[2019] IEHC 841

THE HIGH COURT

[2017 No. 449 S.]

BETWEEN

HAVBELL DAC

PLAINTIFF

AND

HARRY HILLIARD AND URSULA HILLIARD

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 6th day of December, 2019

Introduction

1. This is an application by the plaintiff seeking summary judgment against the defendants in the sum of €1,869,031.90.

2. The indebtedness of the defendants is alleged to have arisen as a result of six loans furnished to the defendants by Permanent TSB in the years 2003 to 2007. On or about 17th June, 2015, Irish Life and Permanent PLC assigned the debts, the subject matter of the defendants' loans, to the plaintiff. The defendants were notified of the assignment of the loans by letter dated 23rd June, 2015, sent by Capita Asset Services (Ireland) Limited on behalf of the plaintiff. On or about 16th September, 2016, Havbell Limited converted from a private company limited by shares to a designated activity company pursuant to the Companies Act 2014.

3. The plaintiff alleges that when the defendants failed to make the repayments due under the loans as and when they fell due, the plaintiff by letter dated 29th November, 2016, demanded payment of all sums due and owing on all six facilities. A further demand was made of the defendants by the plaintiff's solicitor by letter dated 9th January, 2017. The plaintiff states that despite these demands, the defendants have failed, refused and neglected to pay the sums due to it.

4. There are a number of matters that are not in dispute between the parties. The defendants do not dispute that the original loans were drawn down from Permanent TSB. Nor do they dispute that the debt, the subject matter of those loans, was transferred to the plaintiff.

5. While a number of grounds of defence to this application for summary judgment were set out in the affidavits sworn by the first defendant, and were set out in the written submissions of counsel on behalf of the defendants, at the hearing the defendants resisted the application for summary judgment on the following grounds:

   (a) While it was not accepted that there was any default on the part of the defendants in making the repayments due in respect of the loans, it was submitted that if there was any such default, on any particular loan, it was denied that the plaintiff had the right to call in all the loans, either in the circumstances alleged or at all. The defendants do not dispute that the demands as set out above were made of them by the plaintiff, but they dispute the entitlement of the plaintiff to make such demands.

(b) There is a dispute in relation to the interest rates that were applied by both Permanent TSB and the plaintiff on the various loan accounts. In particular, the defendants alleged that the bank acted unlawfully in two respects: firstly, it misapplied a payment made by the defendants of circa €160,000, which was made in 2007, to the wrong account. They applied that payment to the account bearing the lowest rate of interest, whereas it should have been applied to the account bearing the highest rate of interest, which it is alleged would have led to a saving of almost €52,000. Secondly, it is alleged that the interest rates applied to the various accounts are not correctly stated in the statements of accounts used to ground the plaintiff's application for judgment herein. In this regard the defendants rely upon a report from a Mr. Eddie Fitzpatrick dated 27th September, 2017.

(c) It is alleged that the receiver appointed by the plaintiff over certain of the defendants' properties, which had been given as security in respect of certain of the loans, acted unlawfully in two respects: by selling two properties at a gross undervalue and by retaining rents paid by tenants of the various properties and not applying the rents to reduction of the loan accounts.

6. It is submitted on behalf of the defendants that having regard to these issues of both fact and law, it is not appropriate that the plaintiff be awarded summary judgment in the sum claimed, but instead the matter should be remitted to plenary hearing.

The Plaintiff's Claim

7. Having regard to the matters that are not in dispute between the parties and to the matters that are in dispute as outlined above, it is only necessary to set out a brief summary of the plaintiff's claim for judgment herein.

8. The plaintiff's application for judgment is based on a number of affidavits sworn by Mr. Carl Smith, a Director of the plaintiff company. In his first affidavit sworn on 8th September, 2017, Mr. Smith outlined in paragraphs 4 – 15, the six loan accounts held by the defendants with Permanent TSB. The first facility was created by letter of offer dated 20th January, 2003, wherein the defendants accepted a loan of €200,000, which was secured as a mortgage on a property at 145 Emmet Road, Inchicore, Dublin 8. That facility was drawn down to account number 38492303 (hereinafter the "2303 account"). The second loan facility was created by letter of offer dated 30th June, 2003, wherein the defendants accepted a loan from Permanent TSB of €150,000, which was also secured as a mortgage on the property at 145 Emmet Road, Inchicore, Dublin 8. This facility was drawn down to account number 38568133 (hereinafter the "8133 account").

