Neutral Citation [2015] IEHC 652

THE HIGH COURT

RECORD NO: 2015/1293S

BETWEEN:

LSREF III ACHILL INVESTMENTS LIMITED

Plaintiff

-and-

MICHAEL CORBETT AND KEVIN CORBETT

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 22ndOctober, 2015.

PART I

SUMMARY JUDGMENT FOR DEBT UNLIKELY GENERALLY TO BE SUCCESSFUL?

1. This is an application for summary judgment in respect of certain debts. Many such applications are brought. Yet the circumstances in which they will be successful seem unlikely to be especially numerous. Given the potential for unfairness which summary judgment inherently entails, it is clearly right as a matter of policy that such a judgment should not, to use a colloquial phrase, be obtained 'for the asking'. The decisions of the superior courts in this regard, especially the Supreme Court judgments referred to hereafter, consequently do not pitch high the hurdle for those seeking remittal to full hearing.

2. In *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, Hardiman J. indicated, at 623, that:

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

3. Further embellishments on such matters as the applicable judicial mind-frame to bring to summary applications for debt are to be found in the decisions of the High Court in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, *National Asset Loan Management Ltd. v. Barden* [2013] IEHC 32, in which Charleton J. states that *"A defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation"*, and *Cave Projects Limited v. Peter Gilhooley and Others* [2015] IEHC 14.

4. The notion that a defence must have a 'reasonable foundation' or enjoy 'credibility' was amplified upon by the Supreme Court in its decision last year in *Irish Bank Resolution Corporation (in special liquidation) v. McCaughey* [2014] IESC 44. There, Clarke J., speaking for the Court, stated as follows:

> *"5.4 It is important…to re-emphasise what is meant by the credibility of a defence.* **[1]** *A defence is not incredible simply because the judge is not inclined to believe the defendant.* **[2]** *It must, as Hardiman J. pointed out in Aer Rianta, be clear that the defendant has no defence.* **[3]** *If issues of law and construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath, the Court may come to a final resolution of such issues.* **[4]** *That the Court is not obliged to resolve such issues is also clear from* Danske Bank v. Durkan New Homes.
>
> *5.5 In so far as facts are put forward, then*, **[5]** *subject to a very narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept the facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be.* **[6]** *The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in* Aer Rianta. **[7]** *It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."* [Emphasis added].

5. The plaintiff in the within proceedings has sought to place some reliance on the above-quoted text. However, the court is unconvinced that the text represents a significant change to the position applying under *Aer Rianta*. If one closely parses the numbered text, the following observations might be made:

> (a) **[2]** appears to 'trump' **[1]** in that **[2]** tells us what "*must*" pertain, namely what Hardiman J. identified in *Aer Rianta, viz.* it must be clear that the defendant has no arguable defence;
>
> (b) as regards **[3]** and **[4]**, there is almost nothing that cannot be stated as a legal proposition and, as Charleton J. noted in his judgment in *Oltech Systems (Ltd.)v. Olivetti UK Limited* [2012] IEHC 512,para.8,"[E]*xperience demonstrates that there is little that cannot be argued"* – though not quite nothing. Thus there seem likely, in practice, to be few instances in which the court will be required to resolve such issues as are put forward by a defendant. Moreover, where, as here, Senior Counsel presents before the court to argue for a defendant, that is surely indicative that counsel learned in the law and acting consistent with his (or her) responsibilities to the court has formed the professional opinion that whatever case is being presented is both stateable and arguable; this seems a factor to which the court may rightly have regard.
>
> (c) as regards **[5]** and **[7]**, these appear to place a defendant in quite a strong position: the court (I) is required, for the purposes of a summary judgment application, (i) to accept the facts of which the defendant gives evidence, (ii) to accept facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, and (II) has no function in forming a general view as to the credibility of the defendant's evidence.
>
> (d) as regards **[6]**, Clarke J. indicates that facts which "*may not*" provide an arguable defence include (i) unsupported assertions, (ii) assertions unlikely realistically to be supported, (iii) facts which are in themselves contradictory and inconsistent with uncontested documentation or similar circumstances.

