to remove the tenants in situ at the earliest opportunity and sell the properties. They say that they believe he has no intention of thereafter seeking a trial of the action and suggest that the likelihood is that he will discontinue these proceedings once the properties are sold. They say that that being the case this was not an appropriate instance in which to relax the rule against hearsay, notwithstanding the interlocutory nature of the application for injunctive relief.

109. Fourthly, the defendants quarrel with the High Court judge's observation at para. 48 of his judgment, that:

> "*[t]here is no suggestion that the receiver has omitted or suppressed documentation from the defendants that would have been helpful in their case. It is not suggested that that the application is tainted by the absence of full disclosure or lack of candour of the type specified by Clarke J (as he then was) in Bambrick v Cobley [2005] IEHC 43.*"

110. The defendants contend in that regard that the lack of any response by the plaintiff to the case made by them in reliance on the so-called "*C1 Charge*", such as might have brought clarity to what they characterise as "*the true meaning of and methodology of the C1 charge*", was and remains a suppression of the real evidence and indeed documentation.

111. The defendants argue that the broad application of O. 40, r. 4 in these injunctive proceedings went well beyond that envisaged by the very spirit and wording of that rule. They say that it was abusive, and in turn was used to suppress the facts with regard to the lack of entitlement of PFL to appoint the plaintiff as Receiver over their properties, in particular with regard to the 'low bar' applied in injunctive proceedings. While they accept that, in theory, the case could proceed to a plenary hearing, the defendants believe that, in reality, that is very unlikely to happen. The plaintiff has, they say, shown no appetite for a plenary hearing. He failed to produce a statement of claim until met with a motion to strike out, and even then, they say he has failed in the intervening period to engage meaningfully with a voluntary request for particulars and with the defendants' counterclaim. They say that the scale of the plaintiff's use of hearsay was clearly opened to the High Court. They further say it remains abusive and potentially was employed tactically to hide important facts and documents that may directly affect the efficacy of the plaintiff's claim. The defendants contend that the latitude afforded by Sanfey J. to the plaintiff in this case, in terms of receiving his hearsay evidence, was excessive, potentially abusive, and allowed for a suppression of the real facts and documents and was outside of that for which O. 40, r. 4 was created.

112. The defendants further submit that it is contrary to both the wording and spirit of O. 40, r. 4 that the rule should be deployed tactically. They express the firm belief that the use of hearsay evidence by the plaintiff over such a prolonged period, and in the face of repeated challenges to PFL's entitlement to appoint him as receiver, was, in fact, tactical and not born out of necessity. That, they say, is abusive, and it potentially hides evidence from the court.

113. In all of these circumstances the defendants contend that the High Court judge erred in permitting the plaintiff to introduce and rely upon evidence that was manifestly hearsay.

The Plaintiff's Submissions

114. In response, the plaintiff submits that a striking aspect of the defendants' submission in relation to the hearsay issue is that they fail to identify what specific evidence placed before the High Court in the course of the interlocutory injunction application was objected to on the ground of hearsay.

115. He points out that at one juncture in their submission regarding hearsay, the defendants appear to suggest that their real objection to the evidence tendered in the course of the interlocutory injunction hearing is not that the evidence actually placed before the High Court comprised hearsay, but rather that more evidence should have been placed before the court in relation to the alleged assignment of the loans and mortgages by PFL to a third party.

116. The plaintiff contends that the defendants' submission fails to advert to the fact that the initial evidence tendered by the plaintiff to ground the application for interlocutory relief was, insofar as it related to facts within the knowledge of PFL and/or the books and records and files of PFL, verified by way of an affidavit sworn by Donal O'Sullivan, a director of PFL, and filed on the 12th of October 2018. Accordingly, the objection on the ground of hearsay can only pertain – insofar as it has any purchase at all – to the supplemental affidavits sworn by the plaintiff in the course of the interlocutory application.

117. It is submitted on behalf of the plaintiff that the majority of the averments appearing in those supplemental affidavits relate to facts which were clearly within the knowledge of the plaintiff himself. Insofar as there are items which may be argued to comprise hearsay, these include: a copy of Companies Registration Office printout in respect of PFL confirming its directors; a copy of a minute of board meeting of PFL, and; copies of the relevant Folios showing PFL's registration as the owner of the mortgages. Thus, the source of each of the averments concerning those documents was evident on its face.

118. The plaintiff in his submission contends that, in each instance, a court would have reasonable grounds to ascribe *prima facie* reliability to such evidence, notwithstanding that it

was adduced on a hearsay basis. As the defendants appeared to concede, O. 40, r.4 (now rule 8) of the Rules of the Superior Courts permits the admission of hearsay evidence on interlocutory applications. The plaintiff drew the Court's attention to Delany and McGrath, *Civil Procedure in the Superior Courts* (4th edn, Round Hall 2018) where it is stated at para. 21-83 that, "*not only is this expressly provided for* [...] *it reflects longstanding practice*". For those reasons the plaintiff says, the High Court judge was correct to conclude that the plaintiff's application was not tainted by the excessive use of hearsay.

119. The plaintiff makes a secondary or alternative argument. He submits that it is material that Part 3, Chapter 3 of the Act of 2020 had come into force well before the High Court judge delivered his judgment. S. 14 of that Act permits business records to be admitted in evidence, provided they were prepared in the ordinary course of business, and were supplied by a person (whether or not he or she so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

120. The plaintiff argues that the evidence objected to by the defendants (and in particular a board minute of PFL that the plaintiff sought to rely upon) falls within the terms of those provisions and hence is admissible under the Act of 2020.

121. It is submitted that notwithstanding that the Act of 2020 had not been enacted when the affidavits at issue were sworn or when the hearing took place, the Act was in force when the Court had to consider the admissibility of the evidence in the context of delivering its judgment. Since the changes wrought by the Act of 2020 were procedural or evidential, rather than substantive, in nature, the principle of non-retrospectivity in statutory interpretation would not apply to exclude the application of the new rules. In this regard the Court was referred to *R -v- Makanjuola* (1995) 2 Cr App R 469 at 472A-B, and *Toss Ltd. v. District Court Justice & Ors* [1987] IEHC 63 as providing support for the plaintiff's argument on the non-retrospectivity point.

122. In conclusion under this heading the plaintiff submits that, even if this Court were to conclude – contrary to the arguments he has made – that the High Court judge ought to have excluded some of the evidence tendered by the plaintiff as hearsay, in light of the enactment of the Act of 2020 no purpose would be served by remitting these proceedings to the High Court to be reheard in light of any such finding, in circumstances where the evidence in question would inevitably be admitted under the Act of 2020 at any fresh hearing.

"Fraud and s. 31 and s. 30 of the Registration of Title Act"

The Defendants' Submissions

123. In essence, the defendants argue that any reliance placed by the plaintiff on s. 31 of the Act of 1964 is rendered moot by what the defendants describe as the fraud (in the absence of any evidence to refute it, according to the defendants) committed by PFL on the 29th of September 2015 in registering their ownership of the charges over Folios 8095F and 54840F with the Property Registration Authority of Ireland ("the PRAI"). The defendants allege that the fraud arises in circumstances where "*the CI Form-Registration of a Charge*" (registered with the CRO some two weeks later) records the creation on the 29th of September 2015 of a debenture between PFL and US Bank Trustees Limited "*creating an absolute assignment of the loan assets*" to US Bank Trustees Limited. The defendants maintain that that assignment included PFL's interest in the loans secured against the properties comprised in Folios 8095F and 54840F.

124. They complain that the High Court judge was wrong to say during the hearing that he would not entertain a claim of fraud.

125. While the High Court judge did ultimately engage with the defendants' claims of fraudulent conduct by PFL and rejected them in his judgment (see paras. 67 to 74 inclusive of that judgment), the defendants say he was wrong to do so. They criticise his referencing of *Tanager DAC v. Kane* (previously cited) and claim that the circumstances of that case are

clearly distinguishable from this case. The *Tanager* case had involved an administrative error relied upon by Kane, whereas in the present case the defendants say that they can point to what they contend is clear fraud.

