THE HIGH COURT

[2015 No. 1575 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

EUGENE NORTON

FIRST NAMED DEFENDANT

AND

GRACE NORTON

SECOND NAMED DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 23rd day of October, 2018

1. This matter comes on for hearing by way of application by the plaintiff for final judgment against the first defendant in the amount of €3,500,441.41, and €3,324,933.34 against the second defendant, on foot of a summary summons which was issued on 12th August, 2015. The defendants entered an appearance thereto on 15th September, 2015.

2. The plaintiff contends that the debt arises on foot of three facility letters whereby monies were advanced by the plaintiff to the defendants. Both defendants were parties to Facilities 2 and 3; the first Facility concerns the first named defendant only.

Facility 1
3. By letter of sanction dated 1st November, 2006, the plaintiff advanced to the first defendant the sum of €151,297.00 for the purpose of providing bridging finance for an equity input into a development site at Waterford Road, Kilkenny. The said sum was to be repayable by a single payment on 1st May, 2007. The monies were in fact drawn down on 13th January, 2006 to account no. 12720894. In his grounding affidavit, Mr. David Coleman, bank official with the plaintiff in the Cork area, avers that the total amount due and owing by the first defendant as of 13th July, 2015 was €175,508.07, comprising €155,392.72 in principal debt and a further €20,115.35 in respect of interest accrued. He avers that by letter of demand dated 8th November, 2010, the plaintiff demanded repayment of Facility 1 which the first defendant has failed to repay. He further avers that the plaintiff is agreeable to waiving all further interest accruing on the loan from the date of issue of the summary summons. The plaintiff maintains this position also in respect of Facilities 2 and 3.

Facility 2
4. By letter of sanction dated 27th June, 2007, the plaintiff offered the first and second defendants on a joint and several basis a sum of €2,200,000.00. This loan was for the purpose of assisting in the purchase of a property, "Mulhalls", situated at Pudding Lane in the City of Kilkenny. It was to be repayable on demand, subject to a moratorium on interest repayments for the first twelve months. The said monies were drawn down by the defendants on or about 15th October, 2007. Mr. Coleman avers that a loan account - COM35L2A054639 - was opened in respect of Facility 2. He avers that for internal administrative reasons the loan account number was changed on a number of occasions. I am satisfied that nothing turns on the fact that the account number was changed. Mr. Coleman avers that the total amount due and owing on Facility 2 as of 13th July, 2015 was €2,731,593.03, comprising €2,539,266.23 in principal debt and €192,326.80 in respect of interest. The plaintiff demanded repayment of the debt by way of letter of demand dated 8th November, 2010, which the defendants have failed to meet.

Facility 3
5. By letter of sanction dated 20th June, 2008, the plaintiff advanced to the defendants jointly and severally €490,100.00, which was the subject of loan account number 12720118. This loan replaced previous loan facilities to the defendants and it was to be repayable on demand. Mr. Coleman avers that the plaintiff demanded repayment of Facility 3 on 8th November, 2010, which the defendants have failed to repay. He avers that as of 13th July, 2015, the total amount due and owing on Facility 3, was €593,340.31, made up of the principal debt of €525,336.27 and interest of €68,004.04.

6. It is common case that the monies advanced to the defendants in respect of all three loan facilities were secured on properties owned by them.

7. As per the letter of sanction in respect of Facility 1, the monies lent to the first defendant were secured, by way of deed of charge dated 6th November, 2007, on properties owned by the defendants at Woodsgift, County Kilkenny (Folio 17807F) and at 6 New Road, Urlingford, County Kilkenny (Folio 22817F).

8. The monies advanced by way of Facility 2 and Facility 3 were, respectively, secured by way of deeds of charge on Folio 17807F, Folio 22817F, the property known as Mulhalls, Pudding Lane, Kilkenny (unregistered) and on property at 113 Fosterbrook, Stillorgan (unregistered).

9. By way of special summons proceedings bearing record numbers 2011/357 SP and 2014/188 SP against the defendants and others, the plaintiff sought possession of a number of the properties provided by the defendants by way of security for Facilities 1, 2 and 3. The repossession proceedings were contested by the defendants. The said proceedings came on for hearing on 3rd and 4th March, 2015. Judgment was delivered by Binchy J. on 4th March, 2015 granting the relief sought by the plaintiff.

Binchy J.'s judgment is referred to more particularly later in this judgment.

10. In the within proceedings, four affidavits have been sworn by the first defendant on behalf of both defendants. In essence, the defendants advance four defences to the plaintiff's application for final judgment, each one of which, the defendants assert, merits the within proceedings being adjourned to plenary hearing.

11. Overall, the defendants do not contest the fact that they benefitted from the monies the subject matter of the three loan facilities. However, they raise the following four grounds of defence for the purpose of remitting the proceedings to plenary hearing.

The defendants contend:

> 1. The plaintiff's claim is statute-barred;
>
> 2. The plaintiff was in breach of an agreement to provide further development funding to the defendants;
>
> 3. Some, if not all, of the facilities in respect of which the plaintiff sues have not remained in the ownership of the plaintiff since their respective dates of issuance and have been transferred or assigned as between AIB group entities without express notice to the defendants; and
>
> 4. The plaintiff has overcharged interest in respect of the borrowings to which the within proceedings relate and that the defendants were lawfully entitled to a reduced interest rate or a tracker rate which was not afforded to them.

