THE HIGH COURT
CHANCERY

[2021] IEHC 301
[2018 No. 2658P]

BETWEEN

EOIN FANNON

PLAINTIFF

AND
TOM O'BRIEN AND PROMONTORIA (OYSTER) DAC
AND BY ORDER ULSTER BANK IRELAND DAC

DEFENDANTS

JUDGMENT of Mr. Justice Keane delivered on the 28 April 2021

Introduction

1. The third defendant, Ulster Bank Ireland DAC, moves for the dismissal of the claims brought against it by the plaintiff, Eoin Fannon, as disclosing no cause of action and being bound to fail.

Background

2. Mr Fannon and his wife borrowed the sum of €501,500 from First Active plc ('First Active') pursuant to an agreement signed on 17 April 2007 ('the loan agreement'), to purchase an apartment in the Dublin docklands ('the property'). As security for the loan, Mr Fannon and his wife executed a deed of mortgage over the property in favour of First Active on 31 May 2007 ('the mortgage').

3. In 2009, the loan was transferred to Ulster Bank Ireland Limited, now Ulster Bank Ireland DAC ('Ulster').

4. By deed of transfer, dated 19 December 2016, Ulster assigned the loan and transferred the mortgage security to Promontoria (Oyster) DAC ('Promontoria'). On 9 March 2017, Promontoria was registered as the owner of the charge on the property.

The pleadings

i. the original claim

5. A plenary summons issued on behalf of Mr Fannon on 26 March 2018, and he delivered a statement of claim on the same date. The defendants he identified were Tom O'Brien and Promontoria.

6. In that statement of claim, having acknowledged the existence of the loan agreement and mortgage, and having put Promontoria on proof that it has assumed the rights and interests of the mortgagee of the property, Mr Fannon pleads in material part as follows.

7. On or about 14 November 2014, Ulster offered him a new loan repayment schedule, which he accepted on 20 November 2014. That was a distinct agreement ('the repayment agreement') – by implication separate from, or collateral to, the original loan agreement of 17 April 2007.

8. The repayment agreement provided: (a) that Mr Fannon was to repay the sum of €958 monthly for three years; (b) that the principal and interest repayment obligations under

the loan agreement were to be suspended on that basis; and (c) that the repayment agreement was to supersede any and all previous agreements.

9. At the time of the purported transfer of his mortgage loan to Promontoria, Mr Fannon was notified that '...*there is nothing in this notice that changes your contractual obligations to Ulster Bank DAC in respect of these borrowings*.'

10. While Mr Fannon complied with the terms of the repayment agreement, Promontoria breached them by appointing Tom O'Brien as receiver over the property.

11. Further, in communicating with the tenant of the property that Mr Fannon was in default on his mortgage loan; that Mr O'Brien had been properly appointed receiver of the property; and that the rent for the property should be paid to Mr O'Brien and not Mr Fannon, the defendants are liable for the torts of trespass and defamation against Mr Fannon.

12. Thus, Mr Fannon claims an entitlement to various declarations and injunctions against Mr O'Brien and Promontoria, as well as damages against them for breach of contract, breach of duty, defamation and trespass.

ii. the defence of the original defendants

13. Mr O'Brien and Promontoria delivered their joint defence on 18 April 2019. Having placed reliance on the original loan agreement; the transfer of First Active's interest in that agreement to Ulster and then Promontoria; and the registration of Promontoria as the owner of the mortgage charge on the property, they go on to deny the existence of any separate repayment agreement. More specifically, they plead that the contents of subsequent letters from Ulster to Mr Fannon and his wife are inconsistent with the existence of any such separate agreement.

14. Mr O'Brien and Promontoria then plead as follows. Mr Fannon and his wife were in default of their obligations under the loan agreement for significant periods between 2012 and 2017. Under clause 2(a)(i) of the mortgage, the mortgagors were required to repay the balance due on the mortgage loan to the mortgagee on the provision of one month's notice in writing to that effect. Promontoria gave such notice in writing on 24 November 2017, when the balance then outstanding on the mortgage loan was €473,858.62. Mr Fannon and his wife failed to repay that sum and Promontoria appointed Mr O'Brien as receiver over the property on 1 February 2018, pursuant to its entitlement to do so under the mortgage.