126. The defendants contended before the High Court, and continue to contend, that PFL deliberately withheld the existence and details of what the defendants characterize as "*the C1 charge*" from the PRAI to knowingly ensure the PRAI registered charges on the defendants' folios in the name of PFL to which, the defendants say, PFL were not entitled by virtue of "*the C1 charge*" created by PFL themselves in favour of US Bank Trustees Limited. In the alternative, the defendants rely on their assertion that the sole response from the plaintiff to their claims has been to rely on lack of due notice in terms of "*the C1 charge*", to contend that, as a consequence, the legal rights did not travel. The defendants, however, contend that the finance documents and security documents definitively did travel on an equitable basis, even if not on a legal basis.

127. At this juncture, I should digress briefly to state that the defendants' persistent references throughout their submissions to "*the C1 Charge*" is a misnomer because the C1 document does not itself create a charge, it merely records and notifies the CRO of the existence of a charge created by other documents, in this instance a debenture between PFL and US Bank Trustees Ltd relating to certain assets – full particulars of which can only be identified by reading the debenture in conjunction with a related document, referred to in the C1 document as "*the facility agreement*", neither of which were in evidence either before the High Court or before this Court.

128. At any rate, returning to the defendants' arguments, they suggest that there was no evidence before the court below as to how PFL could have completed the (Land Registry) Form 56 in the manner they did without any reference to the impact of "*the C1 charge*" over their claimed entitlement before the PRAI.

129. The defendants further complain about the High Court judge's refusal to look behind the Register in reliance on s. 31 of the Act of 1964; as well as his reference, at para. 158 of his judgment, to there being no evidence of an application to the PRAI to remove PFL as owners of the charges from their folios. They make the point that they believe the correct place to air their claims of fraud was before the High Court judge and they say that they presented him with what they characterised as "*unrebutted evidence of a criminal offence*", but that despite this, and notwithstanding the terms of s. 30 of the Act of 1964, he was still prepared to regard the Register as conclusive and had not been willing to look behind it. The defendants contend that that was a legal error on his part.

130. They further point out that they did in fact subsequently make an application in respect of both folios to the PRAI to have the registration of PFL as owners of the charges removed from their folios, but that these applications were refused. Although the PRAI is not a party to the present litigation, the defendant submissions greatly criticise that entity for the stance that it took. This Court was referred to the correspondence between the defendants and the PRAI, as well as to correspondence from solicitors representing the plaintiff and PFL, in illustration of the defendants' grievance.

131. They contend that what is required is:

> "*some further direction from this Appeal Court with regard to the application of section 31 of the Registration of Title Act in particular in relation to unrebutted evidence of potential fraud in the registration process and section 30 of the same Act*".

132. They further complain that:

> "*Our application is based on fraud,* […] *, we made it both to the High Court and in turn the PRAI, but neither of these institutions seem to be any way obligated or inclined to take any actions in the face of what is an unrebutted allegation of fraud.*"

133. In conclusion on this issue, the defendants in their submissions invite the Court of Appeal to consider and rule on the question:

> "*Should the courts feel obligated to rely on Section 31 of the Registration of Title Act 1964 when presented with unrebutted evidence of fraud in the creation of the charge in the first instance or should the courts when presented with such instances and in the interests of justice adjourn the case potentially affected until a full and proper examination is done, to ensure that the courts are not in fact being an unwitting party to a fraud?*"

The Plaintiff's Submissions

134. In response, the plaintiff contends that the first difficulty with the defendants' argument is that the defendants have never identified the precise nature of the fraud alleged to have been perpetrated by PFL. It appears to be suggested in the defendants' written submissions that PFL was guilty of fraud in failing to bring to the attention of the PRAI the fact that it did not have the requisite interest in the relevant charges to be registered as their owner owing to the debenture entered into in favour of the Security Agent in September 2015. The plaintiff says that in the first instance, any potential validity in this point is dependent on a court being satisfied that the evidence demonstrates that PFL did discharge entirely any interests held by them in the charges at issue in these proceedings to US Bank Trustees Ltd. The plaintiff maintains that this is not the case, but that even if this Court were to take a different view, he understands it to be PFL's contention that it had justifiably believed, in the absence of written notice to the defendants, that it retained a sufficient interest in the mortgages at all material times to be registered as their owner. For those reasons, the plaintiff says, it cannot seriously be maintained that PFL acted fraudulently in registering the charges.

135. In any event, the plaintiff says, defendants misunderstand the effect of the fraud exception in s. 31(1) of the Act of 1964. It is submitted that the effect of this provision is to render the Register conclusive pending the finding of a court that its content ought to be rectified on the ground of actual fraud or mistake. In circumstances where no application to rectify the Register had issued – still less been decided – by the time of the High Court hearing, the High Court judge was bound to treat the Register as conclusive for the purpose of those proceedings.

136. The plaintiff says that this is clear from the decision of the Court of Appeal in the *Tanager* case, where Baker J. stated in relation to possession proceedings brought by a person who was the registered owner of the charge:

> "*The civil bill for possession is one brought by a person or body who claims as registered owner of the charge, and the conclusiveness of the Register means, for the purposes of those proceedings at least, that the court may not hear argument that the registration was wrongly made. The court, in other words, may not, in possession proceedings, 'look behind' the Register.*"

137. Finally, on this issue, the plaintiff says that the subsequent application made by the defendants to the PRAI challenging the registration of PFL's interest on the ground of fraud is not material to the present appeal, for at least two reasons. First, the application appears to have been entirely unsuccessful. Secondly, since the application was only commenced after the High Court judge had delivered his judgment, nothing arising from the application can constitute a ground of appeal from his decision.

"Other Issues"

138. Under this final heading in their written submissions, the defendants seek in the main to reprise many of the argument that they have earlier made under other headings.

139. They also raise issues which are clearly non-justiciable within the context of what has been pleaded, and the parameters of these proceedings. For example, the defendants again state that PFL have taken advantage of a s. 110 tax status that they are not entitled to. Rather than asking this Court to adjudicate on whether PFL complied with their requirements under s. 110, the defendants are instead pointing to what they describe as a vulnerability in the cooperation between the arms of the State, which has allowed PFL to mislead the PRAI, which then cannot be interfered with by the courts. They say that neither PFL, nor the PRAI, nor the other unidentified "*arms of the State*" are parties to this litigation and the issues canvassed are simply not justiciable in this action.

140. The plaintiff, I think understandably, does not reply to this argument in his submissions. Ignoring any question of pleadings, the defendants have not specified what relief they are seeking from this Court in light of the "*vulnerability*" that they claim to have identified. That being so, their position is most readily interpreted as a further request for the Court to look behind the Register, and the plaintiff has already responded to that.

141. Also, in this section of the submissions the defendants dispute the ruling of Sanfey J. that the copy of the Board Meeting minutes adduced by the plaintiff was authentic, contending *inter alia* that the only evidence as to the meeting was hearsay (a point already dealt with) and that the document at issue was not printed on headed company paper.

142. The defendants also assert a belief in this section of their submissions that the plaintiff may voluntarily discontinue the action, and that he will most likely revoke his undertaking as to damages. Suffice it to say that the fact that the defendants may hold these opinions as to what might happen is neither here nor there. The mere assertion by a party, or indeed a witness or a deponent, of a non-expert opinion as to a state of affairs or as to what might happen will not *per se* give rise to a justiciable controversy. The courts act on concrete evidence and not on asserted non-expert opinions. The defendants' opinions as to what the

plaintiff may do in the future is not something that either the court below could have been, or this Court can be, expected to act upon.