9. The third facility was created by letter of offer dated 1st February, 2005, from Permanent TSB, wherein the defendants accepted a loan of €250,000 secured as a mortgage on a property at 2 Woodford Cottages, Palmerstown Village, Dublin 20. It was drawn down to account number 99069597931747 (hereinafter the "1747 account"). The fourth facility was created by letter of offer dated 18th July, 2005, wherein the defendants accepted a loan from Permanent TSB of €150,000, which was also secured against the property at

145 Emmet Road, Dublin 8. The fourth facility was drawn down to account number 99076498294308 (hereinafter the "4308 account").

10. The fifth facility was created by letter of offer dated 18th October, 2005, under which the defendants received a loan of €220,000 from Permanent TSB, which was further secured as a mortgage on the property at 145 Emmet Road, Dublin 8. The fifth facility was drawn down to account number 99076490011233 (hereinafter the "1233 account"). The sixth facility was created by letter of offer dated 16th February, 2007, wherein the defendants accepted a loan from Permanent TSB of €1,106,000 secured as a mortgage on a number of properties including, *inter alia,* 39 Herberton Road, Crumlin, Dublin 12 and 34 Gleneaston Lodge, Leixlip, County Kildare. That facility was drawn down to account number 99076498294308 (hereinafter the "4308 account").

11. Mr. Smith averred that all of the loans were subject to the terms of the various letters of offer and the terms and conditions contained therein and in particular the terms and conditions set out in the Letter of Approval, the General Mortgage Loan Approval conditions and the Irish Permanent Mortgage Conditions. He exhibited copies of the various letters of offer and the terms and conditions attaching to each loan.

12. On or about 17th June, 2015, Irish Life and Permanent PLC transferred to the plaintiff a number of loans, including the loans outlined above which had been made by Permanent TSB to the defendants. The defendants were notified of the assignment of their loans by letter dated 23rd June, 2015, sent by Capita Assets Services (Ireland) Limited on behalf of the plaintiff. On 16th September, 2016, Havbell Limited converted from a private company limited by shares to a designated activity company pursuant to the Companies Act 2014. The defendants do not challenge the assignment of the debts to the plaintiff.

13. Mr. Smith has sworn at paragraph 19 *et seq.* that in breach of the terms of the first to sixth facilities the defendants had, since in or about June 2011, periodically failed to make the required repayments on the first, second, fourth and fifth facilities. By letter dated 29th November, 2016, the plaintiff demanded payment of the sums due and owing on all of the six facilities pursuant to the "*all sums due*" nature of the said facilities. He exhibited a copy of the letters of demand. By further letter dated 9th January, 2017, the plaintiff through its solicitor wrote to the defendants seeking immediate repayment of the amount then due and owing as of 29th November, 2016. He exhibited a copy of the correspondence from the plaintiff's solicitor.

14. He went on to state that despite the terms of the letters of demand, the defendants had failed, refused and neglected to pay the sums due on foot of the said loan accounts. He exhibited statements of account for each of the loan facilities.

15. In a supplemental affidavit sworn on 22nd February, 2019, Mr. Smith gave an overview of the accounts as of 25th February, 2019. In relation to the account bearing Havbell account number 80000324, the last payment of any kind was made to this account in the sum of €162,894 on 6th June, 2017. That was the proceeds of sale from 145 Emmet Road, Inchicore, Dublin 8. As of 25th February, 2019, the arrears on the account stood at

€49,049.17. The total amount outstanding as of that date was €49,236.23. In relation to the loan account bearing Havbell account number 80000365, there had been no payment made to that account since the transfer of the account to Havbell in 2015. Mr. Smith pointed out that, as could be seen from the defendants' own account statements exhibited in the supplemental affidavits sworn by the first defendant, there had been consistently unpaid direct debits since 9th June, 2011. The arrears on that account as of 12th February, 2019, stood at €220,643.77, the total amount outstanding at 25th February, 2019, stood at €221,485.24.

16. With regards to the account bearing Havbell account number 80000426, the last payment to the account of any kind was €800 on 8th February, 2018. As of 12th February, 2019, the arrears on the account stood at €4,176.79. The total amount outstanding as of 25th February, 2019, stood at €949,606.71.

17. In relation to account bearing Havbell number 80001124 the defendants had maintained payments in excess of the monthly instalments for some time. The last payment to the account was made on 8th February, 2019, in the sum of €280. As of 12th February, 2019, the arrears on the account stood at €84,832.36. The total amount outstanding as of 25th February, 2019, stood at €240,269.41. Mr. Smith stated that the arrears were historic in nature and predominately accrued prior to the migration of the defendants' loans. Nevertheless, the loan remained significantly in arrears.