6. In short, on careful analysis: **[1]** and **[2]** appear to leave the *Aer Rianta* test unchanged; **[3]** and **[4]** seem unlikely generally to be significant, especially when (as here) a case is stated and argued by counsel; **[5]** and **[7]** appear either consistent with, or to strengthen, a defendant's position under *Aer Rianta*; and **[6]** helpfully amplifies on *Aer Rianta* by pointing out that the kinds of things

that the court might keep watchful for are such items as are referred to at (d)(i) – (iii).

7. So, is this a case for summary judgment?

PART II

BACKGROUND FACTS
8. These proceedings arise from the defendants' default in relation to certain loan facilities originally advanced to them by Ulster Bank Ireland Limited. The facilities are governed by facility letters of 12th October, 2010, and 7th June, 2011. Ulster Bank's rights to the facilities were transferred to the plaintiff by Ulster Bank by way of deed of transfer dated 17th November, 2014. The facilities are repayable on demand; demand has been made; there has been a failure to repay; and the plaintiff now seeks summary judgment of €10,554,672.28 against the first-named defendant, and €47,257,679.21 against the first and second-named defendants.

9. By facility letter of 12th October, 2010 (accepted and signed by the first-named defendant on 27th October 2010) (the 'October 2010 Facility Letter') Ulster Bank agreed to renew two existing demand loan facilities to the first-named defendant for €8.955m and €402k. This facility letter incorporated Ulster Bank's applicable general terms and conditions subject to certain amendments. In truth, the said facilities had already been drawn in full and the facility letters documented the basis on which Ulster Bank was satisfied to continue the relevant credit.

10. By facility letter of 7th June 2011 (accepted and signed by the defendants on 8th July, 2011) (the 'June 2011 Facility Letter'), Ulster Bank agreed to renew, *inter alia*, five existing demand loan facilities provided to the defendants on a joint and several basis, being Facility B (€5.332m), Facility C (€8.609m), Facility D (€11.448m), Facility E (€8.855m) and Facility F (€12.680m). This facility letter also incorporated Ulster Bank's applicable general terms and conditions subject to certain amendments. Again, the said facilities had largely been drawn down in full and the facility letters documented the basis on which Ulster Bank was satisfied to continue the relevant credit. A small portion of Facility F represented fresh credit.

11. The plaintiff first issued letters of demand in relation to the above-mentioned facilities on 2nd March last and comes to court in reliance on same. Various statements as to the principal and interest owing at this time have been provided to the court and the court accepts the correctness of same.

12. The plaintiff claims that its proofs on this application being in order (and they are), summary judgment should now be entered in the full amounts claimed, subject to a consideration by the court of the issues put forward by the defendants and its determinations as to whether these amount to a *bona fide* defence to any part of the plaintiff's claim.

PART III

ABSENCE OF DEMAND/DEFAULT?
13. There was suggestion in the affidavit evidence that Ulster Bank never communicated to the defendants, before transfer of the loans to the plaintiff, that the loans were in default. Whatever line of argument it was intended to make on foot of this assertion was not raised at the hearings. However, it is not clear to the court what argument could arise in this regard. The plaintiff is the transferee of the above-described facilities. Consistent with the facility agreements, it issued proper letters of demand in relation to those facilities on 2nd March last and comes to court in reliance on same. In this regard, it matters not a whit what Ulster Bank did. And even if it did matter (and it does not), the plaintiffs proved at the hearings that Ulster Bank in a letter of 29th August, 2014 – long before the transfer agreement of 17th November, 2014 – did in fact communicate to the solicitors for the defendants that the relevant loans were in default.