12. Each of these defences will be addressed in turn.

13. Before doing so, it is apposite to address the test for the adjournment of the within proceedings to plenary hearing. As set out by McGuinness J. in *Aer Rianta v. Ryanair Ltd* [2001] 4 I.R. 607, at p. 615, for the matter to be remitted to plenary hearing the Court must be satisfied that the "*defence set out in the affidavits of [the defendants], together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the [defendants] having a real or bona fide defence*." Hardiman J. put it thus, at p. 623:

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

14. As put by Charleton J. in *National Asset Loan Management Ltd. v. Barden* [2013] 2 I.R. 28, at p. 5:

> *"The mere assertion on affidavit of a defence is insufficient. A defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation. An assertion, for instance, that a cheque was paid in discharge of a debt means little if no bank statements are produced to show the provenance of the funds or when, how or to whom money was remitted. Often, arguments are advanced as to collateral contracts or representations that are claimed to override the express terms of a written contract. It is for each such allegation to be analysed in the context of whatever claim the plaintiff may make in response, bearing in mind that the summary judgment procedure does not involve the weighing of competing facts but rather requires an analysis as to whether a defence that might reasonably be an answer to the plaintiff's claim has been made out. If it is very clear that the defendant has no defence, the court should proceed to enter summary judgment."*

15. More recently, in *Cheldon Property Finance DAC v. Hale* [2017] IEHC 432, McGovern J. described the test in the following terms:

> *"The starting point is that, in applications of this kind, the power to grant summary judgment should be exercised with discernible caution. Where there are no real issues or the issues are simply disposed of and easily determinable then this procedure can be used. The court has to consider whether the defendants have satisfied the court that they have a fair or reasonable probability of having a real or bona fide defence. Having considered the evidence, is it clear that the defendants have no defence? The mere assertion in an affidavit of a situation said to give rise to a defence does not of itself provide leave to defend. The court has to look at the whole situation to see whether such an assertion is backed up by credible evidence so that it can be said that the defendants have satisfied the court that there was a fair or reasonable probability of the defendants having a bona fide defence. In approaching the issues that arise in this application for summary judgment, I have applied the test set out in the decisions which I have referred to above." (at para. 9)*

16. I am satisfied to adopt the respective tests, as set out above, for the purpose of determining the issues which arise in this case. Each of the defendants' four defences will now be addressed.

1. The claim that the within proceedings are statute barred for the purpose of the Statute of Limitations, 1957 ("the Statute")

17. In his first replying affidavit sworn 22nd April, 2016, the first defendant, with regard to Facility 1, avers (accepting that the date of repayment of the facility was to be 1st May, 2007) that the plaintiff did not issue its proceedings until 12th August, 2015, some eight years and three months from the date of the alleged breach of the terms of the facility. It is thus contended that the claim in respect of Facility 1 is statute-barred.

18. In respect of Facility 2, the first defendant avers as follows:

> "I say that your deponent attended a meeting at the Plaintiff's Kilkenny branch in late September, 2008. The meeting was attended by a number of the Plaintiff's employees, including Morgan Doyle, a senior manager and Josephine Mulally, who at that time was as an assistant manager at the Plaintiff's Kilkenny branch. During the course of that meeting Ms. Mulally repeatedly informed me that the second Facility was now due for repayment as the moratorium period had now expired. Ms. Mulally informed me that the period had been intended to run from the date of acceptance in June of 2007 and accordingly had expired four months previously, rendering the entire of the balance of the Facility repayable. The only logical conclusion that I could derive from the insistent nature of Ms. Mulally's assertions in this regard was that the Bank was seeking to call in the loan. My perception in this regard was strongly heightened when four months after that meeting, in January 2009, the Bank stopped your deponent's current account facilities. Indeed I received a letter dated 18 March 2009 from Ms. Mulally demanding repayment and notifying me that failing receipt of payment the Plaintiff was going to terminate all of my banking facilities and take whatever steps they considered necessary to obtain payment in full of my total indebtedness."

19. In this regard the first defendant refers to a letter dated 18th March, 2009 addressed to him and entitled "Eugene Norton, Patrick & Geraldine Ryan, Thomas Butler". Two account numbers are referred to in the letter, neither of which is referable to the accounts pertaining to Facilities 1, 2 and 3. The letter advised the first defendant that he had been requested to lodge monies to clear the excess on the accounts listed in the letter. He was requested to lodge sums in excess of €50,000 into his current account and in excess of €1.6 million into the loan account listed in the letter within 30 days of the date of the letter. He was advised that if he did not do so "the Bank will terminate all your banking facilities".

20. The first defendant thus avers that the plaintiff's cause of action vis-à-vis Facility 2 arose as of 18th March, 2009, or at the very latest on 20th March, 2009 (being the date to which the moratorium on interest had been extended). He avers that as the summary summons did not issue within six years of the said dates, the plaintiff's claim in respect of Facility 2 is statute-barred.

21. Similarly, the first defendant avers that as the plaintiff formally called in Facility 3 in about March, 2009, the plaintiff's claim with regard to Facility 3 is also statute-barred in circumstances where the summary summons did not issue until 12th August, 2015.

22. In response to the first defendant's assertion with regard to the Statute, Mr. Gerard O'Driscoll, of the plaintiff bank, swore an affidavit on 14th June, 2016. He reiterates that the plaintiff relies on letters of demand issued on 8th November, 2010 in respect of all three facilities. With regard to Facility 2, Mr. O'Driscoll refutes the first defendant's contention that the letter of 18th March, 2009 relates to Facility 2. He states that the letter refers to a separate facility sum lent to the first defendant and other named third parties for the purchase of a site at Waterford Road, County Kilkenny, a facility which Mr. O'Driscoll states is not in issue in the within proceedings (albeit it was in issue in possession proceedings commenced by the plaintiff against the defendants and others).

23. Mr. O'Driscoll further avers that even if a six-year period was deemed to apply under the Statute (which he is advised it does not), the defendants in any event have acknowledged on more than one occasion the fact that monies were due and owing by them. In this regard, Mr. O'Driscoll refers to a letter written by the first defendant on 18th October, 2010 to a bank official in the plaintiff's bank in Kilkenny wherein he stated, *inter alia*, as follows:

> "I want to reassure you of my full commitment to repay all loans in full."

24. In a further letter of 20th April, 2011, the first defendant stated:

> "In light of the intense pressure from the bank I have been exploring every avenue over the past two years to repay the borrowings on the various properties. I am confident now that I can put together funding of €800,000 to €1,000,000 in favour of AIB, almost immediately."