143. It was also submitted in this section of the defendants' written submissions that this Court should include PFL as a notice party in light of what they characterise as "*the excessive deference shown by Sanfey J. to the plaintiff in the context of a lack of evidence*". Tellingly, perhaps, the defendants acknowledge in making this submission that they have not brought a formal application to have PFL made a notice party. In effect, they are putting it up to the Court to do so its own motion. The basis of the complaint appears fundamentally to relate to the arguments previously made in regard to the admission of evidence which the defendants say was wrongfully admitted, either in the context of a want of proof of stamping or because it was hearsay.

Discussion, Analysis and Decision

"The C1 Charge, and Invalid Demand Letters"

The C1 Charge

144. I have scrutinised the *Form C1 – "Registration of a Charge"* relied upon by the defendants. As there are several pages of tightly spaced and small font text involved, it not proposed to reproduce the document in full within the body of this judgment, rather it will appear as an Annex at the end of this judgment, and the reader is invited to consult the Annex in conjunction with the judgment for context, where necessary. *Prima facie* the document relates to the registration of a charge in the CRO comprising a debenture created by PFL in favour of an entity called US Bank Trustees Limited, which debenture charged certain assets of PFL, including "*Loan Assets*", as continuing security for the payment, performance, and discharge of "*the Secured Obligations*" as of the 29th of September 2015. However, neither the debenture instrument itself, nor relevant underlying documentation such as a "*Facility*

Agreement", with further reference to which certain critical terms appearing in the particulars of the property charged in the *Form C1 – "Registration of a Charge"* such as "*Loan Assets*" and "*the Secured Obligations*" are defined, were adduced in evidence.

145. As can be seen from the copy of it reproduced in the Annex to this judgment, the *Form C1 - "Registration of a Charge"* is in six major parts, under the following headings: "*Company Identification*"; "*Persons Entitled – Particulars of Property*"; "*Particulars of persons verifying the contents of the form*"; "*Particulars of the presenter*"; "*Legal References*", and; "*Signature Information*". The relevant parts with regard to the controversy at issue are those parts under the first two headings.

146. The part entitled "*Company Identification*" reveals that a charge was created on the 29th of September 2015 by Promontoria (Finn) Limited, and that the nature of the charge was a debenture.

147. The part entitled "*Persons Entitled – Particulars of Property*" reveals that the person entitled to the charge is described as "*US Bank Trustees Limited (the Security Agent)*". There then follows a subheading entitled "*Short Particulars of the property charged*" under which it is stated:

> "*The Chargor (A) charged its (i) Mortgaged Property; (ii) Blocked Security Accounts and Blocked Security Account Balances; (iii) Security Accounts and Security Account Balances; (iv) rights under each agreement to which it is a party (v) rights and proceeds under each Loan Asset; (vi) all book debts; (vii) goodwill, uncalled and called but unpaid capital, including, the benefit of any Authorisation; (B) assigned and agreed to assign all present and future benefits, rights, title and interest in the (i) Related Property Rights; (ii) any deeds of easements in connection with the Mortgaged Property; (iii) Licences; (iv) Leases; (v) Receivables, (vi) Blocked Security Account Balances; (vii) Insurances and Insurance Proceeds; (viii) Plant and*

Machinery; (ix) Contracts; (x) Loan assets; (C) charged by way of floating charge its undertaking and assets present and future. See Further Particulars for description of security and capitalised terms."

148. While, as can be seen, the "*Short Particulars of the property charged*" do refer to "*Loan assets*", the description provides no assistance as to what those "*Loan assets*" might be comprised of, and in particular whether the loans granted to the defendants by Ulster Bank and secured on Folios 8095F and 54840F, and subsequently acquired by PFL, are included amongst them.

149. There then follows (over the page) a further subheading, "*Further Particulars of the property charged*" under which some further particularisation is provided, comprised of what I deduce, from an express reference to "*Clause 3 (Security) of the Debenture*", to be either a full or partial quotation of "*Clause 3 (Security)*" from the Deed of Debenture (although in circumstances where the debenture itself is not in evidence before the Court, it has not been possible to confirm this).

150. Then below the subheading, "*Further Particulars of the property charged*", there is a secondary subheading entitled "*3 Security*", below which again is a tertiary subheading entitled "*3.1 Real Property, Related Property Rights, Leases and Related Assets.*" This, in turn, is followed by sub-categories designated (a) to (j) respectively, and of particular potential interest is sub-category (g) thereof which is entitled: "*Loan Assets*", and which states:

> *"(i) As continuing security for the payment, performance and discharge of the Secured Obligations, the Chargor as legal and beneficial owner assigned and agreed to assign absolutely to the Security Agent all of the Chargor's present and future rights, title, benefit and interest in and to the Loan Assets and the*

proceeds thereof subject to Clause 18.11 (Disposals) of the Facility Agreement and the proviso for re-assignment of the Debenture; and

(ii) to the extent that they are not secured pursuant to the foregoing sub-paragraph, the Chargor as beneficial owner charged in favour of the Security Agent by way of first fixed charge all of its rights under each Loan Asset and the proceeds thereof."

151. At the end of sub-category (j) there then follows what amounts to a glossary of "*Defined Terms*" .

152. Within the glossary provided thereafter, "*Loan Assets*" are said to mean:

"*(i) the Portfolio Loans, Portfolio Loan Agreements and Portfolio Rights;*

(ii) any agreement creating any security interest in favour of the Chargor in connection with the Properties or the Portfolio Loans;

(iii) each Portfolio Hedging Agreement to which the charger is a party;

(iv) any letter of credit issued in the Chargor's favour in connection with the Property or the Portfolio Loans […]."

153. "*Portfolio Loans*", "*Portfolio Loan Agreements*", "*Portfolio Rights*" and *"Properties"* and "*Secured Obligations*" are all said to have the meanings given to those terms in "*the Facility Agreement*".

154. The term "*Facility Agreement*", which is repeatedly referred to in the "*Further particulars of the property charged*", is itself defined as:

"*the facility agreement dated 29 September 2015 and made between, among others, the borrower as borrower, Morgan Stanley Principal Funding Inc and BAWAG P.S.K Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft as arrangers, Morgan Stanley Principal Funding Inc. and BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft as*

original lenders, Elavon Financial Services Ltd as facility agent and US Bank Trustees Ltd as security agent."

155. Neither this Court, nor the court below has been provided with a copy of the "*Facility Agreement*". However, without sight of this "*Facility Agreement*", it is not possible to know from the other details in the *Form C1 – "Registration of a Charge",* what were the "*Loan Assets*" involved, or for that matter "*the Secured Obligations*" against the performance of which those assets provided security.

156. What is clear is that while some further explication is provided in the "*Further particulars of the property charged*" concerning what is comprised in the "*Loan Assets*" which have ostensibly been charged by the Debenture at issue, ultimately it is not possible to know from the document whether the loans granted to the defendants by Ulster Bank and secured on Folios 8095F and 54840F, and subsequently acquired by PFL, are included amongst them.

157. In my assessment, the plaintiff is correct in his submission that the document entitled "*Form C1- Registration of a Charge*" is not, in fact, a charge or debenture, but is merely a certificate recording particulars of the property charged pursuant to a debenture between PFL and US Bank Trustees Ltd. The debenture itself and related documentation, such as the "*Facility Agreement*" are not in evidence, and the defendants have not demonstrated that the effect of the debenture was such as to constitute an assignment of PFL's interest in the loans relating to and secured against Folios 8095F and 54840F.

158. In any case, the plaintiff is also right in maintaining that s. 31 of the Act of 1964 applies and, notwithstanding anything that might be contained in the "*Form C1- Registration of a Charge*" exhibited by the defendants, the Register offers conclusive evidence of PFL's interest and *locus standi* to appoint the receiver.

159. In my view, that is dispositive of this aspect of the case and, in the absence of proof of an assignment of PFL's interest in the loans relating to and secured against Folios 8095F and 54840F, it is unnecessary to consider in detail the arguments concerning the effect of notice, or the absence thereof, in respect of any such alleged assignment, beyond saying that if indeed there was such an assignment, the plaintiff is *prima facie* legally correct in contending that in the absence of written notice to the defendants of such an assignment PFL retained a sufficient interest in the mortgages and loan facilities in question to demand the repayment of the debt and to appoint the plaintiff as receiver. I find no error in the High Court judge's approach.