18. In relation to account bearing Havbell number 80001214 the defendants had failed to make a single payment to the account since its migration to the plaintiff. Indeed, as could be seen from the statements exhibited in the first defendant's supplemental affidavit, the defendants began to regularly miss direct debit payments on that account as far back as 13th June, 2011. As of 12th February, 2019, the arrears on the account stood at €145,562.54. The total amount outstanding as of 25th February, 2019, stood at €249,509.08.

19. Finally, in relation to account bearing Havbell number 80001272, the last payment of any kind to the account was €35,491.34 on 14th November, 2017. That was the proceeds of sale from 40 The Corrib, Glenriada, Strokestown Road, County Longford. As of 12th February, 2019, the arrears on the account stood at €106,013.46. The total amount outstanding as of 25th February, 2019, stood at €218,326.63. Mr. Smith exhibited up to date statements of account in respect of each of these accounts.

20. In his first affidavit, Mr. Smith averred at paragraph 23 that a receiver had been appointed by the plaintiff over properties secured by the facilities in January 2017. As of the date of swearing that affidavit the receiver had taken in €36,650 in rental income from the properties and that had been credited against the indebtedness, so that the total amount then due and owing by the defendants stood at €1,869,031.90.

21. In summary therefore the respective arrears across the six accounts claimed by the plaintiff as set out above, amounted to a total arrears balance across the six accounts of €610,278.01. The total principle and arrears balance on the accounts as of 25th February,

2019, stood at €1,928,433.30. Taking account of receipts that had been made in the interim, the plaintiff was therefore seeking judgment in the sum claimed of €1,869,031.90.

Submissions on Behalf of the Defendants

22. On behalf of the defendants, Ms. Taylor B.L. made a number of submissions. Firstly, she submitted that as this was an application for summary judgment, it was well settled that there was a low threshold which had to be crossed by the defendant in order to persuade the Court to have the matter remitted to plenary hearing. In this regard she referred the Court to the decisions in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607, *Harrisrange Limited v. Duncan* [2003] 4 IR 1, *First National Commercial Bank v. Anglin* [1996] 1 IR 75, *National Westminster Bank PLC v.* Daniel [1993] 1 WLR 1453 and *Allied Irish Banks PLC & another v. Killoran & another* [2015] IEHC 850.

23. Counsel submitted that the first issue which would be raised on behalf of the defendants was that, while it was accepted that the plaintiff had made demands for payment of the defendants, it was disputed that they had a right to do so. In particular, the defendants would allege that even if it were established that there was a default on the part of the defendants in making repayments due on foot of any of the individual loan accounts (which was not admitted), that did not entitle the plaintiffs to call in all the loans as they had purported to do. In those circumstances the demands made of the defendants in respect of the loans on which repayments were being made, were unlawful demands and therefore there was no lawful basis for them to obtain judgment in respect of the sums due on any such loan accounts.

24. Secondly, counsel submitted that there was considerable confusion in relation to the amounts claimed by the plaintiff on foot of the various loans. In particular, different total amounts had been claimed at various stages in the proceedings, including a figure that was later admitted as being incorrect, as set out at paragraph 3 of the first affidavit sworn by Mr. Smith. It was submitted that where a plaintiff was seeking summary judgment, the Court must be certain that the actual amount in respect of which judgment was claimed, was properly due and owing by the defendants. It was submitted that in view of the confusion in relation to the total sums claimed at various stages in the proceedings to date, one could not say with certainty what amount, if any, may be due and owing by the defendants to the plaintiff.

25. Furthermore, on the same issue, the defendants would raise the defence that the payment which they had made on or about 18th September, 2007, in the sum of €160,000 was incorrectly applied to account number 1233 when it ought to have been applied to account number 4308, that being the account with the highest interest rate. It was submitted that this was not without significance, as the defendants had exhibited a report from an expert, Mr. Eddie Fitzpatrick, stating that had the payment of €160,000 been made to the higher interest bearing account, rather than the lowest such account, there would have been a saving of almost €52,000, which would have been available to the defendants to make repayments on the various loans.