25. In his second replying affidavit sworn 21st July, 2016, the first defendant refutes any suggestion in Mr. O'Driscoll's affidavit that merely because the three loan facilities are secured on property a twelve-year limitation period applies. He avers that the secured properties are not at issue in the within summary proceedings and that the plaintiff's claim herein is for a liquidated sum arising on foot of three contracts. As such, he contends that it was incumbent on the plaintiff to issue proceedings within six years. As regards the letters exhibited by Mr. O'Driscoll, the first defendant avers:

> "At the time the said letters were written [by the first defendant] in late 2010 and early 2011, I believed that a resolution to the difficulties I was facing was a realistic possibility and as a practicing accountant my professional status and livelihood was dependent upon concluding a resolution. I was fully engaging with the Plaintiff through the employees at its Kilkenny branch, who gave me no cause to doubt that a resolution could be achieved without recourse to legal proceedings. I say that the correspondence exhibited by Mr. O'Driscoll, when taken in the broader context, provides authority for that proposition."

26. In essence, the defendants contend that the plaintiff's claim in respect of all three facilities are out of time because they did not issue their proceedings within the requisite six years, as provided for by s. 11 of the Statute.

27. Section 11 (1) provides:

> "(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued—
>
> (a) actions founded on simple contract;
>
> …"

28. Counsel for the plaintiff submits that the relevant provision of the Statute is s. 36 (1) (a) which provides as follows:

> "No action shall be brought to recover any principal sum of money secured by a mortgage or charge on land or personal property (other than a ship) after the expiration of twelve years from the date when the right to receive the money accrued.
>
> …"

29. It is an incontrovertible fact that each of the three loan facilities in issue in the within proceedings were secured by way of a charge over property. Counsel for the plaintiff thus contends that s. 36 of the Statute is engaged and that it is therefore unstatable for the defendants to contend otherwise. In aid of his submissions, counsel relies on *ACC Bank v. Malocco* [2000] 3 I.R. 191. In that case, Laffoy J. stated, at p.204:

> *"I am satisfied that the limitation period for bringing the summary summons proceedings is the limitation period stipulated in s. 36(1)(a) and that that provision applies to an action on the covenant or on the agreement to repay."*

30. Counsel also submits that insofar as the defendants suggest that the twelve-year limitation period provided for in s. 36 (1) (a) no longer applies because the plaintiff has realised the underlying security, and therefore the claim now made can only be for a simple debt on foot of a contract, such an argument is fundamentally flawed and wrong in law. In this regard, counsel points to the provisions of s. 36 (1) (a) itself which provides the right to recover applies "from the date when the right to receive the money accrued". On the defendant's own case (which the plaintiff disputes), the cause of action accrued in 2009. Counsel states that at that point in time the loan facilities were secured and therefore s. 36 of the Statute clearly applies. It is contended that s. 36 continues to apply notwithstanding the subsequent realisation of the underlying security. The plaintiff submits that the applicable limitation period of twelve years cannot be retrograded to six years simply because of a subsequent realisation of the security. It is submitted that there is no authority to support the defendants' position in this regard and that the defendants' position runs contrary to established authority. Reliance is placed by the plaintiff on the unanimous House of Lords decision in *West Bromwich BS v. Wilkinson* [2005] 4 All ER 97.

31. It is also submitted on the part of the plaintiff that even if it could be said that the three facilities were governed by s. 11 of the

Statute, and not by s. 36 (1) (a), the defendants in any event have acknowledged the debt by reason of the contents of the first defendant's letters of 18th October, 2010 and 20th April, 2011. By reason of these acknowledgements, the limitation period was reset. In this regard, counsel points to s. 56 of the Statute which provides: -

> "(1) Where—
>
> (a) any right of action has accrued to recover any debt, and
>
> (b) the person liable therefor acknowledges the debt,
>
> the right of action shall be deemed to have accrued on and not before the date of the acknowledgment."

32. Counsel further contends that even if the Court were to disregard the defendants' letters of 18th October, 2010 and 20th April, 2011 and finds that a six-year limitation period applies the proceedings are still within time given that demand was first made for repayment in respect of all three facilities on 8th November, 2010. It is submitted that there is no basis for the defendants' contention that demand was made in March 2009. The only demand then made was in respect of a different loan facility which is not part of the within proceedings.

33. Counsel for the defendants submits, however, that the Statute is a full defence to the within proceedings and certainly an arguable defence. It is submitted that if the defendants have raised an arguable defence then the matter must go to plenary hearing.

34. The defendants' argue that the three loan facilities constitute three simple contracts. With regard to Facility 1, they say that it was to be repaid on a specified date, namely 1st May, 2007. Accordingly, the first defendant was in breach by 2nd May, 2007 and thus the plaintiff had to issue within six years of that date. With regard to Facility 2, that sum was to be repaid twelve months from the date of drawdown. Thus, on an ordinary reading of that loan contract, the facility became repayable on 27th June, 2008 and, accordingly, the plaintiff should have issued its proceedings within six years of that date. With regard to Facility 3, while there is no reference in the loan agreement to a repayment date, it is contended that there was a demand for a repayment on 18th March, 2009, as averred to by the first defendant. It is argued that the said letter made demand for repayment with regard to all three facilities. Counsel contends that even if the Court is not persuaded by defendants' arguments regarding the earlier dates relied on by them, it is nevertheless arguable, based on the contents of the 18th March, 2009 letter, that a demand for repayment was made in respect of all three facilities on 18th March, 2009, which puts the within proceedings outside of the Statute.

35. It is further submitted that insofar as the plaintiff relies on s. 36 (1) (a) of the Statute, regard must be had to the words "principal sum of money". Section 36(1)(a) envisages only a claim in respect of a principal sum, yet, the within proceedings claim interest in respect of each of the facilities to the date of issue of the proceedings. The defendants contend that it cannot be said that s. 36 (1) (a) applies, since interest is sought to be recovered. Moreover, the defendants point to *ACC v. Malocco*, where Laffoy J. held that s. 36 of the Statute applies only to an action to recover a debt balance, including capitalised interest, as of the date the right to recover the principal money accrued. In the within case, it is incontrovertible that the plaintiff's case involves interest post that date, which, counsel for the defendants submits, puts the plaintiff's claim outside the scope of s. 36 (1) (a), on the basis of Laffoy J.'s *dictum* in *ACC v. Malocco*.

36. The defendants also contend that if the plaintiff wished to rely on s. 36 (1) (a) of the Statute then it was obliged to sue on foot of the covenant to repay contained in each of the respective deeds of charge, as opposed to the simple contracts pursuant to the facility letters on which the plaintiff now seeks to rely. As the plaintiff has not sued on foot of the covenants to repay as set out in the deeds of mortgage, it is argued that the plaintiff cannot rely on s. 36 (1) (a). Had the plaintiff done so, the defendants would have to concede that s. 36 (1) (a) was applicable.