PART IV

THE FACILITY LETTER OF 11TH JANUARY 2011
14. When it comes to the joint facilities, the defendants seek to rely on a facility letter of 11th January 2011. But this cannot be. The June 2011 Facility Letter expressly provides that it supersedes all previous facility letters, which facility letters are deemed cancelled. So even if the defendants could prove, as they contend, that the June 2011 Facility Letter lapsed or was terminated for breach (and for the reasons stated hereafter, it is the court's view that they cannot) this would not have the effect of resurrecting pre-June 2011 Facility Letter loan agreements from the graveyard for dead loan agreements to which they have been consigned. The facility letter of 11th January 2011 is not and cannot be of any avail to the defendants. Before addressing the issues raised by the defendants as to the efficacy or otherwise of the June 2011 Facility Letter and the October 2010 Facility Letter, the court turns first to consider certain terminological issues that seemed to it to present at the hearings.

PART V

SOME TERMS DEFINED

i. Overview.
15. What is a 'facility agreement'? What is a 'condition precedent'? These were issues that arose in the within proceedings, and about which there seemed, surprisingly, to be some level of dispute. Obviously when it comes to matters of contract law, the general freedom of contract has the result that there is an uncountable variety of 'facility agreements' and 'conditions precedent'. Even so, it is possible to arrive at some generic definitions of these terms.

ii. What is a facility agreement?
16. *Facility agreement*. A facility agreement is an agreement in which a lender, *e.g.* a bank, identifies the terms on which it is prepared to make one or more loan facilities available to a borrower. The three main types of facility that lenders extend are 'term loans', 'overdrafts' and 'revolving credit facilities'.

17. *Term loan*. A term loan is a committed facility that allows a borrower to draw a lump sum (in whole or in tranches) over a defined period and in accordance with a defined repayment schedule. Once drawn and repaid, an amount borrowed under a term loan cannot be re-borrowed.

18. *Overdraft facility*. An overdraft facility is an uncommitted loan facility, generally repayable on demand. It allows draw downs to a particular maximum and is a useful means of ensuring a borrower has access to necessary cash-flow. Though it is technically possible to have an 'evergreen' overdraft facility, such a facility will generally be subject to periodic review at agreed intervals; implicit in the concept of such a review, unless otherwise agreed, is that the facility may continue to be extended or may, alternatively, be

withdrawn.

19. *Revolving credit facility*. A revolving credit facility is a committed facility, allowing a borrower to 'draw down' amounts to a defined maximum for defined periods during the currency of the facility. Significantly, under a revolving credit facility amounts repaid can be re-borrowed, making such facilities a commercially attractive 'mish-mash' of lending that offers borrowers the certainty of a term loan and the flexibility of an overdraft.

20. *Survival of a facility*. An important point to note about a facility agreement, and which seemed not properly to be appreciated by the defendants in the within proceedings, is that it is possible to execute a facility agreement and yet for no credit to issue or become issuable under same, but for the facility agreement nonetheless to survive. This may be because one or more of the conditions precedent to the extension of credit has not been satisfied (the concept of a 'condition precedent' is considered below) or it may be that the borrower having put the facility agreement(s) in place finds that it has no use the credit available. (In such instance the lender should still turn a profit thanks to the 'arrangement fee' that it will have charged for entering into the relevant facility agreement). But this does not mean that the facility agreement withers away, unless (unusually) the parties were to agree that this consequence should follow. Rather, a facility agreement will continue, albeit that credit may go un-extended (or cease to be extended) thereunder.

iii. What is a condition precedent?
21. A condition precedentat its simplest is an 'If you do that, I'll do this' provision. In a facility agreement, the critical but not sole conditions precedent, so far as the lender is concerned, are usually the requirements as to security. In this context, the 'that' will be that the borrower comply with the security requirements; the 'this' will be that, subject to compliance with the security requirements and any such other requirements as the lender identifies as critical, credit will be advanced. The court has been referred by the defendants to the decision of the court (Cregan J.) in *Maloney v. Danske Bank A/S* [2014] 10 JIC 0602, in particular the following observations at para.49:

> *"The term 'condition precedent' means, as a matter of logic, that the parties have agreed that the obligations in the contract must occur in a certain sequence over a certain period of time. Thus one condition precedes another and if the earlier condition is not fulfilled then the other conditions do not have to be fulfilled or are unenforceable."*