26. It was further submitted on the issue concerning the interest rates, that it was the opinion of Mr. Fitzpatrick that the interest rates charged by the plaintiff on the various accounts were incorrect. In a report dated 27th September, 2017, Mr. Fitzpatrick had noted that the interest rates on the accounts which were subject to the standard variable rates, had increased by September 2017 to margins which were considerably in excess of the ECB rate, or the three month Euribor rate. In such circumstances he stated that questions needed to be asked as to what exactly were these rates varying against and why those rates were not moving in line with market rates. He went on to state that it was difficult to quantify the actual monetary effect that those variable interest rates had had on the defendants' accounts, as there were many issues to consider including the interest rate actually applied and the effect of that on the repayment schedule. However, he was able to give the following opinion:

> *"I would have no hesitation in stating that if you were to take all the above into consideration there is a greater chance than not that you would not have been in arrears at any time".*

Counsel submitted that on the basis of that report, there was a serious issue to be tried, which of itself warranted the case being remitted to plenary hearing.

27. Finally, counsel stated that there were serious issues to be determined in relation to the conduct of the receiver, who had been appointed over some of the properties secured under the loans. In particular, it would be alleged by the defendants that the receivers sold two of the properties at a gross undervalue. In this regard, the first defendant had exhibited to his affidavit a report from an estate agent showing that the properties at Emmet Road, Dublin 8 and the Longford property had been sold at significant undervalue. It was submitted that had the properties been sold at their true market value, a far greater sum would have been available to the defendants to make repayments under the loans and no question of arrears would have arisen.

28. Counsel further submitted that the receiver had acted inappropriately in failing to account for rents received by him from the properties over which he had been appointed. It was submitted that the defendants were entitled to have that issue litigated and to have the amount of those rents set off against any amount found to be due and owing by the defendants to the plaintiff.

29. In support of these submissions, counsel referred to the decision of Ní Raifeartaigh J. in *AIB v. Marino Motor Works Limited* [2017] IEHC 522, where the defendant had also furnished a report from an expert, wherein his review of the statements of accounts had identified a significant difference between the interest charges on the bank statements and his independent calculations. He had stated that the scale of the discrepancies were "*very significant*". He had stated that according to the bank statements there "*are significant overcharges*" and "*when you take into account the compounding effect that these overcharges are a significant portion of the outstanding debt*". Counsel submitted that Mr. Fitzpatrick's report was to like effect. In the *Marino Motor Works* case the learned Judge had come to the conclusion that having regard to these matters, it was a not a

case that was suitable for disposal by way of summary judgment. She stated as follows at paragraph 32:

> *"Having regard to all of the above matters, it seems to me that the matter is not suitable for disposal by way of summary judgment. I have reached this conclusion with some considerable reservation, but my concern is that a summary judgment would be entered for a particular sum when neither the defendant nor the court is in a position to check, on the information available, that the figures are correct. This is not a straightforward case of a single loan with a single loan account on which the interest charged can be easily calculated. There were multiple accounts and the interest calculation is potentially complex. It has not been done in a manner sufficiently transparent for a professional accountant, on the information available to date, to be able to assess whether the figure is correct. Further, the bank has refused to provide the information when it was requested, albeit that the request was made late in the day."*

30. Counsel submitted that the facts in this case in relation to the dispute concerning interest as set out in Mr. Fitzpatrick's report, meant that this case was very similar to the circumstances in the *Marino Motor Works* case. Accordingly, it was submitted that this action should be remitted to plenary hearing. Counsel further submitted that where expert evidence was necessary, it was settled that it was not appropriate to award summary judgment; see decision in *Munster Based Metals Limited v. Bula Limited*, (Unreported, High Court 29th July, 1983).

31. Counsel submitted that there were mixed issues of law and fact in relation to the issues concerning the conduct of the receiver. It was submitted that it was manifestly unfair for the plaintiff to have an "*each way bet*" by appointing a receiver in the full knowledge that the rental income had previously been used to discharge the loan and then seek summary judgement as a result of an alleged "*default*", which only arose because the receiver ceased to apply the monies collected to that loan. The "*default*" was engineered by the receiver to the benefit of the plaintiff. It was submitted that that would constitute a perverse "*double whammy*" inflicted on the defendants and, on that basis alone, it was submitted that the matter should not be dealt with summarily.

32. Counsel referred to the decision of O'Brien C.J. in *Crawford v. Gillmor* [1891] 3 LR Ir 238, where he stated as follows at page 245:

> *"Final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises."*

33. Counsel also referred to the dicta of Finley C.J. in *Irish National Bank v. Graham* [1995] 2 IR 244 at page 249 – 250:

> *"The purpose of a plenary hearing instead of a summary judgment in a case of this description is for the purpose of resolving a dispute of fact which remains between*

the parties and the determination or resolution of which is necessary for the decision in the case."