15. Hence, Mr O'Brien and Promontoria deny that Mr Fannon is entitled to the relief that he claims, or any relief, against either of them.

iii. the joinder of Ulster

16. By order of Reynolds J, made on 14 October 2019, Ulster was joined as a co-defendant in the proceedings and Mr Fannon was given three weeks to serve an amended plenary

summons and statement of claim upon it. By further order of Reynolds J made on 14 January 2020, the period allowed for serving those documents on Ulster was extended by fourteen days from that date. The plenary summons recites that it was amended on 23 January 2020.

iv. the amended claim

17. In his amended statement of claim, ostensibly delivered on 1 November 2019, Mr Fannon includes the following additional pleas.

18. Having regard to what Mr O'Brien and Promontoria have pleaded in their defence, Ulster failed to inform Promontoria of the existence of the repayment agreement. That was an agreement between Mr Fannon and Ulster and not, as originally pleaded, one between Mr Fannon, on one side, and Mr O'Brien and Promontoria, on the other.

19. In consequence, Promontoria's wrongful appointment of Mr O'Brien as receiver over the property was caused by the breach of contract, negligence and breach of duty of Ulster in failing or neglecting to notify Promontoria of the existence and terms of the repayment agreement.

20. Thus, Mr Fannon seeks damages for breach of contract, negligence, trespass and defamation against Ulster.

v. Ulster's defence

21. Ulster delivered its defence on 13 February 2020. As a preliminary objection, it pleads that Mr Fannon's claims against it do not disclose a reasonable cause of action and are bound to fail. That preliminary objection is, of course, the subject of the motion at hand.

22. Without prejudice to that preliminary objection, Ulster goes on to plead, in essence, as follows.

23. It did not enter a separate, or any, repayment agreement with Mr Fannon in November 2014. In consequence, the pre-existing interest-only repayment arrangement under Mr Fannon's mortgage loan came to an end in December 2014, after which he was required to repay interest and capital in accordance with the terms of the loan but failed to do so.

24. In consequence, Ulster is not liable to Mr Fannon for any breach of contract, negligence, breach of duty or wrongful conduct of any kind.

25. In particular, Ulster has no liability to Mr Fannon for defamation of any sort, which claim is, in any event, barred under s. 11 of the Statute of Limitations, as amended by s. 38 of the Defamation Act 2009.

26. Thus, Mr Fannon has no entitlement to the relief he claims, or any relief, against Ulster.

vi. Mr Fannon's voluntary discovery request to Ulster

27. On 16 April 2020, the solicitors for Mr Fannon wrote to those for Ulster seeking voluntary discovery of all documentation concerning the mortgage of the property from the creation of the mortgage to the present, including all correspondence, all records of correspondence, and all recordings of telephone calls between Ulster and Mr Fannon concerning that mortgage.

28. The solicitors for Ulster replied on 21 April 2020, reiterating its position that it is not a necessary party to the action and threatening to apply to have the proceedings against it dismissed should Mr Fannon fail to serve a notice of discontinuance within 14 days. The letter continued that, in the event of the discontinuance of the proceedings against it, Ulster '*might consider*' consenting to an order that it make discovery, as a non-party, of: (1) all documents relating to requests made by Mr Fannon between 1 October and 31 December 2014 for an alternative payment arrangement; and (2) all recordings of telephone calls made in December 2014 relating to requests made by Mr Fannon for an alternative payment arrangement.

The motion

29. The present motion issued on 15 June 2020 and was initially made returnable for 2 November 2020. It is grounded on an affidavit of Sean Linnane, a manager with Ulster, sworn on 24 May 2020.

30. Mr Fannon swore an affidavit in reply on 29 October 2020.

31. In their respective affidavits, both Mr Linnane and Mr Fannon refer to an affidavit sworn on 3 July 2018 by Sarah Mulvey, a manager with Ulster, on behalf of Mr O'Brien and Promontoria in opposition to Mr Fannon's application for interlocutory injunctive relief. While Ms Mulvey's affidavit and the exhibits to it were included in the motion papers submitted to me, I have not had sight of any of the other papers in that injunction application. Nor have I had produced to me a copy of the order made by the court on that application.