22. The court does not see that this clause entails the advantage for the defendants for which they contend, *viz*. that their non-compliance with the conditions precedent as to security in the June 2011 Facility Letter has the consequence that that facility letter falls away in its entirety. The principal consequence of non-compliance with those conditions precedent is that no credit need be extended, no more; the facility letter remains extant. In truth, what the defendants appear to contend is that when it comes to conditions precedent 'if the earlier condition is not fulfilled then the other conditions do not have to be fulfilled and are unenforceable'. This is a radically different proposition to that posited by Cregan J. in the above-quoted text. Moreover, while it is possible that parties could make provision to this effect in a contract, it is not what the parties have agreed in the June 2011 Facility Letter.

23. In this last regard, some emphasis has been placed by the defendants on the last line of the 'Conditions Precedent' clause in that facility letter. This provides that *"Unless the Bank shall otherwise agree, all Conditions Precedent must be satisfied on or before 30th June 2011, otherwise the Facilities shall lapse and the Bank shall have no further commitments of any kind to the Borrower"*. The term "*Facilities*" is defined in the applicable general terms and conditions to *"have the meaning assigned to them in the Facility Letter"*. So in the case of the June 2011 Facility Letter it means the facilities referred to therein and mentioned in the above outline of the background facts. Put simply, all the quoted clause means, and clearly means, on any reading, is that 'subject to contrary agreement by the Bank, if the conditions precedent are not satisfied, you, the borrower, can forget about the provision, or continuing provision, of credit under the agreed facilities'. The clause does not mean that the facility agreement collapses; it means that the obligations as to availability and provision of credit collapse, nothing more.

PART VI

EFFICACY OF JUNE 2011 FACILITY LETTER?
24. In addition to such contentions as were raised by the defendants concerning the conditions precedent, they claim that they are not bound by the June 2011 Facility Letter because (a) no new drawdown occurred, (b) the term provided for in the January 2011 Facility Letter had not yet expired, and (c) the June 2011 Facility Letter was repudiated by Ulster Bank by fundamental breach.

(a) No new drawdown
25. As mentioned above, the facilities made available under the June 2011 Facility Letter had largely been drawn down in full and the facility letters documented the basis on which Ulster Bank was satisfied to continue the relevant credit. A small portion of Facility F represented fresh credit. The consideration offered by Ulster Bank for the June 2011 Facility Letter took the form, *inter alia*, of the release of its entitlement to enforce a prior facility letter of 11th January 2011 against the borrowers, an offer to make previously drawn facility letters available going forward, and an offer of materially altered terms in relation to certain of the facilities. So there was a binding fresh agreement between the parties, the validity of which was unaffected by any want of fresh drawdown. In some ways, it is surprising to see this argument being proffered, given that a like argument was clearly and completely rejected by the High Court and the Court of Appeal in *Bank of Ireland v. Flanagan and Another* [2015] IECA 56. There, the appellant argued that a loan contract was unenforceable because money was never actually drawn down and accordingly there was no consideration. Ryan J., in the High Court, had stated as follows:

> *"[T]he facility letter put in place a new arrangement between the parties which replaced the earlier provisions and this was done by agreement between them. In return for the agreement by the defendants to make the payments as now scheduled in the facility letter, the Bank agreed to give up its entitlement to enforce the agreements that were previously in place. The submission that there was no actual transfer of cash, either from the Bank to the defendants or internally from one place to another in the Bank, is a misunderstanding of what happened as a matter of contract between the parties when this last facility was agreed."*

26. The Court of Appeal agreed with the High Court, stating, at para. 17:

> *"For the appellants to try and argue that because the facility refers to drawdown and no actual drawdown in fact took place the Bank are in some way disentitled to the repayment of the monies the subject of this facility is a contrived and empty argument devoid of any merit whatsoever. It is quite obvious that being a loan in the nature of a restructuring of existing borrowings, no physical drawdown of any additional funds took place in the sense of funds being made available to the borrowers for use by them."*

(b) Execution of new loan agreement in place of existing term loan agreement
27. There is nothing in law to stop parties to a term loan agreement agreeing, for good consideration, to cancel an existing term loan agreement and replace it with some other arrangement or simply to part ways. That is all that happened here. The notion that, in such circumstances, the new loan agreement cannot properly cancel and replace one or more previous loans is mis-founded in logic and mistaken in law.