34. Counsel also referred to the decision in *Bank of Ireland v. Education Building Society* [1991] 1 IR 220 and to the principles set down by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 IR 1 and in particular to principle 5 thereof.

35. In summary, it was submitted that given the serious irregularities in relation to the interest charged, which had been supported by an accountant's report; the "*fire sale*" of two of the defendants' properties and the receiver collecting rents and not applying same to "*arrear*" accounts, the defendants would be entitled to a set off against any sum found to be due and owing by them to the plaintiff. Having regard to the nature and number of issues so raised, it was submitted that it was appropriate that the case be remitted to plenary hearing.

The Plaintiff's Submissions in Reply

36. In relation to the default issue and the question of whether the plaintiff was entitled to seek repayment from the defendants on all of the loan accounts, it was submitted that under clause 2.5 of the Permanent TSB Mortgage Conditions 2002, it was provided as follows:

"2.5 The mortgagor will and hereby covenants to pay to Permanent TSB and discharge on demand (or on such terms as may otherwise be agreed in writing) the general indebtedness and liability."

37. The term *"the general indebtedness and liability"* was defined in clause 1.21 to mean all indebtedness and liability incurred by the mortgagor to Permanent TSB in the usual course of banking business, being the balance or balances which on the account or accounts of the mortgagor with Permanent TSB either alone or jointly with any other person or persons remains or remain unpaid, whether at the date of the mortgage or at any time thereafter. The clause further provided that this could be in respect of bills, notes or drafts acceptances paid or discounted or advances made at the request of or to the use or accommodation of the mortgagor and all monies for which the mortgagor may in any way be liable to Permanent TSB either as principle or surety. It further provided that interest would be payable from the date of demand at the rate or rates charged by the bank and calculated according to the custom of bankers save and except the Advance and interest thereon at the Applicable Rate.

38. Mr. Rooney B.L. on behalf of the plaintiff submitted that clause 2.5 of the terms and conditions applicable to each of the facilities, which had been exhibited in Mr. Smith's affidavit, explicitly allowed for demand to be made of the general indebtedness and liability. In effect the plaintiff was entitled to make a demand on foot of each and every loan facility whenever they chose. In this case, as had been set out in the supplemental affidavit of Mr. Smith, all of the loan accounts remained in arrears to varying degrees and no payments whatsoever were being made on four of the loan accounts. In these circumstances it was submitted that there simply could not be any question as to the

defendants being in default, nor to the right of the plaintiff to demand repayment of all sums due and owing.

39. Counsel further pointed out that it had been repeatedly stated in the two replying affidavits sworn by the first defendant that he had not made any default in relation to his indebtedness under the various loans. Counsel submitted that that was demonstrably untrue. The account statements, which had been exhibited in both the affidavits sworn by Mr. Smith and the affidavits sworn by the first defendant, clearly showed that while some payments had been made on some of the accounts, there was an arrears balance across all six accounts totalling €610,278.01. The total principle and arrears balance as of 25th February, 2019, stood at €1,928,433.30. It was submitted that in these circumstances, it was simply untrue to assert that the defendants had not defaulted on their repayment obligations under the various loans. Such default was clearly visible from the statements of account which had been exhibited.

40. In relation to the points raised by the defendants concerning the interest rates which had been charged by the plaintiff on the various loans, counsel made a preliminary objection in relation to the report furnished by Mr. Fitzpatrick. He stated that this report should not be considered by the Court for two reasons. Firstly, it was effectively hearsay and as such its admission would be in breach of the provisions of the Rules of the Superior Court, Order 40, rule 4.

41. Secondly, he submitted that there was a more fundamental objection to the admission of Mr. Fitzpatrick's report in evidence. He submitted that the report was inadmissible, as there was no evidence before the Court that Mr. Fitzpatrick was an expert as alleged. There was no statement as to any qualifications or indeed even any experience that he had in banking matters. The Court was totally in the dark as to whether he held any relevant qualifications whatsoever. There was no *curriculum vitae* submitted with the report, nor was there any indication thereon that he held any degrees, or other qualifications in banking or financial matters. In such circumstances, it was submitted that the Court should not take account of the opinions expressed by Mr. Fitzpatrick in his brief report.