32. I heard the motion remotely on 13 January 2021. Rory White BL, instructed by Capital Law Partners LLP, appeared for Ulster. Benedict Ó Floinn SC, with Martin Canny BL and Hazel Fannon BL, instructed by Killeen Solicitors, appeared for Mr Fannon. Anthony Thuillier BL, instructed by Byrne Wallace, Solicitors, held a watching brief on behalf of Mr O'Brien and Promontoria.

The relief claimed

33. In its motion, Ulster seeks one of the following three reliefs:

    (a) An order pursuant to Order 19, rule 28 of the Rules of the Superior Courts ('the RSC') or the inherent jurisdiction of the court, or both, dismissing Mr Fannon's claim against Ulster on the grounds that it fails to disclose any reasonable cause of action and is bound to fail;

    (b) An order pursuant to O. 19, r. 27 of the RSC or the inherent jurisdiction of the court, or both, striking out the plenary summons and statement of claim, or

portions of them, as unnecessary or failing to disclose any reasonable cause of action; or

(c) An order pursuant to O. 15, r. 13 of the RSC or the inherent jurisdiction of the court, or both, striking out Mr Fannon's claim against Ulster on the ground that Ulster's joinder and presence before the court is not necessary.

The basis for seeking relief

34. Ulster submits that Mr Fannon's various claims against it all hinge on a discrete legal issue that can only be resolved against him. That issue is whether a borrower can have any claim against the assignor of his loan for alleged breaches of the loan contract by the assignee. Ulster argues that Mr Fannon can have no claim against it in contract or in tort because of the operation and effect of the provisions of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 ('the Judicature Act'), as interpreted and applied by the Court of Appeal in *McGuinness v Kenmare Property Company Limited* [2015] IECA 299, (Unreported, Court of Appeal (Kelly, Finlay Geoghegan and Irvine JJ), 21 December 2015) ('*McGuinness*').

35. Section 28(6) of the Judicature Act provides, in material part:

> 'Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor....'

36. *McGuinness* was an appeal against the refusal by the High Court of an application for leave to join a co-defendant in those proceedings. Mr McGuinness was alleged to have borrowed large sums of money from Irish Bank Resolution Corporation ('IBRC'), which had since gone into special liquidation. Those borrowings were repayable on demand and were secured by mortgages over five apartments and an interest held in a property fund. Kenmare Property Company ('Kenmare') claimed that it had purchased the relevant loans, which had in consequence been assigned to it by IBRC, and that IBRC had notified Mr McGuinness of that assignment. Kenmare demanded repayment of the loans and, in default of repayment, appointed Shane McCarthy as receiver of the apartments.

37. Mr McGuinness issued proceedings against Kenmare and Mr McCarthy but could not do so against IBRC without the leave of the court under s. 6(2)(b) of the Irish Bank Resolution Corporation Act 2013 ('the 2013 Act'). In the general indorsement of claim in his plenary summons, Mr McGuinness had claimed the following substantive reliefs:

(1) Damages for negligence, breach of contract and negligent misrepresentation against IBRC for the alleged mismanagement of, and overcharging on, his loan accounts.

(2) Damages for negligence, breach of contract and negligent misrepresentation against IBRC the alleged mis-selling and mismanagement of the property fund.

(3) A declaration that his loans had not been lawfully transferred to Kenmare, rendering its appointment of Mr McCarthy as receiver over the apartments null and void.

(4) A declaration that a *lis pendens* be registered over the apartments.

(5) Damages for negligence and breach of contract against IBRC and Kenmare for an alleged conflict of interest resulting from the employment by Kenmare of a former employee of IBRC.

38. In order to obtain leave to join IBRC as a defendant to those proceedings, Mr McGuinness had to surmount the low bar of the following two-fold test:

(1) that, for the purpose of the jurisdiction to order the joinder of a defendant under O. 15, r. 13 of the RSC, he could demonstrate a stateable case against IBRC – *Allied Irish Coal Supplies v Powell Duffryn International Fuels Ltd* [1998] 2 IR 519 (at 527); and

(2) that, for the purposes of s. 6(2)(b) of the 2013 Act, he could demonstrate that it was right and fair for the court to grant leave to proceed against IBRC and that the issues raised could not be more conveniently decided in the course of the winding up – *Wright-Morris v Irish Bank Resolution Corporation Ltd (In special liquidation)* [2014] 3 IR 468 (at 479).