(c) Alleged fundamental breach by Ulster Bank
28. The defendants suggest that Ulster Bank's decision not to allow drawdown of part of Facility B (or of a Facility G that is not the subject of the within proceedings) constitutes a repudiatory breach of the loan agreement. But the applicable general terms and conditions, at clause 11.3, reserve to Ulster Bank a right to *"cancel a Facility before it is drawn down or availed of if there occurs a material change relevant to the Borrower…"*. Moreover, the facility letter provides that Ulster Bank is under no obligation to provide the facility unless the conditions precedent are met. Additionally, given that the loans in question are demand loans, it would be contrary to common-sense and commercial practice (of which commercial law must ever be mindful) that a lender would be required to issue monies under a demand facility and immediately demand repayment of same. As Clarke J. observes in *Moorview Developments Limited v. First Active plc* [2009] IEHC 231, at para.10.1: *"It is, in my view, a logical consequence of any facility being one which can be demanded by the lender, that the lender cannot be obliged to provide any further funding."* This Court respectfully agrees.

PART VII

EFFICACY OF OCTOBER 2010 FACILITY LETTER?
29. When it comes to the contractual efficacy of the October 2010 Facility Letter, the defendants raise, *mutatis mutandis*, the 'no new drawdown' and 'conditions precedent' points that were raised by them in the context of the June 2011 Facility Letter. For like reasons to those identified in respect of those contentions, as levelled at the June 2011 Facility Letter, the court considers that they must also fail insofar as they are levelled at the October 2010 Facility Letter.

PART VIII

ALLEGED REPRESENTATIIONS AND A POSSIBLE 'CULTURE CLASH'
30. The defendants contend that it was represented to them by Ulster Bank that repayment or refinancing of the defendants' facilities with the bank would occur by the extension on a rolling basis of funding, so that new funding would immediately replace the old on its expiration. There is evidence before the court of previous renewals of credit by Ulster Bank but that is no evidence of the alleged representations arising; it just shows that credit was on occasion renewed. To the extent that the defendants seek to rely on certain loan amortisation schedules attaching to the January 2011 facility agreement (and which show the figures as amortising to sometime in 2015), that argument flounders on the fact that the January 2011 agreement has been cancelled and the June 2011 Facility Letter and the October 2010 Facility Letters plainly state that the facilities that they govern are to be repaid or refinanced by 30th August 2011; of evidence, or the possibility of evidence forthcoming, that would establish some contrary over-arching agreement, there is none.

31. In truth, it seemed to the court, as it listened to the within application, that there was something of a 'culture clash' between borrowers and banker. The borrowers struck the court as so-called 'ordinary' people; they believe themselves to have had a particular oral agreement that they 'shook hands on' with Ulster Bank. The successor in title to the bank comes to the court, pointing to the written agreements that were executed by the parties and asks that those written agreements now be enforced. The court has had careful regard to the form and substance of those agreements and, in fairness to the bank that drafted them, they could not be any clearer in what they provide. The central provisions of each of the facility agreements are contained in a roughly five-page document that most borrowers, and any solicitor worth her salt, could read, understand and assess in half an hour. The 'boilerplate' provisions sit in accompanying general terms and conditions but there is nothing in the 'boilerplate' that jumps out as unusual. Moreover, while the terms of the facility agreements are drafted in the formal English that one would expect in a serious legal document, they are certainly not drafted in 'legalese' that only the initiated could understand.