The (allegedly) Invalid Demand Letters

160. The point being made by the defendants under this heading is a net one and is related to the point just dealt with. They say that there can be no doubt the demands relied on by PFL prior to appointing Mr. Fennell as a receiver over the properties in question are invalid because "*[t]hey are demands based on equitable entitlements, and as is clear from the unrebutted evidence of the C1 charge, as of the 29th of September 2015, PFL by way of an instrument under their own hand made an absolute assignment of the equitable rights to the Loan Assets to UST.*"

161. In circumstances where I have already concluded that (i) there was insufficient evidence before the High Court to allow it to conclude that the loans granted to the defendants by Ulster Bank and secured on Folios 8095F and 54840F, and subsequently acquired by PFL, were included amongst the Loan Assets charged by any debenture that may have been entered into between PFL and UST; and (ii) that the High Court judge was entitled, having regard to s.31 of the Act of 1964, to regard the Register as offering conclusive evidence of PFL's interest and *locus standi* to appoint the receiver, it seems to me that this complaint is fundamentally undermined and cannot be upheld. I therefore reject the

contention of the defendants that the High Court judge was seriously in error in his findings at paras. 57 to 65 inclusive of his judgment. On the contrary, he was entitled on the evidence before him to consider that valid demands for payment had been made.

"The Stamp Duty Issue"

162. The first question that must be asked in addressing this issue is what was the transaction in question?

163. The transaction in question involved the transfer by Ulster Bank of its interest in certain loans, including the mortgages executed by the defendants in 2004 and 2006 in respect of the properties in issue, to PFL, by way of a Loan Sale Deed of the 23rd of July 2015 (headed "Mortgage Sale Deed") and a Deed of Novation dated the 14th of September 2015.

164. The plaintiff relies on s. 90(2) of the Act of 1999. This provides *inter alia* that a "*debt factoring agreement*" (meaning an agreement for the sale, or a transfer on sale, of a debt or part of a debt where such sale occurs in the ordinary course of the business of the vendor or purchaser) is not chargeable with stamp duty.

165. It is then necessary to ask if the transaction at issue is of the same type as that referred to by Barrett J. in *Healy v. Ulster Bank*, cited previously?

166. The *Healy* case related to a transfer by Ulster Bank to Promontoria (Aran) Limited of five loans by way of Mortgage Sale Deed, Deed of Novation and Global Deed of Transfer. In response to the argument that the Ulster Bank to Promontoria transfer documentation was not admissible in evidence under s. 127 of the Act of 1999, Barrett J. found that stamp duty was not chargeable on the transaction, which was a debt factoring agreement, under s. 90(2)(a) of the Act of 1999. I am satisfied that the transaction in the instant case is of the same type as that in *Healy*, as was found by the trial judge.

167. However, while that may be so, the defendants say that their argument is not the one that was addressed in *Healy* and that Sanfey J. erred in fact and in law in concluding that it

was. The defendants say that their argument, which Sanfey J. did not address, was about the effect of the Regulations of 2012 on s. 127(4) of the Act of 1999. They say that there are obligations with regard to s. 127(4) even where the transaction falls under an exemption. It is therefore necessary to examine the defendants' contention in greater detail.

168. It may be helpful at this point to quote in full the terms of s. 127(4) of the Act of 1999. It provides:

> "*(4) Except as provided for in this section, an instrument executed in any part of the State, or relating, wherever executed, to any property situated, or to any matter or thing done or to be done, in any part of the State, shall not, except in criminal proceedings or in civil proceedings by the Commissioners to recover stamp duty, be given in evidence, or be available for any purpose, unless it is not chargeable with duty or it is duly stamped in accordance with the law in force at the time when it was first executed.*"

169. The defendants neither explicitly concede nor contest in their submissions that the Loan Sale Deed is exempt from stamp duty. However, it is evident from these submissions that the defendants appear to at least accept that a debt factoring agreement qualifies for exemption under the exception provided for in s. 90(2)(a) of the Act of 1999. However, the defendants submit that a finding of exemption does not dispose of the s. 127(4) issue. They say that a return should have been filed prior to a s. 90 exemption being granted, leading to the issuance of a certificate of proof, without which the documents cannot be relied on in evidence under s. 127(4).

170. The question for this Court therefore is, whether s. 127(4) of the Act of 1999 allows the instruments at issue to be received in evidence absent a certificate of proof?

171. Focusing on the final clause within s. 127(4) that states, "***unless it is not chargeable with duty*** *or it is duly stamped in accordance with the law in force at the time when it was*

first executed" (emphasis by emboldening and underlining added), it is apparent that the restriction on evidence does not apply to instruments that are not chargeable with stamp duty.

172. However, the defendants submit that the issue is not solely whether stamp duty was payable, due to obligations which they say arise under s. 127(4) even where an exemption applies. In that regard, the defendants also refer to the final sentence of s. 127(4) but emphasise for the purposes of their case the following emboldened and underlined wording, "*unless it is not chargeable with duty* ***or it is duly stamped in accordance with the law in force at the time*** *when it was first executed.*"

173. The defendants contend that the restriction on evidence in s. 127(4) applies to instruments that are exempt from stamp duty, but which nonetheless are required to be stamped by Revenue. They rely on the Regulations of 2012, submitting that these regulations amended s. 127 of the Act of 1999. While I note the argument made in that regard, nothing in this judgment is to be taken as deciding that s. 127 was amended by the Regulations of 2012. I do not find it necessary to definitively determine that issue. That being said, adopting as a premise, solely for the purposes of testing the defendants' argument, that the Regulations of 2012 did operate to effect such an amendment, the question is: if that be the case, are the defendants correct in what they say was required of the plaintiff? Do the Regulations of 2012 introduce a requirement for the production of a certificate proving exemption from stamp duty in order for a litigant in the position of the plaintiff, who is seeking to introduce in evidence documents of the type objected to by the defendants (i.e., documents evidencing a debt factoring agreement), to be able to avail of s. 127(4) of the Act of 1999?

174. Regulation 11(3)(b) of the Regulations of 2012 provides that the Commissioners will issue a "*stamp certificate*" where an electronic or paper return has been delivered to denote, *inter alia*, that the instrument is not chargeable with stamp duty. The question then arises whether there is a requirement to deliver a return for the transaction in this matter.

175. Regulation 3 of the Regulations of 2012 provides that "*Subject to paragraph 2 of Schedule 1, any instrument described in paragraph 1 of that Schedule shall be stamped by means of the e-stamping system.*" Schedule 1 paragraph 1 is as follows:

"*1. An instrument executed on or after 7 July 2012 which—*

(a) is chargeable to stamp duty under the Principal Act and in respect of which stamp duty is due and payable,

(b) is chargeable to stamp duty under the Principal Act but which qualifies for an exemption or relief from the charge to stamp duty under Chapter 1 of Part 7 of that Act, or

(c) is chargeable to stamp duty under the Principal Act or any other enactment but which qualifies for an exemption or exclusion from the charge to stamp duty and which, not being an instrument to which paragraph 2 applies, is—

(i) a conveyance or transfer on sale of the fee simple of land or an interest in land,

(ii) a conveyance or transfer operating as a voluntary disposition inter vivos for the fee simple of land or an interest in land,

(iii) a lease of land for a term exceeding 30 years, or

(iv) an assignment of a lease of land where the unexpired term of the lease exceeds 30 years."