39. IBRC opposed the application for leave to join it as a defendant on the basis that, by operation of s. 28(6) of the Judicature Act, Mr McGuinness could have no stateable case against it.

40. In giving judgment for the Court of Appeal, Kelly J stated:

'22. The IBRC argument runs that having regard to that statutory provision, as the loans in question have been assigned to Kenmare, it (Kenmare) has the exclusive right to demand repayment and enforcement of the loan obligations. Thus, any action seeking to restrain the enforcement of those obligations must be brought against Kenmare. It is argued that Mr McGuinness thus has no right to litigate in respect of the reliefs sought in the general endorsement of claim on the plenary summons.

23. I have no difficulty in accepting the validity of that argument in respect of reliefs 3, 4 and 5 identified on the general indorsement of claim. Relief 3 seeks a declaration

that the loans had not been properly and lawfully transferred to Kenmare and that, accordingly, the appointment of Mr McCarthy is void. Equally, the declaration concerning the *lis pendens* can be dealt with by Kenmare. The claim for damages at para. 5 of the indorsement of claim is one which arises out of an alleged conflict of interest because of Kenmare's employment of a former official. Again, that is a matter that falls to be dealt with by Kenmare.

24. I have a good deal more difficulty in accepting the validity of the IBRC argument in respect of the reliefs sought at paras. 1 and 2 of the summons, a difficulty bolstered by the clear intention of Kenmare to plead that any allegation concerning negligent misrepresentation or mis-selling of the loans is a matter in respect of which it washes its hands. Kenmare says those reliefs fall to be dealt with exclusively by IBRC. Notwithstanding that, counsel for IBRC contends that the reliefs sought at paras. 1 and 2 of the indorsement of claim fall to be dealt with exclusively by Kenmare.

25. Reliefs 1 and 2 are somewhat augmented by the contents of para. 22 of the affidavit relied upon by Mr McGuinness in his application to the High Court. There he said:

> *'I say that neither Eileen nor myself owe any sum to [Kenmare] or Pepper Financial Services ['Pepper'] in that:-*
>
> *(1) The facilities would have been cleared in full back in 2009 had the associate director carried out what had been verbally agreed at the meeting in the Hermitage Hotel in Portlaoise in January 2009.*
>
> *(2) A deed of ownership of the loan book has not been provided by Pepper or Kenmare.*
>
> *(3) A deed of appointment of [Pepper] has not been provided.*
>
> *(4) In the event that the court finds any amount due which is denied there is an overcharge because of the use of a 360 day year.*
>
> *(5) The amount of €1,736,713.26 demanded is incorrect.*
>
> *(6) If the receiver is allowed to take over, Revenue will be denied VAT receipts on rent received and also on the eventual sale of the properties.'*

26. While some of these matters clearly can be dealt with by Kenmare allegations concerning the events which took place years prior to Kenmare's arrival on the scene may not.'

41. On behalf of the Court of Appeal, Kelly J took note of the statement of Lord Hobhouse for the United Kingdom Privy Council in *Government of Newfoundland v Newfoundland Railway Co* (1887) 13 App. Cas. 199 (at 213) that unliquidated damages could be set off

against an assignee, 'if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment', as applied by Lynch J in *International Factors (Ireland) Ltd v Midland International Limited* (Unreported, High Court, 9 December 1993), before continuing:

'36. I have no difficulty in accepting the principle that the assignee takes subject to equities and that those equities include a right to set off, but I do not accept that that gives right to the result sought for by IBRC.

37. The cases cited and the principles established in them, do not appear to me to be applicable to this case.

38. In the cases relied upon, the assignee was the plaintiff in the proceedings. The defendant was a counterclaimant seeking damages arising out of a breach of the assigned contract. In this case, Mr McGuinness is the plaintiff. He is not merely seeking damages for breach of a contractual obligation, but also in respect of alleged tortious activity on the part of IBRC and its officials. If he succeeds in his claim for damages for such activity, he will utilise it in set off against any monetary obligations which he may have on foot of his borrowing. I do not think that any unliquidated damages which may be awarded him in tort can be regarded as *"flowing out of and inseparably connected with the dealings and transactions which gave rise to the subject of the assignment"* per Lord Hobhouse.