37. Counsel also submits that the plaintiff is not entitled to rely on the decision of the House of Lords in *West Bromwich BS v. Wilkinson*. Counsel contends that the *dictum* of Lord Hoffmann makes clear that the right to receive the money in that case turned upon the construction of the provisions of the mortgage deed. It is submitted that in the present case, the plaintiff has specifically stated that it is relying only on the three facility letters and not the mortgage deeds. Accordingly, the defendants argue that the decision in *West Bromwich BS v. Wilkinson* is of no relevance.

38. Counsel further contends that while the plaintiff relies on letters of 18th October, 2010 and 20th April, 2011 in support of their argument that the defendants have acknowledged that the monies are due and owing, it is to be noted that these letters were not addressed to Mr. O'Driscoll. As he was not the recipient of the letters, he cannot rely on them to defeat the defendants' Statute defence. It is further contended that the letters are not admissions of debt. Given that the first defendant so avers, this constitutes a dispute, the determination of which is for a plenary hearing and not for the Court on a motion for summary judgment. Counsel submits that the Court should not prefer the evidence of Mr. O'Driscoll over that of the first defendant.

39. In all of the above circumstances, counsel contends that the defendants have an arguable defence based on the Statute.

40. By way of reply to the defendants' submissions, it is the plaintiff's position that insofar as the defendants, with regard to Facility 2, rely on the letter of 17th November, 2008, that letter merely extended the moratorium on interest repayments to 20th March 2009 –it did not demand repayment. It is further submitted that insofar as the first defendant seeks to rely on representations made to him by the plaintiff, such evidence is inadmissible based on the parol evidence rule. It is impermissible for the defendants to seek to vary the terms of a written contract. In this regard, counsel for the plaintiff relies on *Ulster Bank v. Deane* [2012] IEHC 248, where, at para. 6, McGovern J. stated: -

> *"It appears, therefore, that they are seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the 'parol evidence ' rule. . .. In short, a party is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement."*

41. Counsel for the plaintiff argues whether under s. 36 (1) (a) or s. 11 of the Statute, the plaintiff's proceedings are within time.

42. With regard to the parties' respective submissions, I will firstly address the defendants' contention that the plaintiff does not come within the ambit of s. 36 (1) (a) of the Statute.

43. In the course of his submissions, counsel for the defendants argued that it is not appropriate for the Court to determine the issue

of the Statute given that the defendants have put before the Court an arguable defence based on same. By way of reply to the defendants' submissions in this regard, counsel for the plaintiff argued that it is open to the Court at the summary judgment stage to determine questions of law and that the Court can determine whether the defendants have raised an arguable ground based on the Statute.

44. I am satisfied that it is open to the Court at the summary stage to determine questions of law. In the instant case, the issue of whether the plaintiff's proceedings fall within the ambit of s. 36 (1) (a) is a question of law.

45. To return now to the question of whether the within proceedings come under the ambit of s. 36 (1) (a) of the Statute. It is undoubtedly the case that each of the three facilities in issue in the within proceedings were secured on property. To my mind, this factor is sufficient to place the plaintiff's claim within s. 36 (1) (a). I accept the plaintiff's argument that the defendants have not put to the Court any authority for the proposition that the plaintiff was obliged to sue on the covenant to repay as set out in the mortgage deeds. The proposition is not sustainable in law, in my view, having regard to the dictum of Laffoy J. in *A.C.C. Bank v. Malocco* that s. 36 (1) (a) " *applies to an action on the covenant or on the agreement to repay"* (emphasis added)

Furthermore, I am satisfied that s. 36 (1) (a) does not require a party to sue on the mortgage; what s. 36 (1) (a) states is that the monies claimed must be secured by a mortgage. Accordingly, a plain reading of the provision does not require the plaintiff to sue on foot of the mortgage deed.

46. Insofar as the defendants submit that the plaintiff can rely on s. 36 (1) (a) of the Statute only with regard to principal monies and not interest, I am satisfied that it is open to the Court to grant partial judgment to the plaintiff in respect of the principal monies and adjourn the issue of interest to plenary hearing. However, by virtue of what is addressed later in this judgment with regard to s. 11 of the Statute, the Court finds no arguable grounds, based on the Statute, for the question of interest to be remitted to plenary hearing.

47. I am also satisfied that the decision in *West Bromwich BS v. Wilkinson* is persuasive authority upon which the Court can rely to reject the defendants' argument that s. 36 (1) (a) of the Statute is not engaged in the within proceedings.

48. In *West Bromwich BS v. Wilkinson*, the factual position was as follows: the defendants purchased a house using a loan provided by the claimant building society secured by a charge on the house. The defendants duly defaulted on the mortgage payments. In July 1989, the building society obtained an order for possession, which was executed in October 1989. The house was sold in November, 1990. Including arrears of interest, there was a shortfall of some £23,000 sterling. The defendants heard nothing from the building society for over twelve years until in November 2002 they were served with a claim for the shortfall and interest. The defendants considered the claim was barred by s. 20 (1) of the Limitation Act, 1980, which for all intents and purposes is similar to s. 36 (1) (a) of the Statute. The building society contended that although the advance was originally secured by a mortgage, the security had been realised before it had commenced proceedings. It was argued that as the money was no longer secured by a mortgage, s. 20 of the 1980 Act had no application. The building society's argument was rejected both by the Court of Appeal and by the House of Lords.