176. For completeness, Schedule 1, para. 2 states:

"*2. This paragraph applies to—*

(a) an instrument creating a joint tenancy between spouses to which section 14 of the Family Home Protection Act 1976 (No. 27 of 1976) applies,

(b) an instrument creating a joint tenancy between civil partners to which section 38 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (No. 24 of 2010) applies,

(c) an instrument to which section 87B(2) of the Principal Act applies,

(d) an instrument to which section 106B(2) of the Principal Act applies,

(e) an instrument to which section 108B(3) of the Principal Act applies, or

(f) a lease for any indefinite term or any term not exceeding 35 years to which paragraph (1) under the Heading "LEASE" in Schedule 1 to the Principal Act applies."

177. Chapter 1 of Part 7 of the Act of 1999 contains ss. 79 to 83D of that Act. This Chapter is titled "*Instruments which must be presented to the Commissioners for adjudication in order to obtain exemption or relief*". Debt factoring agreements qualifying for exemption under s. 90(2) of the Act of 1999 fall instead under Chapter 2 of Part 7 which is titled "*Other instruments*". The requirement to e-stamp such "*other instruments*" per Regulation 3 of the Regulations of 2012 only arises, per Schedule 1, sub-para. 1 (c) of those regulations, where they relate to an interest in land, as per sub sub-paras. (c)(i) to (iv). While the defendants do not address this aspect of the Regulations in their submissions, the position seems to me to be clear. As the instruments in controversy did not relate to an interest in land coming within any of the categories listed in Schedule 1, sub sub-paras. 1 (c)(i) to (iv), but rather concerned a debt factoring agreement, Regulation 3 of the Regulations of 2012 would not have operated to inhibit the plaintiff from relying on s. 127(4) of the Act of 1999 in respect of such instruments.

178. Accordingly, the High Court was correct to admit the documents in controversy and receive them in evidence, and the grounds of appeal relating to "*Stamp Duty Issues*" are dismissed.

"Hearsay and the application of Order 40 Rule 4 at the hearing"

179. I am satisfied that the High Court judge was not in error in permitting the plaintiff to rely on affidavits containing some hearsay in support of his application for interlocutory injunctive relief. The starting point must be that Order 40, Rule 4 (now Rule 8) permits hearsay to be included, that is to say averments of facts that were not within the knowledge of the deponent, providing that the deponent identifies the person who informed him of the facts deposed and states his belief that the facts are correct. As the plaintiff has submitted, the initial evidence tendered by the plaintiff to ground the application for interlocutory relief was, insofar as it related to facts within the knowledge of PFL and/or the books and records and files of PFL, verified by way of an affidavit sworn by Mr. O'Sullivan, a director of PFL, and filed on the 12th of October 2018.

180. Insofar as the supplementary affidavits were concerned, the plaintiff is right in my belief in contending that the majority of the averments appearing in those supplemental affidavits relate to facts which were either clearly within his own knowledge, or related to documents the source of which was evident on their face and in respect of which a court could attach *prima facie* reliability, such as documents from the CRO, minutes of board meetings of PFL, and land registration Folios from the PRAI.

181. I regard Order 40 Rule 4 (now Rule 8) as declaratory of the position that has always obtained in regard to the law of evidence in so far as it relates to interlocutory applications, namely that hearsay evidence may be admitted in such cases as a matter of discretion (the words "*may be admitted*", not "*shall be admitted*", are used in the rule in question) and notwithstanding that in other types of application where affidavits are used the rule against hearsay is to be rigorously, perhaps even indeed rigidly, applied. In the latter regard, see the judgment of Irvine J. (as she then was) in *Director of Corporate Enforcement v. Bailey* [2008] 2 I.L.R.M. 13, at 23.

182. The discretion that I have referred to must be exercised judicially on a case-by-case basis, with the Court being assiduous to ensure that in the circumstances of the case before it no unfairness would ensue to an affected party by relaxation of the rule against hearsay. Sanfey J. was clearly cognisant of his obligations in that regard, and was determined to fulfil them.

183. In substance, the defendants suggest that there are reasons to be concerned that Sanfey J.'s discretion was not properly exercised in circumstances where the application did not involve great urgency, where the plaintiff had not suggested that deponents were not available to him, where, in their belief, the matter was unlikely to proceed to plenary hearing, and where, also in their belief, hearsay was being adduced for tactical reasons and not out of necessity, effectively as a means of hiding evidence from the court in abuse of the court's process.

184. In my assessment, there is simply no evidence in this case of any attempt to hide evidence, or to abuse the court's process by means of reference to hearsay material. As to the issues of lack of urgency, the possibility that deponents might in fact have been available to testify at first hand concerning matters at issue, and the possibility that the outcome of the interlocutory application might prove in practical terms to be dispositive of the action, these were of course considerations to be taken into the mix in any consideration of how the discretion should be exercised. However, in my judgment, not one of them, nor the cumulative effect of them, could, in the circumstances of this case, have operated to give rise to such a level of concern as would resulted in the High Court judge only being able to exercise his discretion in one way, namely against receiving the hearsay evidence in controversy. I am satisfied that, notwithstanding the circumstances pointed to, the High Court judge was not so constrained. He was best placed to have an overview of the case and to determine whether it was possible to ensure fairness to both sides notwithstanding any

relaxation of the hearsay rule. I have concluded there is no reason to belief that Sanfey J.'s decision on this issue was other than one made in the proper exercise of a lawful discretion which he enjoyed.

185. Further, and in any case, although it is unnecessary to decide the point in the light of the findings just made, it seems to me that the plaintiff has put forward submissions, which I accept as having considerable cogency, as to the potential implications for this litigation of the Act of 2020, were the objection based on hearsay to be upheld and the matter remitted to the High Court. Suffice it to say that this reinforces me in my view that Sanfey J.'s decision to reject the hearsay objection was the correct one in the circumstances of the case.

186. In the circumstances the grounds of appeal relating to the admission of hearsay evidence are dismissed.

"Fraud and s.31 and s.30 of the Registration of Title Act"

187. The defendants' argument under this heading is based upon a fundamental misconception concerning how ss. 30 and 31 of the Act of 1964 intersect and operate both in law and in practice. It is appropriate before discussing this further to set out the terms of both provisions (to the extent relevant):

188. S. 31 of the Act of 1964 has two sub-sections, but only s. 31(1) is relevant in the context of the justiciable controversies at issue in this case. S. 31(1) provides:

> "***31.***—*(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake,*

and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

189. S. 30 of the Act of 1964 contains two subsections, both of which are relevant. It provides:

"***30.****—(1) Subject to the provisions of this Act with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.*

(2) Any entry, erasure or alteration in the register made by fraud shall be void as between all parties or privies to the fraud."

190. The combined effect of both provisions is that the Register is conclusive. However, where the Register is shown to be inaccurate by reason of "*actual*" (i.e., proven and declared, not merely asserted or suspected), fraud or mistake (and we are not concerned in this case with mistake) a court of competent jurisdiction can direct the Registrar to rectify the Register in such manner and on such terms as it thinks just. However, unless and until both actual fraud has been proven and an order for rectification of the Register has been obtained, the Register remains conclusive and is to be relied upon.

191. Proof of civil fraud requires the proper pleading of the allegation of fraud in court proceedings against the alleged fraudster seeking a declaration that the conduct or transaction complained of was fraudulent. While the standard of proof is the same as in other civil cases, namely proof on the balance of probabilities, in order to sustain an allegation of fraud, it must be pleaded with great specificity, and be supported by highly cogent evidence, and the alleged fraudster must at least have had the opportunity to engage with the allegation and to seek to rebut it, if so inclined.

192. The practical effects of a transaction that has been established to have been fraudulent, i.e., proven in the manner just spoken about, are undone by virtue of s. 30 of the Act of 1964. Where there has been a disposition of registered land or of a registered charge on land, which if unregistered would be fraudulent and void, the disposition at issue will also be regarded as fraudulent and void notwithstanding that ownership of the land or charge at issue was registered. However, s. 30 has no legal effect where fraud is merely asserted, or is merely suspected. For it to operate with legal effect an actual fraud requires to have been demonstrated, i.e., that the alleged fraud has been proven to exist before a court of competent jurisdiction and declared as such.