39. Furthermore, to exclude IBRC from the proceedings would be to place Mr McGuinness at a considerable litigious disadvantage. First, he would immediately be confronted with a line of defence which I have already identified on the part of the Kenmare to the effect that it has no liability in respect of any tortious activities on the part of IBRC or its officials. That line of argument may or may not be successful, but I do think that it would be fair or appropriate that Mr McGuinness should be put to the hazard in respect of it. Second, if IBRC are not defendants in the proceedings, he will not be in a position to obtain discovery against them other than on a non-party basis. Whilst these matters would not, of themselves, be determinative they add weight to the case in favour of the joinder of IBRC.

40. In these circumstances, I have come to the conclusion that the nature of the tortious claim which is sought to be advanced by Mr McGuinness is such as to justify the joinder of IBRC. Accordingly, I would allow this appeal and grant leave to pursue the claim against IBRC pursuant to s. 6(2)(b) of the [2013] Act.'

The basis for opposing the application

42. Mr Fannon contends that he is advancing three separate heads of claim against Ulster, each of which is stateable and none of which is captured by the proposition accepted in *McGuinness* that where a debt has been assigned absolutely and express notice of that assignment has been given to the debtor, then any action seeking to restrain the enforcement of the debt must be taken against the assignee and not the assignor.

43. Those three heads of claim are:

(a) damages for Ulster's alleged breach of the repayment agreement – an agreement separate from, or collateral to, the loan agreement ostensibly assigned by Ulster to Promontoria – in failing to notify Promontoria of the existence and effect of that agreement.

(b) damages in negligence for Ulster's alleged breach of duty in failing to inform Promontoria of the existence and effect of the repayment agreement.

(c) damages in both trespass and defamation for the actions of Ulster, as well as Mr O'Brien and Promontoria, in informing the tenant of the property that Mr Fannon was in arrears with the mortgage loan on the property, that Mr O'Brien had been lawfully appointed receiver over the property, and that the rent on the property must be paid to Mr O'Brien, and in procuring a change in the title of the ownership of the property by the management company of the building in which it is located.

The test for striking out proceedings

44. For obvious reasons, Ulster primarily invokes the inherent jurisdiction to strike out proceedings that are bound to fail, rather than the narrower one conferred by O. 19, r. 28 of the RSC.

45. As Clarke J explained in *Moylist Construction Ltd v Doheny* [2016] 2 IR 283 (at 287):

'[7] At least since the decision of Costello J in *Barry v Buckley* [1981] I.R. 306, it has been clear that the courts have an inherent jurisdiction to strike out proceedings as being bound to fail, which jurisdiction is in addition to the somewhat separate entitlement of a court to strike out proceedings under O. 19, r. 28 of the Rules of the Superior Courts 1986. The distinction between the two forms of jurisdiction is analysed in *Salthill Properties Ltd v. Royal Bank of Scotland plc* [2009] IEHC 207, (Unreported, High Court, Clarke., 30 April 2009) which was approved by this court in *Lopes v. Minister for Justice* [2014] IESC 21, [2014] 2 I.R. 301. An application under the rules is based on a contention that the case as pleaded does not disclose a cause of action. The inherent jurisdiction under *Barry v. Buckley* extends to cases where it can be shown that there is no arguable basis in fact and law for the claim made. That the facts, and in particular an analysis of documents, can be addressed at least to some extent in the context of such an application is clear from the judgment of this court in *Keohane v Hynes* [2014] IESC 66, (Unreported, Supreme Court, 20 November 2014).'

46. Nonetheless, as Costello J expressly acknowledged in *Barry v Buckley* (at 308), the inherent jurisdiction should be exercised sparingly and only in clear cases. Moreover, as Clarke J pointed out in his judgment for the Supreme Court in *Keohane v Hynes* (at para. 6.2), the extent to which it is appropriate for the court to assess the evidence and the facts on a motion to dismiss as being bound to fail is extremely limited. In adopting that

position, Clarke J in part relied on the following passage from the judgment of Barron J in the earlier case of *Jodifern Ltd v Fitzgerald* [2000] 3 IR 321 (at 333):

> 'The function of the court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself.'