42. Counsel further submitted that even if the Court were to hold against him on that point, the report did not provide a basis on which the Court should reasonably deny the plaintiff summary judgment in the matter. This was due to the fact that Mr. Fitzpatrick acknowledged that some of the loans were on tracker rates and he stated that these were very clearly identifiable and quantifiable. He did not make any specific complaint in relation to the interest rates applied to those loans. He did highlight the standard variable rates applied to two of the loans being account numbers 4308 and 2303. He went on to comment upon the interest rates that had been charged and the margin by which they exceeded the ECB rate, or the three month Euribor rate. Based on that, he stated that questions needed to be asked: what exactly were these rates varying against and why the rates were not moving in line with the market rates? He went on to state that it was difficult to quantify the monetary effect that those interest rates had had on the

defendants' accounts. He came to a somewhat vague conclusion, as set out earlier in the judgment.

43. Mr. Rooney B.L. stated that the loans in question were admitted to be subject to interest at the standard variable rate. The bank was entitled to set that rate at whatever level it chose. Mr. Fitzpatrick did not say that these rates were wrong or unlawful, he only asked what the rates were varying against. A standard variable rate does not vary against anything. He submitted that the bank was entitled to vary the rates as and when it chose. It was clear from the statements of account that changes in interest rate had been highlighted to the defendants as they were made over time.

44. Counsel further pointed out that this case was very different to the report which had been furnished by the expert in the *Marino Motor Works* case, there the defendant had exhibited a report from a person who could fairly be said to be an expert. The Judge noted that Mr. Weakliam, who had provided the report, was a fellow of the ACCA and a *licentiate* of the Institute of Bankers in Ireland. He was a qualified accountant and had worked as such and as a financial analyst with AIB Group from 1984 to 1996, before founding a consultancy practice. Furthermore, it would appear from the content of the report as quoted in the judgment, that he was able to give far more concrete examples of where the bank had applied the wrong interest rate in that case. Counsel submitted that Mr. Fitzpatrick's report was glaringly deficient both in relation to a statement of his qualifications and in relation to his conclusions.

45. In relation to the defence raised in respect of the payment made in 2007 of €160,000, counsel submitted that there was no evidence that the bank had acted wrongly, or in breach of contract by applying that sum to the account against which it was actually credited. In the course of submission to the Court, counsel for the defendants had stated that that payment was made during the so called "*Celtic Tiger*" years and as such, there was no paper work accompanying it. The defendants simply paid the money to the bank. Mr. Rooney submitted that as the payment had been made in 2007 and as there had been no objection by the defendants at any time subsequent thereto, until the present proceedings that the money had been credited to the wrong account, their action, if any, was long since statute barred. In these circumstances there was no merit in the point raised on behalf of the defendants.

46. Without prejudice to that submission, counsel stated that even taking that point at its highest, that would only allow for a set off of €52,000 according to Mr. Fitzpatrick's report. If the Court chose to hold with the defendants on that point, it was submitted that the appropriate course would be to grant the plaintiff judgment in the remainder of the sum and remit the issue in respect of the misapplication of the payment and the resultant alleged overcharging of interest of €52,000, to plenary hearing. In this regard counsel referred the Court to the decision in *AIB v. Killoran* [2015] IEHC 850, at paragraph 55.

47. Finally, in relation to the allegations made by the defendants that the receiver appointed by the plaintiff had acted unlawfully or inappropriately by selling the two named properties at a gross undervalue, and by allegedly not giving credit to the defendants for

the rents received by the receiver, in respect of the properties over which he had been appointed, counsel stated that while it was not admitted that the receiver had acted in any way inappropriately, insofar as the plaintiffs did have any complaint in relation to the actions of the receiver this was a matter between the plaintiff and the receiver. In this regard counsel relied on the decision in *Close Invoice Finance Limited v. Gabriel Matthews & another* [2015] IECA 132, where it was held that generally speaking the receiver would be deemed to be the agent of the debtor and not the agent of the debenture holder or bank who had appointed him, unless the debenture holder or bank had directed the receiver to act in a particular way.

48. Without prejudice to the generality of that submission, counsel further stated that the two properties in question had not been sold at undervalue. This was due to the fact that they had been sold at auction and therefore had obtained the best price available on the market at the time of sale.

49. In relation to the issue concerning rents, while it was not conceded that the defendants had any legitimate complaint in this regard, counsel pointed out that if they did have a grievance that the receiver had not properly accounted for the rents received by him, that was a matter between the defendants and the receiver. That was clear from the Close Invoice case cited above and from the subsequent decision of Barrett J. in *Ennis Property Finance DAC v. Murphy* [2017] IEHC 573. It was submitted that the mere assertion by the defendants that the receiver had not properly accounted for the rents received by him, was not sufficient to prevent the plaintiff obtaining summary judgment.