193. The defendants in this case have not proven actual fraud. Rightly, or wrongly, they clearly suspect fraud on PFL's part and have asserted such fraud based on their suspicion. However, they have not brought proceedings against PFL seeking to prove that fraud and to have it declared by a court of competent jurisdiction that that company fraudulently procured their registration of ownership of the charges at issue in these proceedings; nor have they sought to join PFL to the present proceedings for that purpose; nor, as the High Court pointed out at para. 73 of his judgment, was any application made for an order directing the Register to be rectified on the grounds of actual fraud, either in the context of the present proceedings or in separate proceedings.

194. Moreover, even assuming the appropriate parties were before the Court (and they are not, as PFL has not been joined) and that a claim of fraud properly pleaded and appropriate reliefs claimed (which again is not the case), the evidence proffered thus far by the defendants in support of their claim of fraud does not approach the level of cogency that would be required to establish fraud. The C1 document, on its own, categorically does not establish the existence of a fraud. It merely refers to a debenture having been entered into between PFL and US Bank Trustees Limited in which certain property and interests was

charged which included a category of such property/interests generically described as "*Loan Assets*", but which does not define what those "*Loan Assets*" included, save by reference to another document referred to as "*the Facility Agreement*" which has not been produced in evidence.

195. In a matter such as a contention of fraud, the burden of proof lies squarely on the party asserting the existence of the fraud. The C1 document does not demonstrate the existence of a fraud. Even if the debenture, the existence of which does not appear to be disputed by the plaintiff, did include the loans granted by Ulster Bank to the defendants in respect of the secured properties in issue here, which were subsequently acquired by PFL, amongst the "*Loan Assets*" assigned to US Bank Trustees Limited (and defendants have not established that), the transaction would not necessarily imply that PFL's reliance of its registration of the ownership of the charges with PRAI involved anything fraudulent. Absent notice to the defendants of any assignment of PFL's interest in the properties, US Bank Trustees Limited would have had no possibility of having recourse to the defendants in respect of the debts they had acquired, and the defendants would have remained liable to PFL to repay those debts. Moreover, a great deal would inevitably depend on the precise nature of the legal relationship between PFL and US Bank Trustees Limited. Here, only partial information in that regard was put before the High Court. Neither the debenture itself nor the associated "*Facility Agreement*" were produced in evidence, and the exact terms of either are not known. In essence, the terms of, and parameters of, the legal relationship between PFL and US Bank Trustees Limited insofar as it may have concerned the charges at issue in the present proceedings, and whether that had involved some form of trust relationship, or a securitisation arrangement, or something else entirely, are not known with any certainty.

196. As the High Court judge pointed out, the plaintiff, as the receiver in these proceedings, has relied squarely on the fact that PFL is the registered owner of the charge on

the properties, and he has exhibited the folios to his affidavit of the 5th of July 2019 showing that to be the case. The plaintiff was entitled, in the absence of proof of actual fraud to rely on s. 31 of the Act of 1964, and to ask the High Court to treat the Register as being conclusive evidence of PFL's ownership of the charges at issue.

197. While the defendants have sought to argue that the case of *Tanager*, from which the High Court judge quoted at para. 72 of his judgment, was distinguishable on its facts, I am satisfied that the principle relied upon by the High Court judge, as stated at para. 67 of the judgment of Baker J. in *Tanager*, was nonetheless apposite and applicable to the present case, the principle in question being of equal applicability regardless of whether an asserted defect in the registration was said to be due to a mistake, as was the situation in *Tanager*, or a fraud, as the defendants contend was the situation in this case. Absent a request to rectify the Register in circumstances of actual (i.e., proven) fraud or mistake, a Court may not be asked to go behind the Register. The position in the present case is quite clear. There is no evidence of actual fraud, merely an unproven assertion of fraud; and there has been no request for rectification of the Register on the basis that actual fraud was demonstrated before a court of competent jurisdiction to have occurred, giving rise to a declaration to that effect on which the defendants could rely for the purposes of seeking rectification of the Register. In the circumstances, the High Court judge was entirely correct to treat the Register as conclusive of PFL's ownership of the charges at issue.

198. I am satisfied that insofar as the grounds of appeal based on any claim of fraud are concerned, they must all be rejected.

"Other Issues"

199. For the reasons already stated at paras. 138 to 143 above, I do not consider it necessary to further address the defendants' submissions to this court under the heading "*Other issues*". I am satisfied that the issues identified therein are either separately addressed

under other headings or are non-justiciable in the context of these proceedings and this appeal.

Conclusion

200. In circumstances where I have not been persuaded that it is appropriate to uphold any of the defendants' grounds of appeal, the appeal must be dismissed.

Costs

201. The defendants have not succeeded in their appeal in any respect. It follows that the plaintiff should be entitled to his costs. If, however, a party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty-one days of the receipt of the electronic delivery of this judgment, and a costs hearing / costs adjudication on the papers (as seems appropriate to the court) will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the Order of the Court, including the proposed costs order, will be drawn and perfected.

202. As this judgment is being delivered electronically, Faherty J. and Binchy J have indicated their agreement therewith and the orders I have proposed.

COMPANIES REGISTRATION OFFICE
AN OIFIG UM CHLÁRÚ CUIDEACHTAÍ

C1 Submission Number: 10197925

C1 - Registration Of A Charge

Company Identification

Registration of a charge

Date charge created	29 September 2015

Company Details

Company Number	565829
Company Name	PROMONTORIA (FINN) LIMITED

Description of the Charge

Description	Debenture

Persons Entitled - Particulars of Property

Persons entitled to the charge

1

Surname/Company Name	U.S. Bank Trustees Limited (the Security Agent)
Forename (if person)	
Address	Fifth Floor 125 Old Broad Street London EC2N 1AR United Kingdom

Short particulars of the property charged

The Chargor (A) charged its: (i) Mortgaged Property; (ii) Blocked Security Accounts and Blocked Security Account Balances; (iii) Security Accounts and Security Account Balances; (iv) rights under each agreement to which it is a party (v) rights and proceeds under each Loan Asset; (vi) all book debts; (vii) goodwill, uncalled and called but unpaid capital, including, the benefit of any Authorisation; (B) assigned and agreed to assign all present and future benefits, rights, title and interest in the: (i) Related Property Rights; (ii) any deeds of easements in connection with the Mortgaged Property; (iii) Licences; (iv) Leases; (v) Receivables; (vi) Blocked Security Accounts and Blocked Security Account Balances; (vii) Insurances and Insurance Proceeds; (viii) Plant and Machinery; (ix) Contracts; (x) Loan Assets; (C) charged by way of floating charge its undertaking and assets present and future. See Further Particulars for description of security and capitalised terms.

Contact Info: digital.certs@cro.ie

C1 Submission Number: 10197925

Further particulars of the property charged

Registration of debenture dated 29 September 2015 made between Promontoria (Finn) Limited (company registration number: 565829, the "Chargor") and U.S. Bank Trustees Limited (the "Security Agent") (the "Debenture").
Security:
Pursuant to Clause 3 (Security) of the Debenture:

3. SECURITY

3.1 Real Property, Related Property Rights, Leases and related assets

(a) As continuing security for the payment, performance and discharge of the Secured Obligations:
(i) the Chargor as legal and beneficial owner and registered owner or, as the case may be, as the person entitled to be registered as owner, charged by way of first fixed charge unto and in favour of the Security Agent, with the payment, performance and the discharge of the Secured Obligations:
(A) the Mortgaged Property;
(B) any estate or interest which the Chargor may from time to time after the date of the Debenture acquire in the Mortgaged Property; and
(C) the Chargor's entitlement to, and interest in, any share or shares in any service, residents' or management company relating to the Mortgaged Property and all rights relating to, or accruing in connection with, such shares;
(ii) the Chargor as beneficial owner, assigned and agreed to assign absolutely in favour of the Security Agent the full benefit of:
(A) all of its present and future benefits, rights, title and interest in the Related Property Rights;
(B) all of its present and future benefits, rights, title and interest in and to any deeds of easements or rights of way used in connection with the Mortgaged Property;
(C) all of its present and future benefits, rights, title and interest in and to the Licences and all rights of recovery and compensation which may be receivable by it on account of the non-renewal of any Licence;
(D) all of its present and future benefits, rights, title and interest in (but not obligations under) the Leases entered into in connection with the Mortgaged Property and the full benefit of all rights and remedies relating thereto, including all negotiable and non-negotiable instruments, guarantees, indemnities and rights of tracing and all of its powers of recovery in respect thereof;
(E) all of its present and future benefits, rights, title and interest in the Receivables and all debts, revenues and claims (including choses in action which may give rise to any debt, revenue or claim) arising from or in connection with the Mortgaged Property including, without limitation, all sums receivable by it by virtue of all Leases,

subject to the proviso for reassignment contained in the Debenture.