47. In *Moylist* (at 287-288), Clarke J adopted the following conclusions from his earlier judgment in Keohane:

> '6.5 It is important, for the avoidance of any doubt, that the overall principle be clearly stated. As pointed out in many of the authorities, not least in the judgment of Murray J. in *Jodifern Ltd. v. Fitzgerald* [2000] 3 I.R. 321, the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in *Jodifern Ltd. v. Fitzgerald* , whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis.
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> 6.6 It is for that reason that all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law. It is against that background that the extent of the court's entitlement to look at the facts needs to be judged.'

48. Clarke J continued in (at 289-290):

> '[12] However, in addition, it seems to me that the comments made in [*Keohane*] in reality stem from a more fundamental principle. The default position in respect of any proceedings is that they should go to trial. Depriving the parties of a full trial in whatever form is appropriate to the proceedings concerned is a departure from the norm, and one which should only be engaged in when there is no real risk of injustice in adopting that course of action.'

Analysis

49. Ulster argues that the effect of s. 28(6) of the Judicature Act, as interpreted and applied by the Court of Appeal in *McGuinness*, either by itself or in conjunction with the incontrovertible evidence Ulster has adduced, is to deprive Mr Fannon's three heads of

claim against Ulster of any arguable basis in fact or law so that those claims are bound to fail and should be struck out accordingly.

50. *McGuinness* is certainly authority for the proposition that, upon the assignment of a debt, s. 28(6) of the Judicature Act operates to give the assignee the legal right to the debt; all legal and other remedies for the debt; and the power to give a good discharge for the debt, so that, from then on, any action seeking to restrain the enforcement of the debt lies against the assignee and not the assignor.

51. So, in *McGuinness*, the Court of Appeal had no difficulty in accepting that the plaintiff's claims for declarations that his loans had not been lawfully transferred and that he was entitled to register a *lis pendens* over the mortgaged property, and for damages for an alleged conflict of interest resulting from the employment by the assignee of a former employee of the assignor, were all claims that lay against the assignee and not the assignor. Mr Fannon makes no such claim against Ulster in this case.

52. On the other hand, the Court of Appeal was not willing to accept that the plaintiff's claims of negligent misrepresentation, overcharging and mis-selling against the assignor were each claims that now lay solely against the assignee, nor that certain of the plaintiff's other claims in respect of events that occurred prior to the assignee's 'arrival on the scene' could properly or fairly be dealt with solely by the assignee and not the assignor.

53. It seems to me that none of Mr Fannon's three heads of claim against Ulster seeks to restrain the enforcement of the loan agreement. Each is a claim for damages based on alleged acts or omissions of Ulster that are not directly referable to the loan agreement or its enforcement, but rather turn on the existence and effect of the repayment agreement and the alleged failure of Ulster to apprise Promontoria of those matters. As such, those claims concern events that occurred prior to Promontoria's arrival on the scene.

54. Mr White seeks to overcome this apparent obstacle by advancing two further arguments in the alternative. The first is that, by operation of s. 28(6) of the Judicature Act, Promontoria took the assignment of Mr Fannon's debt from Ulster subject to each and every existing agreement concerning that debt, as well as subject to all equities entitled to priority over Promontoria's rights as assignee. The second or alternative argument is that, as a matter of fact, there was no separate or collateral repayment agreement concerning the debt, as purportedly demonstrated by the contemporaneous correspondence that Ulster has exhibited.

55. The first argument is one of law. While Ulster submits that s. 28(6) should be construed as having the effect it contends for, it does not cite any authority for that construction. The issue is presented as one of first impression. If s. 28(6) is construed in that way, it is not clear how it would affect Mr Fannon's claim against Ulster for its alleged negligence in failing to apprise Promontoria of the existence of the repayment agreement. The fundamental question remains whether it is clear, by reference to that contention, that Mr Fannon's claims against Ulster must fail.

56. The second argument is one of fact and is thus, necessarily, an invocation of the broader inherent jurisdiction to strike out proceedings. That argument relies on the proposition that the correspondence exhibited to the affidavit sworn by Ms Mulvey on behalf of Ulster in support of Promontoria's opposition to Mr Fannon's application for interlocutory injunctive relief represents *incontrovertible* evidence that the repayment agreement contended for by Mr Fannon does not exist. However, not only does Mr Fannon join issue with that assertion on oath in his replying affidavit but he also claims his evidence is corroborated by the averments of his accountant, Jane Kingston, in an affidavit that she swore on 12 July 2018 in support of that application. Unfortunately, I have not had sight of that affidavit. Further, Mr Fannon avers that he does not accept that the documentation exhibited by Ms Mulvey represents the complete record of his dealings with Ulster and is anxious to pursue the issue in discovery.