49. In his judgment for the House of Lords, Lord Hoffmann put the matter thus:

> *"7. The appeal therefore gives rise to two questions. One is a general question of law. Does s 20 apply in a case in which an advance is originally secured by a mortgage but the security is realised (or released) before proceedings are commenced?*
>
> *The second turns upon the construction of this particular and rather unusual mortgage deed, namely whether upon default the building society had a "cause of action" (s 8) or a "right to receive the money" (s20) in respect of the outstanding capital*
>
> *…*
>
> *10. I think that Bartlett's case [2003] 1 WLR 284 was rightly decided. Putting aside actions for the recovery of land, where questions of title are involved, English law attributes periods of limitation by reference to the cause of action which the claimant seeks to enforce. Thus there are periods of limitation for personal injury actions, defamation actions, other actions in tort, actions founded on simple contract, actions on a specialty and so on. This method of classification suggests that ordinarily time will run from the moment when the cause of action designated by the appropriate rule has arisen. It would be strange if the lender could then stop time running by his own act in exercising the power of sale. If, therefore, the cause of action when it arose was a claim to a debt secured on a mortgage, I do not think section 20 ceases to apply when the security is subsequently realised."*

50. I am satisfied to accept the foregoing as a persuasive authority in aid of the plaintiff's submission with regard to s. 36 (1) (a) of the Statute. Accordingly, I am satisfied that it is not arguable that s. 36 (1) (a) ceased to apply in this case solely because the securities have been realised by the plaintiff.

51. Even if I am in error with regard to my findings with regard to s. 36 (1) (a) of the Statute, I am nevertheless satisfied that the plaintiff's proceedings are still within time for the purpose of s. 11 of the Statute. The defendants raised a number of matters which, they assert, demonstrates that the proceedings were not brought within the timeframe provided for in s. 11 of the Statute. I do not, however, find merit in their arguments. In the first instance, I am satisfied that there is no basis for the defendants' reliance on the plaintiff's letter of 18th March, 2009 as a basis for their assertion that demand was made by the plaintiff in respect of all three loan facilities on 18th March, 2009. I am satisfied that the terms of that letter clearly relate to specific accounts relating to a loan facility (the Waterford Road development) which was advanced to the first defendant and four other third parties and that the letter does not pertain to the three loan facilities in issue in the within proceedings. As such, I am satisfied that the reference in the 18th March, 2009 letter to "all banking facilities being terminated" has to be read only in the context of the loan facilities in issue in the said letter.

52. Furthermore, I find no merit in the first defendant's argument that the Facility 3 letter is somehow uncertain because no reference is made therein to a repayment date for the monies advanced. I accept the plaintiff's submission that that in making this argument, the defendants fail to have regard to the "General Terms and Conditions governing Business Lending" which are attached to all three facility letters. Clause 3.1.1 of same provides, *inter alia*, that: - "Loan account facilities are repayable on demand."

53. From the evidence adduced in the within proceedings, I am satisfied that a demand for payment was made by the plaintiff in respect of all three facilities on 8th November, 2010. As such, the plaintiff's claim for the principal sums advanced on foot of the three

facilities, as well as the interest claimed in respect of the sums advanced, is within time, given that the proceedings issued on 12th August, 2015. Moreover, even if the Court is wrong in this regard, it remains the position that the defendants' indebtedness to the plaintiff was expressly acknowledged by the first defendant on two occasions, namely on 18th October, 2010 and 20th April, 2011.

54. In all the circumstances, I find that there is no fair or reasonable probability of the defendants having a bona fide defence based on the Statute.

2. Alleged breach by the plaintiff to provide development monies

55. In his replying affidavit sworn 22nd April, 2016, the first defendant avers as follows: -

> "The . . .first Facility was granted for the purpose of providing me with funds for an equity input into one of my property development projects, the Waterford Road development. [Mr. David Ryan, the commercial manager of the plaintiffs' Kilkenny branch] had previously facilitated the financing for that project on behalf of the Plaintiff, wherein €1,640,000.00 was lent for the purpose of purchasing the site for the development of blocks of apartments. It was at all times understood by all concerned that the Plaintiff would provide further financing for the construction component of the development, with a further sum of €1,000,000.00 to be provided in that respect."

56. The first defendant exhibits a number of documents said to refer to the agreement regarding further finance reached between him and the plaintiff. In particular, he refers to a letter of sanction "in principle" dated 4th November 2005 in respect of the provision of €1,000,000 loan to finance site clearance and the construction of ten apartments at Waterford Road, Kilkenny. He further pointed to a bank memorandum dated 25th November, 2005 in relation to the Waterford Road development which states as follows: -

> "We sanctioned €1.6m (80% finance) to purchase site at Waterford Rd Kilkenny n/o partners. We sanctioned €1m to develop first block of 10 apartments n/o newco ltd. The deal is now almost ready to proceed – delay until now caused by the vendors.
>
> *Eugene Norton:*
>
> In order for the purchase of Waterford Road to take place, each partner has to provide €230k equity. Eugene was to arrange this bridging with Ulster Bank against an unencumbered property in Urlingford. When he went to put this bridging in place they wanted to look at financing the entire deal. In order to ensure that this didn't happen, I asked Eugene to let me look at the bridging proposal again. The request is now for the €230k facility against the sale of the property in Urlingford worth €400k. Joe Coogan (auctioneer) had originally intended going to public auction with the property in early November but has advised Eugene to wait until the New Year."

57. In his affidavit, the first defendant avers: -

> "I say that notwithstanding the earlier agreement and representations of Mr. Ryan, the sanction of the finance and repeated applications on my part for its release, the aforesaid sum was never provided by the Bank, thereby severely impeding the progression of the Waterford Road development and eventually leading to it stalling entirely. While these matters were ongoing I was simultaneously in discussions with the Plaintiff concerning the purchase and development of a property known as Mulhall's on Pudding Lane in Kilkenny City. The aforesaid second Facility was granted for the purpose of purchasing the said property. As with the Waterford Road development, it was understood and agreed that the Plaintiff would provide ongoing funding for the construction component of the Pudding Lane development and my application for funds to acquire the property also specified that the site would be developed. I say that this understanding is clearly discernible from an internal memorandum sent by Anne Lennon, the manager of the Kilkenny Branch around the time the Letter of Sanction in respect of the second Facility was issued."

58. The memorandum referred to by the first defendant is dated 26th July, 2007 and reads, in part, as follows: -

> "I have an approval here from Dan O'Connell for Eugene Norton – to purchase property here in Kilkenny (behind the bank).
>
> The loan of €2.2m was purchase price (€2m) + stamp duty - €200K – rate proposed P+ 1.5 – …
>
> Customer has recd our letter of offer and is not happy with the rate.
>
> Loan is a long term sanction with clients purchasing a property to let with review in 2 years in line with planning a further development to the rear + ultimately to place on fifteen year capital and interest loan.
>
> Client seeking to have the rate at cof + 1.5% - [I] don't think this reflects the overall deal, we have not charged an arrangement fee as we are looking at the longer term picture.
>
> If development funding is sought down the road, then I would look at an arrangement fee at that time."