(b) [Not used in this Form C1]

(c) Security Accounts
As continuing security for the payment, performance and discharge of the Secured Obligations:
(i) the Chargor as beneficial owner charged by way of first fixed charge to the Security Agent all of the Chargor's present and future rights, title, benefit and interest in and to those Blocked Security Accounts and Blocked Security Account Balances that are from time to time held by it with the Security Agent and any Blocked Security Accounts and Blocked Security Account Balances from time to time held by it with a Third Party Bank;
(ii) the Chargor as legal and beneficial owner hereby assigned and agreed to assign absolutely to the Security Agent all of the Chargor's present and future rights, title, benefit and interest in and to those Blocked Security Accounts and Blocked Security Account Balances that are from time to time held by it with any Third Party Bank subject to the proviso for reassignment contained in the Debenture; and
(iii) the Chargor as beneficial owner charged by way of first fixed charge to the Security Agent all of the Chargor's present and future rights, title, benefit and interest in and to all Security Accounts and Security Account Balances.

(d) Insurances and Insurance Proceeds
As continuing security for the payment, performance and discharge of the Secured Obligations the Chargor as beneficial owner, assigned and agreed to assign absolutely in favour of the Security Agent the full benefit of all of its present and future benefits, rights, title and interest in the Insurances maintained or effected now or hereafter by it and all Insurance Proceeds subject to the proviso for reassignment contained in the Debenture PROVIDED THAT if the Insurances are not capable of assignment, this assignment shall operate only as an assignment of all

of its present and future benefits, rights, title and interest in the Insurance Proceeds.

(e) Plant and Machinery; other equipment
As continuing security for the payment, performance and discharge of the Secured Obligations the Chargor as beneficial owner, assigned and agreed to assign absolutely in favour of the Security Agent the full benefit of all of its present and future benefits, rights, title and interest in all of its plant and machinery, fixtures, vehicles, implements, utensils, computers, office equipment and other equipment from time to time used in connection with or forming part of the Mortgaged Property including without limitation, the Plant and Machinery, together with all replacements thereof, additions, improvements and accessories thereto subject to the proviso for reassignment contained in the Debenture.

(f) Contracts
(i) As continuing security for the payment, performance and discharge of the Secured Obligations, the Chargor as legal and beneficial owner assigned and agreed to assign absolutely to the Security Agent all of the Chargor's present and future rights, title, benefit and interest in and to the Contracts and the proceeds thereof subject to Clause 18.11 (Disposals) of the Facility Agreement and the proviso for reassignment contained in the Debenture; and
(ii) to the extent that they are not secured pursuant to the foregoing sub-paragraph, the Chargor as beneficial owner charged in favour of the Security Agent by way of first fixed charge all of its rights under each agreement and document to which it is a party including, for the avoidance of doubt, any letter of credit issued in its favour and any bill of exchange or other negotiable instrument held by it.

(g) Loan Assets
(i) As continuing security for the payment, performance and discharge of the Secured Obligations, the Chargor as legal and beneficial owner assigned and agreed to assign absolutely to the Security Agent all of the Chargor's present and future rights, title, benefit and interest in and to the Loan Assets and the proceeds thereof subject to Clause 18.11 (Disposals) of the Facility Agreement and the proviso for reassignment contained in the Debenture; and
(ii) to the extent that they are not secured pursuant to the foregoing sub-paragraph, the Chargor as beneficial owner charged in favour of the Security Agent by way of first fixed charge all of its rights under each Loan Asset and the proceeds thereof.

(h) Book Debts
As continuing security for the payment, performance and discharge of the Secured Obligations, the Chargor as beneficial owner charged in favour of the Security Agent by way of first fixed charge all of its book and other debts and all other monies due and owing to it, which are governed by the laws of Ireland.

(i) Other Assets
As continuing security for the payment, performance and discharge of the Secured Obligations, the Chargor as beneficial owner charged by way of first fixed charge to the Security Agent:
(i) all of its goodwill;
(ii) the benefit of any Authorisation governed by the laws of Ireland or required by the laws of Ireland (statutory or otherwise) held in connection with its use of any of the Charged Property;
(iii) any beneficial interest, claim or entitlement that the Chargor has in any pension fund or any asset of any pension fund, located in Ireland or governed by the laws of Ireland; and
(iv) its uncalled capital and its called but unpaid capital.

The charges and assignments referred to above shall be first ranking fixed charges and/or security assignments. To the extent that all or any part of the Charged Property purported to be the subject of an assignment hereunder is not effectively assigned, the Chargor instead charged by way of first fixed charge such Charged Property to the Security Agent as continuing security for the payment, performance and discharge of the Secured Obligations.

(j) Floating Charge
As continuing security for the payment, performance and discharge of the Secured Obligations, the Chargor, as beneficial owner, charged by way of a first floating charge to the Security Agent its undertaking and all of its assets both present and future whatsoever and wherever which are at any time and from time to time not otherwise effectively assigned, charged or otherwise secured by way of fixed charge or assignment under the Debenture.

Defined Terms:
Any reference herein in this Form C1 (including these Further Particulars) to "present" shall mean as at the date of the Debenture.

C1 Submission Number: 10197925

In this Form C1 (including these Further Particulars), the following terms shall have the following meanings:

"Authorisation" has the meaning given to it in the Facility Agreement.

"Blocked Security Accounts" means the accounts of the Chargor listed in Schedule 1 Part 2 of the Debenture together with any account opened or maintained by the Chargor in Ireland and from time to time designated as a "Blocked Security Account".

"Blocked Security Account Balances" means the amount from time to time standing to the credit of the Blocked Security Accounts.

"Charged Property" means the property of the Chargor both present and future charged to the Security Agent by or pursuant to the Debenture and references to the Charged Property include references to any part of the Charged Property.

"Contract" means any agreement, contract, instrument or other arrangement governed by the laws of Ireland to which the Chargor is a party.

"Facility Agreement" means the facility agreement dated 29 September 2015 and made between, among others, the Borrower as borrower, Morgan Stanley Principal Funding, Inc. and BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft as arrangers, Morgan Stanley Principal Funding, Inc. and BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft as original lenders, Elavon Financial Services Limited as facility agent and U.S. Bank Trustees Limited as security agent.

"Fixtures" means all fixtures and fittings (including trade fixtures and fittings) and fixed plant and machinery of the Chargor located in Ireland.

"Floating Charge" means the charge created under Clause 3.1(j) of the Debenture.

"Floating Charge Property" means any of the Chargor's property charged by way of the Floating Charge.

"Insurances" means all contracts and policies of insurance and re-insurance of any kind taken out or, as the context requires, to be taken out and maintained by or on behalf of the Chargor or in which the Chargor has an interest, governed by the laws of Ireland.

"Insurance Proceeds" means all proceeds of the Insurances payable to or received by the Chargor (whether by way of claims, return premiums, ex gratia payments or otherwise) and the benefit of all rights devolving under or pursuant to Insurances, but excluding, for the avoidance of doubt, any liability of the Chargor for third party claims to the extent that those proceeds are applied, or required to be applied, directly to discharge a liability of the Chargor to a third party.