Conclusions

50. The approach which the Court should take to an application such as this, is well settled in law. The relevant test was set down by the Supreme Court as far back as 1996 in *First National Commercial Bank v. Anglin* [1996] 1 IR 75. In that case Murphy J., giving the judgment of the Court, endorsed the following test laid down in *Banque de Paris v. DeNaray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank PLC v. Daniel* [1993] 1 WLR 1453:

> *"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."*

51. The test set down in the Anglin case has been applied in a number of cases in the intervening years. The appropriate test was more recently set out in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607 in which case Hardiman J. stated as follows at page 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 defendants affidavits fail to disclose even an arguable case?"

52. In *Harrisrange Limited v. Duncan* [2003] 4 IR 1, McKechnie J. having analysed the relevant case law, set out a helpful summary of the relevant principles. It is not necessary to set these out in this judgment, as they are very well known. The Court has had regard to all of these cases and to the principles set out in *Harrisrange* in reaching its determination herein.

53. The Court has also had regard to the *dicta* of Moriarty J. in *Allied Irish Banks v. Killoran* [2015] IEHC 850, where he warned that the Court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. He advised that courts must be alert to defendants who seek merely to defer the evil day on the basis of arguments that do not pass muster, and must remain mindful of the *de minimis* rule in assessing summary judgment applications, see paragraph 56 of the judgment.

54. The first issue which the Court must determine is whether there was any default by the defendants in making the repayments due on the loans as and when they fell due. In his affidavit, the first defendant repeatedly stated that the defendants had not been in any such default. I am satisfied having regard to the content of the statements of account exhibited in the affidavits of Mr. Smith and also in the first defendant's own affidavits, that while some payments have been made in respect of certain of the accounts, there are arrears owing on all the accounts. In these circumstances it cannot credibly be argued that the defendants have not defaulted in their repayment obligations in respect of the loans.

55. In relation to the right of the plaintiff to call in the loans and seek repayment of all of them, I am satisfied that at the date of demand by the plaintiff, they were entitled to do so. This arises by virtue of the provisions of clauses 1.21 and 2.5 which gave them a right to call in the loans on demand. Accordingly, given the level of default and arrears that had arisen, they were entitled to issue the letters of demand which they did on 29th November, 2016, and subsequently through their solicitor on 9th January, 2017. Accordingly, I am satisfied that the plaintiff has made a lawful demand for repayment of each of the loans. I am further satisfied having regard to the content of the affidavit sworn by Mr. Smith and the documents exhibited thereto, that the level of arrears and the level of total indebtedness as stated therein, is properly due and owing by the defendants to the plaintiff.

56. I turn now to the issue in respect of the interest rates that were applied by the plaintiff to the various accounts. The defendants' assertion that there is an issue to be tried in this regard, is based on the report furnished by Mr. Eddie Fitzpatrick on 27th September, 2017. The first objection taken by Mr. Rooney B.L. on behalf of the plaintiff, to the admission of that report was that it contained hearsay evidence and that as such its admission was prohibited pursuant to the provisions of the Rules of the Superior Courts Order 40, rule 4. I do not think that that submission is well founded. This is an application

for summary judgment and while it may not be technically an interlocutory application, it is in the nature of an interlocutory application. In these circumstances as is recognised by the rule, I think it is appropriate to admit hearsay evidence. However, I am not even sure that the content of Mr. Fitzpatrick's report could properly be classified as being hearsay evidence. Hearsay evidence is where a person gives evidence of what was said to him by a third party, who is not before the Court. While it could be argued that the fact that Mr. Fitzpatrick's report is merely exhibited in the affidavit sworn by the first defendant, that that is therefore the giving of hearsay evidence by the first defendant in respect of what he has been told by Mr. Fitzpatrick; I think that such argument is incorrect. Exhibiting the report of Mr. Fitzpatrick, is similar to having Mr. Fitzpatrick swear his own affidavit in the same terms as were set out in his report. Accordingly, I do not think that the report is inadmissible pursuant to Order 40, rule 4.