59. It is not disputed that this memorandum concerned the monies advanced to the defendants by way of Facility 2.

60. In his replying affidavit, Mr. O'Driscoll avers that the first defendant raised the same arguments and relied on the same documents as are now being relied on in the within proceeding in his defence of the possession proceedings which were before Binchy J. in March 2015. Mr. O'Driscoll states: -

> "Mr. Justice Binchy held such documents did not constitute, or evidence, an agreement on the part of AIB to provide development funding to the Defendants as claimed. I beg to refer to the pleadings and proceedings in the Possession Proceedings when produced. The Defendants did not appeal the decision of Mr. Justice Binchy. I am advised that in the circumstances the Defendants are precluded from seeking to make such claims in the within proceedings."

61. Insofar as the first defendant made reference to the Waterford Road property, Mr. O'Driscoll avers: -

> "None of the facilities at issue in the within proceedings relate to the property at Waterford Road. The property at Waterford Road was purchased by [the first defendant] (one third share), Mr. Thomas Butler (one third share), Mr. Patrick

Ryan (one sixth share) and Ms. Geraldine Ryan (one sixth share). AIB provided the funding to purchase the Waterford Road property. AIB did not provide any development funding, nor did it agree to do so. The borrowers on that facility defaulted on same and it formed part of the Possession Proceedings. It does not form part of the within proceedings and therefore bears no relevance whatsoever. It was notable that in the Possession Proceedings none of the other three borrowers to the Waterford Road facility made any claim that AIB agreed to provide development funding."

62. In his second replying affidavit, the first defendant takes issue with Mr. O'Driscoll, stating-

> "Mr. O'Driscoll furthermore seeks to rely on the fact that the other three Defendants in the previous proceedings did not seek to contest the Plaintiffs' claim to bolster the Plaintiff's position . . . I say and believe that the Plaintiff agreed that it would not pursue those Defendants in the context of the within proceedings on the understanding that they would not contest the Possession proceedings. Accordingly I say that little or no weight should be attached to their choice not to defend the Possession proceedings and furthermore that the Plaintiff should not be permitted to imply that such failure suggests that your deponent and the Second Named Defendant herein have no defence to the within proceedings."

63. In his third replying affidavit, the first defendant states: -

> "I say and am advised that the Plaintiff is clearly seeking to conflate the decision of Mr. Justice Binchy with the outcome of the within proceedings. I have maintained at all times that there are a number of factual issues in dispute between the parties, which I was not in a position to properly deal with in the context of the Possession Proceedings in the absence of a plenary hearing.
>
> In my affidavit in the Possession Proceedings sworn on 11 March 2013 I stated my position in relation to certain assurances made by the Plaintiffs employees to advance additional funding for the development of a site at Waterford Road, Kilkenny and a second premises known as Mulhall's Restaurant, Pudding Lane, Kilkenny in the context of the Possession Proceedings. I maintained at all times that the Plaintiff subsequently resigned from the representations made by its employees that further funding for the construction phases both the Waterford Road and Pudding Lane Developments would be provided. Replying affidavits were sworn by various employees of the Plaintiff Bank, but I do not accept their version of events, and I say that their account is inconsistent with the factual matrix existing at the relevant time, including my own financial circumstances and the very nature of the development projects themselves."

64. The defendants maintain that the matters raised by the first defendant on affidavit constitute an arguable defence. As the plaintiff failed to fund the development, the defendants now wish to now pursue a set-off against the plaintiff's claim. It is submitted that their claim in this regard is intrinsically linked to the plaintiff's claim. Counsel asserts that it is not for the Court to determine if the defendants have established a set-off; the Court only has to be satisfied that the defendants have raised an arguable defence in this regard. It is further submitted that insofar as Mr. Coleman and Mr. O'Driscoll, on behalf of the plaintiff, refute the first defendant's claim that the plaintiff is in breach of agreement, the Court should note that neither individual dealt with the defendants and the plaintiff has not put any evidence on affidavit from the individuals in the plaintiff bank who in fact dealt with the defendants. It is argued that in those circumstances, the first defendant's evidence on affidavit should be preferred to that of Mr. Coleman and Mr. O'Driscoll.

65. Counsel for the plaintiff submits that insofar as the first defendant avers that the plaintiff was in breach of an agreement to provide the defendants with development funding, this is not a defence for the purpose of the within proceedings, but rather an alleged cause of action for an alleged breach of a separate contract. It is further submitted that documents exhibited by the first defendant do not corroborate his version of events and that the documents relied on are purely aspirational.

66. Counsel for the plaintiff further submits that the first defendant has not laid any foundation on affidavit for his alleged claim to a set-off. It is submitted that even if there was the basis for such a claim, that this is a separate cause of action and no mutuality has been demonstrated by the defendants, as required by *Moohan v. S & R Motors (Donegal) Ltd* [2007] IEHC 435. The plaintiff also points out that none of the facility letters in issue in the within proceedings refers to any agreement on the part of the plaintiff to provide funding for the Mulhall Development (the subject of Facility 2)

67. More fundamentally, it is submitted on behalf of the plaintiff that as the same defence as is now asserted in the within proceedings was raised in the possession proceedings and rejected by Binchy J. as a matter of fact. Counsel for the plaintiff contends that as the defendants did not appeal the decision of Binchy J., they are thus bound by the findings of fact such as to give rise to issue estoppel.