"Leases" means any lease, licence or contract or agreement to lease, licence or let or any contract of occupation entered into in relation to the Mortgaged Property or any part(s) thereof, governed by the laws of Ireland and/or in respect of property located in Ireland which term shall include all guarantees provided in connection with such leases and any sub-letting or sub-leasing of the Mortgaged Property or parts thereof, and any one a "Lease".

"Lessees" means any tenants, lessees, sub-lessees, licensees or other parties from time to time having a right of occupation under a Lease of all or any part of the Mortgaged Property, and any one a "Lessee".

"Licence" means any licence, permit or authority now or hereafter held and/or required in relation to the Mortgaged Property or any part thereof, governed by the laws of Ireland and/or in respect of property located in Ireland.

"Loan Assets" means
(i) the Portfolio Loans, the Portfolio Loan Agreements and the Portfolio Rights;
(ii) any agreement creating any security interest in favour of the Chargor in connection with the Properties or the Portfolio Loans;
(iii) each Portfolio Hedging Agreement to which the Chargor is a party;
(iv) any letter of credit issued in the Chargor's favour in connection with the Property or the Portfolio Loans;

(v) any bill of exchange or other negotiable instrument held by the Chargor in connection with the Property or Portfolio Loans; and
(vi) any other agreement, contract, instrument or other arrangement governed by the laws of Ireland and from time to time designated by the Chargor and the Security Agent as a "Loan Asset" for the purposes of the Debenture.

"Mortgaged Property" means all freehold, leasehold and other immoveable property in which the Chargor holds or acquires a legal or beneficial interest, located in Ireland, including any freehold property, leasehold property or other immoveable property specified in any Form 52 entered into in connection with the Debenture, all rights and appurtenances belonging or appertaining thereto, all buildings, erections and Fixtures from time to time thereon and the benefit of any covenant for title given or entered into by any predecessor in title to the Chargor in respect of the Mortgaged Property and any monies paid or payable in respect thereof.

"Plant and Machinery" means all plant, machinery, computers, office equipment and vehicles of the Chargor located in Ireland.

"Portfolio Hedging Agreement" has the meaning given to that term in the Facility Agreement.
"Portfolio Loan Agreements" has the meaning given to that term in the Facility Agreement.
"Portfolio Loans" has the meaning given to that term in the Facility Agreement.
"Portfolio Rights" has the meaning given to that term in the Facility Agreement.
"Properties" has the meaning given to that term in the Facility Agreement.
"Receivables" means the aggregate of all amounts payable to or for the benefit or account of the Chargor as lessor or licensor arising from or in connection with the letting, use or occupation of the Mortgaged Property (or any part thereof), including (without limitation and without double counting):
(i) rents (including turnover rent), licence fees and equivalent sums reserved or made payable;
(ii) sums received on any deposit held as security for the performance of any Lessee's or licensee's obligations save to the extent that the Chargor is obliged to hold any such deposit on trust for a Lessee or licensee;
(iii) any premium paid for any Lease;
(iv) any other monies paid in respect of use and/or occupation;
(v) proceeds of insurance in respect of loss of rent;
(vi) receipts from or the value of consideration given for the surrender or variation of any letting;
(vii) proceeds paid by way of reimbursement of expenses incurred in the management, maintenance and repair of, and the payment of insurance premiums for, the Mortgaged Property, save to the extent that the Chargor is obliged to hold such proceeds on trust for a Lessee or Lessees;
(viii) proceeds paid for a breach of covenant under any Lease and for expenses incurred in relation to any such breach;
(ix) any contribution to a sinking fund paid by any Lessee save to the extent that the Chargor is obliged to hold such contributions on trust for any Lessee or Lessees;
(x) payments from a guarantor in respect of any of the items listed in this definition; and
(xi) interest, damages or compensation in respect of any of the items listed in this definition,

but in each case excluding any VAT and Service Charge Income on any sum mentioned in this definition.

"Related Property Rights" means:
(i) any covenant, agreement or undertaking in relation to the construction and maintenance of roads, pavements and utilities for services abutting and serving the Mortgaged Property or charges, levies or such like in respect of the same or the taking in charge thereof by the local authority and any indemnity in respect of the matters aforesaid;
(ii) any right, benefit or agreement made between the Chargor and the local authority pursuant to which it has been or may be granted rights of access or rights of way in relation to the Mortgaged Property or otherwise;
(iii) any covenant, agreement, guarantee or indemnity in respect of the construction and maintenance of the buildings now erected or in the course of erection or hereafter to be erected on the Mortgaged Property the benefit of which is vested in the Chargor; and
(iv) all of the Chargor's rights to be paid or receive compensation under any statute by reason of any compulsory acquisition or other exercise of compulsory powers in relation to the Mortgaged Property or any refusal, grant subject to conditions, withdrawal or modification of planning permission or approval relating thereto or any control or limitation imposed upon or affecting the use of the Mortgaged Property and so that the production of the Debenture to the person liable to pay such compensation shall be sufficient authority to it, him or her to pay such monies to the Security Agent.

"Secured Obligations" has the meaning given to it in the Facility Agreement.

"Security Accounts" means the accounts of the Chargor listed in Schedule 1, Part 1 of the Debenture together with any account opened or maintained by the Chargor in Ireland and from time to time designated as a "Security Account" by the Chargor and the Security Agent and any replacement account(s) from time to time.

"Security Account Balances" means the amount from time to time standing to the credit of the Security Accounts.

"Service Charge Income" means all monies receivable by the Chargor pursuant to the Leases to fund the cost of the maintenance and insurance obligations assumed by the Chargor pursuant to the Leases.

"Third Party Bank" means a bank or other financial institution other than the Security Agent with whom the Chargor from time to time holds a Security Account.

"VAT" means value added tax within the meaning of the Value Added Tax Consolidation Act 2010, any tax which replaces it and any other tax of a similar nature, together with all interest thereon and penalties that may accrue in respect thereof.

Any capitalised terms not expressly defined in this Form C1 shall have the meaning given to them in the Debenture, and if not defined therein then as defined in the Facility Agreement.

Particulars of persons verifying the contents of the form

Details of Person(s) who are certifying that the information provided is correct

Nature of interest in charge	Verification of charge by lender
Type Of Signature	Signature as a Solicitor on behalf of an Entity

Individual details

Surname	Tervoert
Forename	Glen
Is a counter signature required?	Yes
Nature of interest in charge	Verification of charge by Company
Type Of Signature	Signature as a Solicitor on behalf of an Entity

Individual details

Surname	Fox
Forename	Karol

C1 Submission Number: 10197925

Particulars of the presenter

Reference

Presenter Details

Type of entity	BEARes Individual
Name	Glen Tervoert
Address	Arthur Cox Solicitors Earlsfort Centre Earlsfort Terrace Dublin 2
Email Address	Glen.Tervoert@arthurcox.com

CI Submission Number: 10197925

Legal References

Collective Citations

Companies Act 2014

Legal Function Performed:

Particulars of a Charge created by a company incorporated in the State

Companies Act 2014

Section: 409(3)

Legal Function Performed:

Cert. that the charge was presented for registration in the country where the property is situate

Companies Act 2014

Section: 3

COMPANIES REGISTRATION OFFICE
AN OIFIG UM CHLÁRÚ CUIDEACHTAÍ

Submission Number: 10197925
Submission Type : C1

Company Number: 565829
Company Name: PROMONTORIA (FINN) LIMITED

Signature Information

This submission was digitally signed using a Revenue Online Service (ROS) certificate on the 14 October 2015 by KAROL FOX

This submission was digitally signed using a Revenue Online Service (ROS) certificate on the 12 October 2015 by GLEN TERVOER

Legal References:

Collective Citation:
Companies Act 2014