57. However, I think that Mr. Rooney's second objection to the admission of Mr. Fitzpatrick's report is well founded. In that report, there is no indication whatsoever that Mr. Fitzpatrick holds any qualification at all in relation to banking or financial matters. Nor is there any statement that he has any experience in relation to banking or financial matters. Broadly speaking, there are essentially two types of witnesses whose evidence can be tendered to the Court. The first are witnesses as to fact, who can give evidence as to what they saw and heard and did at a particular time. The second category is expert evidence, where the expert due to his or her knowledge, qualifications and experience in the relevant area, is permitted to give opinion evidence on the issue before the Court. Experts are the only people permitted to give opinion evidence before a Court. While it is certainly true that there is no specific threshold which has to be met before a person can be classed as being an expert, there must be some evidence before the Court that the person proffered as an expert, does in fact have some expertise and experience in the relevant area upon which he or she proposes to give an opinion. In this case such evidence is totally lacking. I simply do not know who Mr. Fitzpatrick is; what qualifications, if any, he may hold and what experience, if any, he may have in banking and financial matters. In the absence of any such evidence, I decline to admit Mr. Fitzpatrick's report in evidence.

58. However, even if I am wrong in that, I am not satisfied that the content of his report establishes an arguable defence on behalf of the defendants. All his report does is two things: firstly, it states that had the payment made in 2007 of €160,000 been applied to the highest interest bearing account, rather than to the lowest interest bearing account, the defendants would have made a saving of circa €52,000. Secondly, he states that in respect of two of the accounts, which were subject to the standard variable rate of interest, questions needed to be asked in relation to the margin against which the standard variable rate had been set. I accept the submissions made by Mr. Rooney B.L. in this regard. As it was a standard variable rate, it was not computed against any particular base level. It was a rate which the bank was entitled to charge and vary from time to time. This it did over the years and notice to that effect was given in the statements of account. The defendants did not object to such rates of interest being applied during that time. Notwithstanding that, I do not see that they have any legitimate complaint in

relation to the rates of interest charged as set out in the statements of account exhibited in respect of the relevant loans.

59. Turning now to the allegation that the payment made on behalf of the defendants in 2007 was applied to the wrong account, I do not think that there is any substance to this ground of defence. The defendants were not able to produce any documentary evidence concerning the payment of this sum, nor any evidence that that sum had been credited by the plaintiff to the wrong account. It was accepted by counsel on behalf of the defendants that they were long since statute barred from making any complaint in this regard. There is no evidence before the Court that Permanent TSB acted in breach of contract or unlawfully in crediting that payment to the account to which it did. Accordingly, this ground of defence is without substance.

60. Finally, in relation to the assertion that the defendants have an arguable defence based on the alleged wrongdoing of the receiver appointed by the plaintiff in selling two of the properties at an alleged gross undervalue and in allegedly failing to account for rents received by him in respect of the mortgaged properties, I am satisfied that the defendants cannot legitimately resist summary judgment on this basis.

61. It is well established in Irish law that a receiver, once appointed, becomes an agent of the debtor, rather than of the party who appointed him. The debenture holder who appointed the receiver can only become liable to the debtor company, or to guarantors in respect of that company, in circumstances where it is established that the debenture holder directed the receiver to act in such a way as to cause loss to the debtor and by extension to the guarantors. This is clearly established in the decision of the Court of Appeal in *Close Invoice Finance Limited v. Matthews* [2015] IECA 132 and in the decision of Barrett J. in *Ennis Property Finance DAC v. Raymond Murphy* [2017] IEHC 573. Accordingly, I am of the view that if the defendants have any legitimate grievance in respect of the conduct of the receivership carried out by the receiver, their action, if any, is against the receiver. Such allegations of misconduct do not afford them a defence to these proceedings, there being no evidence before the Court that the plaintiff directed the receiver to act in any particular way, or otherwise interfered in the receivership.

62. Even if I were to hold that the actions of the receiver could provide a legitimate defence to the within application for judgment, I am not satisfied that the grounds asserted by the defendants as representing inappropriate or negligent behaviour on the part of the receiver, are in fact established. While it is alleged that the two properties were sold at an undervalue, they were sold at public auction and therefore it cannot be argued that they did not achieve the best price available on the market at the time that they went to auction. In relation to the allegation that the receiver did not apply the rents received in the appropriate manner, there is no evidence of any such misapplication of funds by the receiver.

63. Having regard to my conclusions as set out above, I am not satisfied that the defendants have reached the admittedly low threshold for resisting summary judgment as set out in the cases cited earlier in this judgment. For the reasons set out herein, I am satisfied that

the plaintiff is entitled to summary judgment against the defendants. Accordingly, I award the plaintiff judgment in the sum of €1,869,031.90 against the defendants jointly and severally.