68. The test as to whether or not issue estoppel arises is set out in the decision of the Supreme Court in *McCauley v. McDermott* [1997] 2 ILRM 486. For a successful plea of issue estoppel, it must be established that:

> *"(a) The same question has been decided in earlier proceedings;*
>
> *(b) The judicial decision which is said to create the estoppel was final;*
>
> *and*
>
> *(c) The parties to that judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised or their privies."*

69. In the context of the plaintiff's argument that issue estoppel arises, it is necessary to consider Binchy J.'s ruling made in the possession proceedings which were commenced by the plaintiff against the defendants and others. Binchy J. addressed the issues raised by the first defendant in the following terms: -

> *"The first and second defendants say they have three points to make in their defence to this application. Firstly, they contend that at all times, the plaintiff had agreed with the defence that in addition to advancing sums to purchase the Waterford Road site in 2005 and the Mulhall's property in 2007, the plaintiffs agreed to advance funds sufficient to develop these properties for onward sale. The [defendants] contend that it would have made no sense for them to buy these properties without such an assurance, as they did not have the capital to redevelop the properties themselves and that the plaintiffs were aware of this.*
>
> *. . .*

As to the first argument, that is that the bank promised to provide development funding to the [defendants] for the properties at Waterford Road and also the Mulhall property, there is no evidence of this. There is a document dated the 4th of November 2005, whereby the bank issued a sanction in principle only, stating that formal sanction would only issue following the provision of information as sought. This document was subject to conditions that were never met and the facility never advanced beyond the sanction and principle stage. Otherwise, the Nortons' arguments in this regard are based entirely on discussions had with various bank officials, including Mr. Ryan, Mr. O'Connell and Mr. Connolly, each of whom deny any such promises were made.

It follows that the first and second defendants' arguments in this regard are based on parol evidence unsupported by any documents other than the approval in principle referred to above, which amounts to no more than a draft document. Moreover, the letters of offer that issued in relation to these facilities contain no reference at all to development funding.

I'm satisfied that this claim on the [part] of the defendants falls far short of a prima facie defence of the proceedings, such as to merit referring this application to a plenary hearing, and that this view is supported by the authorities opened by counsel for the plaintiff in particular AIB v. Higgins & Ors and Ulster Bank v. Deane. It is absolutely clear that there was no commitment given in writing by the plaintiffs in any of the facility letters, the purpose of which in each case was clear in its terms.

The bank may well have had discussions of a positive nature with Mr. Norton in relation to the provision of such funding, but that falls far short of a binding commitment. Mr. Norton, as a qualified accountant, would have been fully aware of this. Moreover, Mr. Norton had the benefit of legal advice for all of these transactions. He may well have believed that development funding would be made available to him, in a climate in which such finding was readily available, but this belief, unsupported by any documentation, is not in my view sufficient to deprive the plaintiffs of the orders they seek in these proceedings."

70. On behalf of the defendants, it is submitted that there is nothing in the judgment of Binchy J. for this Court to take account of. It is contended that the plaintiff has not satisfied the test for issue estoppel as set out in *McCauley v. McDermott*. Counsel submits that the proceedings which were the subject of Binchy J.'s judgment were possession proceedings which have no bearing in the instant case, and in respect of which both the requisite legislation and proofs were of a different order to the necessary proofs in the instant case.

71. I am satisfied, however, that the first part of the test set out in *McCauley v. McDermott* is satisfied in the present case given that the same issues as are now being raised were before Binchy J. in the possession proceedings. At the end of the day, the issues raised by the defendants were determined by the factual findings of Binchy J. in the possession proceedings. Contrary to the defendants' submissions, the issue here relates not to the doctrine of *res judicata* but rather to issue estoppel. As set out in Delany and McGrath *McGrath's Civil Procedure in the Superior Courts* (3rd Ed.), "issue estoppel greatly expands the parameters of res judicata because there is no requirement of exact identity of causes of action; identity of issue will suffice".

In the present case, the core issue of fact which underlies the defendants second defence- whether there was an agreement to provide development funding- has been determined by Binchy J.

72. The defendants argue that the plaintiff has not satisfied the third element of the test set out in *McCauley v. McDermott*. They assert that this is so given that in the possession proceedings there were three other parties named as defendants, in addition to the within defendants. In all of these circumstances, counsel submits that it is not proper for the plaintiff to request the Court to rely on the factual findings of Binchy J.

73. I am entirely satisfied, however, that the third requirement of *McCauley v. McDermott* has been met in this case given that the plaintiff and the defendants were parties in the possession proceedings. To my mind, the fact that there were other named defendants as well as the within defendants in the possession proceedings is not a bar to the plaintiff relying on the doctrine of issue estoppel.

74. I am equally satisfied that as the defendants did not appeal the ruling of Binchy J., the second element of the test set out in *McCauley v. McDermott* has been met in this case.

75. Even if I had not found that issue estoppel arose in the present case, I find, in any event, that the documents put forward by the defendants do not support their contention that agreement had been reached with the plaintiff on the question of future funding. What is averred to by the first defendant, to my mind, amounts to no more than "*mere assertions*" or matters of an aspirational nature, which is not sufficient for the Court to remit the matter to plenary hearing. This is clear from the approach adopted in *Ulster Bank v. Deane* [2012] IEHC 248. At para. 13 thereof, McGovern J. opined:

"The defendants make much of the fact that they were assured that the Bank only expected payment out of the proceeds of sale of dwellings which were being constructed by the defendants' company Deane Homes Ltd. The defendants understood that this was a long-term relationship and Mr. Eamon Moyles, a financial accountant retained by the defendants, said on affidavit that he understood the banking relationship was a "long-term" one and that the Bank would be repaid as and when furnished dwellings were sold. I am quite satisfied that this was the understanding of the parties when they entered into the agreement, but there is nothing to suggest that such an understanding had acquired the status of a legal obligation. It was merely aspirational. The monies were lent on the basis of facility letters which were clear on their face and which were payable on demand."

76. In all the circumstances, no arguable grounds have been made out as regards the defendants' second defence.

3. Alleged unlawful assignment of some or all of the facilities between AIB Group entities

77. In his fourth replying affidavit sworn 29th January, 2018, the first defendant avers as follows:

"I believe and have been advised by my solicitor that some, if not all of the facilities the subject matter of these proceedings have not remained in the ownership of the Plaintiff since their respective dates of issuance and have been transferred or assigned as between AIB Group Entities without express written notice to the Defendants. Accordingly, I have been advised by my solicitor and believe that the facilities the subject matter of these proceedings are not enforceable at the suit of the Plaintiff and the demands relied upon by the Plaintiff are null and void."