32. It is incumbent on all of us to approach written agreements with great caution and to seek independent legal advice when and as appropriate before signing agreements that, as here, have the potential to be financially ruinous in the event of default. A critical provision in the two facility letters appears in the closing section, close to the signature blocks. It provides that *"This Facility Letter supersedes all prior agreements, arrangements or correspondence between the Bank and the Borrower in relation to the Facilities."* Yet the defendants come to court arguing that there were overarching representations on the part of Ulster Bank, when executing the facility letters, that survived the execution of same. If there were overarching representations, and there is no evidence of same, nor even, *e.g.*, a suggestion that if Mr 'X' or Ms 'Y' of Ulster Bank's lending team were to be called to give evidence, he or she would testify to the existence of same, they cannot have survived the clause just quoted.

33. Of course, there will be cases where, to borrow from the wording of Griffin J. in *Doran v. Thompson Limited* [1978] I.R. 223, 230 one party will *"by his words or conduct*, [have] *made to the other, a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment"*. In such situations, Griffin J. continues, "*it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance. The representation, promise or assurance must be clear and unambiguous to found such an estoppel*". Moreover, the court accepts the contention of counsel for the defendants that, consistent with s.28(6) of the Supreme Court of Judicature Act (Ireland), 1877, an absolute assignment of a debt or chose in action, such as the assignment effected between Ulster Bank and Lone Star in respect of the defendants' borrowings comes subject to all equities which would have been entitled to priority over the right of the assignee. However, the insurmountable difficulty which the defendants face in the within proceedings is that when it comes to that "*clear and unambiguous promise*" referred to by Griffin J. in *Doran*, or the equities referenced in s.28(6) of the Act of 1877, there is absolutely no evidence of same before the court, nor is there even, to borrow from the wording of Clarke J. in *McCaughey*, "*a credible basis for believing that [such] evidence may be forthcoming*". There is therefore no basis in this regard for refusing the summary judgment sought.

PART IX

CONTRA PROFERENTEMAND 'MATRIX OF FACT'
34. Counsel for the defendants urged the court to have regard to the principle of *'contra proferentem', i.e.* the general principle of contractual interpretation whereby if there is doubt about the meaning of particular provision in a contract, the relevant provision will be construed against the person who put the words forward. It was also suggested in the submissions for the defendants, by reference, *inter alia*, to the judgment of Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*

[1998] 1 W.L.R. 896, 912–913, as endorsed by Geoghegan J., for the Supreme Court, in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, that the court should have regard to the matrix of fact, *i.e.* the circumstances surrounding the execution of the facility agreements and a claimed discrepancy between what was agreed and what was reduced to writing. There appear to the court to be three difficulties with these contentions:

> (1) there is no doubt as to the meaning of any of the clauses in the facility agreements in issue. There is, in consequence, no alternative meaning to be preferred.
>
> (2) there is no evidence before the court of anything in the background of applicable facts of this case which suggests that something went wrong as regards the language deployed or provisions entered into between the parties in the relevant facility agreements. Nor, to borrow again from Clarke J. in *McCaughey*, has the court been offered *"a credible basis for believing that [such] evidence may be forthcoming"*.
>
> (3) the court is confronted in the agreement with a clause in each of those facility agreements which simply and starkly states that *"This Facility Letter supersedes all prior agreements, arrangements or correspondence between the Bank and the Borrower in relation to the Facilities."* That is a clause which effectively precludes the court from having regard to the matrix of fact (unless it is suggested that this clause is itself contrary to the matrix of fact, in which case this suggestion fails for the lack of evidence, or even the prospect of evidence, as to such contrariness to which the court refers to in (2)).