78. In aid of his arguments, the first defendant points, by way of example, to the mortgage deed exhibited in the affidavit of Mr. O'Driscoll sworn 14th June, 2014 which, the first defendant contends, "confirms a transfer to AIB Mortgage Bank which is not a party to [the within] proceedings". The first defendant maintains that neither he nor the second defendant was given express notice of such transfer of the facilities to AIB Mortgage Bank Ltd.

79. It is thus submitted that in those circumstances the defendants have an arguable defence that the within proceedings are not properly constituted. It is also submitted that no deed of assignment has been put before the Court as required by s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 ("the Judicature Act"). Counsel for the defendants referred to *AIB Mortgage Bank v. Thompson* [2017] IEHC 515. In that case, Baker J. referred to *O'Rourke v. Considine & Ors* [2011] IEHC 191 where Finlay Geoghegan J. set out the four conditions which are required to be met for an assignment to be valid under s. 28(6) of the Judicature Act:

> *"(a) The assignment was for a debt or other legal chose in action.*
>
> *(b) The assignment was absolute and was not by way of charge only.*
>
> *(c) The assignment was in writing under the hand of the assignor.*
>
> *(d) Express notice in writing was given to the debtor."*

80. By way of response to this ground of defence, counsel for the plaintiff submits that the first defendant's averments that the facilities have been transferred constitute "mere assertions", without the first defendant having identified any of the purported assignments upon which he relies. Insofar as the first defendant refers to the mortgage deed under which the Facility 2 monies were secured, counsel for the plaintiff points to the fact that what is being pursued in the within proceedings are the monies lent by way of Facility 2, and not the charge on the property.

81. The first thing I would observe is that the first defendant's averments that the three facilities in issue in the within proceedings have been assigned or transferred "as between AIB group entities" is based on his belief and that of his solicitor, without any factual information being disclosed in the first defendant's affidavit. I am therefore constrained to find that the first defendant's are "*mere assertions*" which do not meet the arguable grounds threshold.

82. Insofar as the first defendant, in aid of his argument that there was transfer to AIB Mortgage Bank (an entity which is not party to the within proceedings), queries the mortgage deed which is exhibited at "GD 5" of Mr. O'Driscoll's affidavit, the fact of the matter is that the plaintiff and AIB Mortgage Bank and the defendants were parties to the said deed. As is clear from the face of the deed, both defendants signed the deed, which was witnessed by their solicitor. I fail to comprehend, in those circumstances, the defendants' reliance on the Judicature Act given that the mortgage deed in question clearly evidences that the defendants were on notice of any such transfer. The fact that AIB Mortgage Bank is not a party to the within proceedings does not, to my mind, raise an arguable defence for the defendants, particularly in circumstances where what is being pursued in the within proceedings are monies advanced to the defendants by the plaintiff on foot of the three facilities.

83. It was also suggested by counsel for the defendants that the reference by Mr. Coleman at para. 16 of his affidavit, sworn 29th February, 2016, to the loan account in respect of Facility 2 having been changed on a number of occasions "for internal administrative reasons" raises the possibility that this facility was the subject of a transfer by the plaintiff. Again, I am constrained to find that this submission, in the absence of any factual basis for same, is merely speculative on counsel's part.

84. Counsel for the plaintiff drew the Court's attention to Clause 7.15 of the General Terms and Conditions which attached to each of the facilities in question. The clause provides:

> "The Bank reserves the right to assign, transfer or sub-participate all or part of any facility to any of the companies in the Allied Irish Banks Group or to any financial institution either within the State or otherwise, without the prior consent of the Borrower and will be entitled to give any proposed assignee, transferee or sub-participant such information as it deems necessary relating to the Borrower and any facility."

85. To my mind, even if there was any credible evidence of an assignment or transfer by the plaintiff of the three facilities to another entity (or evidence of such assignment or transfer without notice to the defendants), given the contents of Clause 7.15 it would be difficult to accept that a fair or reasonable probability of the defendants having a *bona fide* defence arises. In all the circumstances, the defendants have not reached the arguable grounds threshold in respect of their third defence.

4. Alleged overcharging of interest and/or failure to provide a tracker rate to the defendants

86. At paras. 5 to 7 of his fourth affidavit, the first defendant avers:

> "I further believe and am advised that the Plaintiff has overcharged interest in respect of the borrowings the subject matter of these proceedings and that I was lawfully entitled to the benefit for reduced interest rate and/or a tracker interest rate. Similarly, for this reason I have been advised by my solicitor and believe that the facilities the subject matter of these proceedings are not enforceable at the suit of the Plaintiff and the demands relied upon by the Plaintiff are null and void.
>
> …
>
> I believe and am advised that a review of the terms and conditions attaching to the facilities the subject matter of these proceedings would confirm my believe that the Plaintiff has overcharged the Defendants in respect of the facilities the subject matter of these proceedings and that we are entitled to the benefit of a tracker and/or substantially reduced interest rate.
>
> I say that it has been widely and publically accepted by the Plaintiff that it has overcharged or misapplied interest in a vast number of instances and I believe that this is one such instance. I say and I am advised that it would be utterly improper for this Honourable Court to grant Judgment as against the Defendants absent express and detailed confirmation under Oath by the Plaintiff of the matters complained of herein are not applicable to the within proceedings."

87. Notwithstanding the aforesaid arguments, I am constrained to find that the first defendant's averments amount to no more than "*mere assertions*". The first defendant has not set out the basis upon which the defendants were entitled to a tracker interest rate. Moreover, the provisions of each of the facility letters belie the first defendant's contention. In each case, the basis upon which

interest was to be calculated was specifically set out: each facility sum was lent subject to interest at "Prime rate varying, plus 1.5% per annum …"

88. Furthermore, insofar as the first defendant alleges interest overcharging, there are no calculations in this regard set out in the first defendant's affidavits. This is in circumstances where the first defendant is by profession an accountant and where he received statements of account from the plaintiff on a regular basis. Moreover, there is no suggestion that any complaint was ever made by the defendants about interest overcharging.

89. In all the circumstances, the defendants have not raised an arguable case for a tracker rate.

Summary

90. The plaintiff is entitled to enter final judgment against the first defendant in the sum of €3,500,441.41 and against the second defendant in the sum of €3,324,933.34. I will hear submissions with regard to a stay.