PART X

APPOINTMENT OF RECEIVERS

35. The court understands separate proceedings to have been commenced by the defendants on 24th September last concerning loss or damage suffered by the defendants consequent upon the appointment of receivers by the plaintiff. Those proceedings have been commenced against the plaintiff to the within proceedings, and also such receivers as have been appointed by the plaintiff, seeking a declaration that the purported appointment of the receivers is void, an injunction to prevent the sale of secured properties, and damages for deceit. Insofar as articulated in the within proceedings, any claims by the defendants as to the above-mentioned appointment of the receivers comprise little (if anything) more than mere assertion. Moreover, when it comes to the fact of those proceedings, this Court respectfully adopts the approach recently taken in not dissimilar circumstances by Moriarty J. in *Allied Irish Banks plc and AIB Finance Limited v. Killoran and Anor* (Unreported, High Court, Moriarty J., 24th July, 2015), namely that (a) those other proceedings (not the proceedings for summary recovery of debt) are the most appropriate route by which to articulate any complaint arising in relation to the appointment of the receivers, and (b) the assertions made in these proceedings for summary recovery of debt and concerning the appointment of the receivers or related matters are not sufficient to preclude the granting of the summary judgment now sought.

PART XI

'DEMI-CONSUMERS' AND UNCONSCIONABLE BARGAINS

36. Though it is slim comfort to the defendants in the within proceedings, it is clear to the court from this and other cases of like nature presenting before the courts at this time that there is a class of vulnerable people who currently fall outside the definition of 'consumer' in the Consumer Credit Act and associated legislation, yet who are in need of substantive legal protection. At the present time, these are often, though not always, people who – if the court might be pardoned a colloquialism – 'got lucky' during the Celtic Tiger era and then lost all in the economic crash that followed. These people often borrowed significant sums of money, even though in truth they were often what, for want of a better term, might be called 'demi-consumers', *i.e.* people who sat and sit beyond, but not far beyond, the penumbra of protection presently afforded by our consumer credit legislation. Such people continue to present before the courts in significant numbers, often as so-called 'lay-litigants', given the present usually very high cost of legal representation. Typically, they are people who:

> (i) have defaulted on loans and against whom (often summary) judgment is sought,
>
> (ii) are not consumers within the meaning of the Consumer Credit Act and like legislation,
>
> (iii) are not commercial actors of such a scale that they enjoy or ever enjoyed anything other than a very weak position when treating with a lender, and
>
> (iv) at this time do not enjoy any especial protection under statute, albeit that they may enjoy some level of protection under the Central Bank's *Consumer Protection Code*.

37. Whether such people ought to be afforded additional statutory protection is for our elected lawmakers to decide, and the court expresses no opinion in this regard; it is not its place to do so. However, it does seem to the court that when it comes to such individuals, judges have a, perhaps heightened, duty to be watchful that the courts are not hijacked as vehicles whereby unconscionable bargains are enforced. Examples of behaviour that might *perhaps* in some particular instances be deemed unconscionable would be (i) the hopeless 'over-securing' of a loan, *i.e.* the initial taking of security the value of which was then greatly in excess of the amount(s) being loaned, (ii) invoking a personal guarantee sought and granted in circumstances where other initial security otherwise granted was, when granted, perfectly adequate, and (iii) the inclusion of a clause which offends against common fairness and whereby a strong party could 'push the weak to the wall', *e.g.*, by unreasonably demanding ever further security without meaningful concession in return. A well-founded belief by the court as to any unconscionability presenting would at the least, it seems to this Court, justify a refusal of summary judgment for a debt and remittal of a matter for plenary hearing. All that said, it is, of course, important for borrowers to note that under our law as it presently stands, unconscionable bargains have hitherto tended generally to be the exception: persons who borrow money ought therefore generally to expect that it will fall to be repaid on the agreed terms and that any associated security arrangements will be enforced.

38. When it comes to the defendants in the within proceedings, there has been no suggestion that the agreements in issue were in any way unconscionable and, this being so, for the court to find that there was some element of unconscionability arising would involve its acting without any proper basis, something it of course cannot do.

PART XII

CONCLUSION

39. On a human level, one cannot but feel for the defendants and the unhappy position in which they now find themselves, unable to repay the vast sums that they have borrowed and losing much or all to their creditors. However, as a matter of law, there is no basis in the facts or argument presenting on which the court can justify remitting this matter for plenary hearing, notwithstanding the low threshold for such remittals that is set by the *Aer Rianta* decision and such associated case-law as has been considered above. This is one of those cases in which the court is coerced by our present law into granting the summary judgment sought.