57. In *Moylist* (at 290), Clarke J identified broad similarities between the criteria that govern the exercise of the inherent jurisdiction to dismiss proceedings and those that govern the jurisdiction to grant summary judgment. As Clarke J observed (at 290):

> 'In both cases, the reason why it is suggested that there should not be a full plenary hearing is based on a contention that there would be no point because there is either no defence (in the case of a defendant in summary summons proceedings) or no claim (in the case of a plaintiff faced with an inherent jurisdiction application) which would justify imposing the burden and expense of a full plenary hearing on the opponent in question.'

58. Clarke J continued (at 290-2):

> '[17] However, it is clear from *McGrath v. O'Driscoll* [2006] IEHC 195, [2007] 1 I.L.R.M. 203 that, while the court has an entitlement in a summary summons application for judgment to resolve questions of law or the interpretation of documents, that entitlement should only be exercised where it is possible and appropriate so to do within the confines of a motion without running the risk of injustice. It seems to me that a similar consideration necessarily applies concerning the extent to which it is appropriate to get into complex issues of law or construction on an application to dismiss a case as being bound to fail. Like the summary judgment motion, such an application will be heard on affidavit and within the confines of a motion rather than at a full hearing. The test which the court is required to apply is very similar. In a summary judgment application, it is as to whether it is very clear that the defendant has no defence (this test is now well established, going back at least to *Aer Rianta c.p.t. v. Ryanair Ltd*. [2001] 4 I.R. 607). That is very similar to the test applied in a *Barry v. Buckley* application which requires the court to be satisfied that the claim is bound to fail or, to use the language of the summary judgment jurisprudence, that it is very clear that the plaintiff has no case and thus that the plaintiff's claim is bound to fail (see *Barry v. Buckley* [1981] I.R. 306).
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> [18] It seems to me to follow from that analysis that there are cases which are just not suitable for an application to dismiss under the inherent jurisdiction. Clearly, cases

involving factual disputes (save to the very limited extent to which it is appropriate to engage with the facts as identified in *Keohane v. Hynes* [2014] IESC 66, (Unreported, Supreme Court, 20 November 2014)) have already been held to fall into that category. However, it seems to me that there are also limitations on the extent to which cases which involve issues of law or construction can properly be the subject of an application to dismiss under the inherent jurisdiction. The limitation is similar to that which was identified in *McGrath v. O'Driscoll* [2006] IEHC 195, [2007] 1 I.L.R.M. 203 as applying in the context of summary judgment motions. A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and such as would require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored.

[19] As far back as *Sun Fat Chan v. Osseous Ltd.* [1992] 1 I.R. 425, McCarthy J. made the apposite comment at p. 428 that: -

> "Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture."

[20] A good example can be found in the distinction between the facts determined in *Bakht v. The Medical Council* [1990] 1 I.R. 515 and those found in the subsequent case of *Philips v. The Medical Council* [1991] 2 I.R. 115. In the latter case, Costello J. felt free to depart from the facts found in *Bakht v. The Medical Council* (which had been heard on affidavit) because a more complete account became available as a result of the oral evidence tendered in *Philips v. The Medical Council*. That was so notwithstanding the fact that the issues were to a significant extent either legal or documentary. The fact that two High Court judges came to different conclusions on what were, to a significant extent, facts which were the subject of a documentary record in, respectively, judicial review proceedings heard on affidavit and plenary proceedings heard on oral evidence is a salutary lesson against the overuse of applications which prevent a full plenary hearing.

[21] That is not, of course, to say that there will not be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the court to reach a conclusion on those questions on the hearing of a motion to dismiss. That is also not to say that the fact that a plaintiff may make a large number of points, each one of which is clearly unstateable, should not prevent a dismissal from being ordered. As Denham J. observed in a different context in *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412 at p. 462, "[s]eventeen noughts are still nothing".

[22] But I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might

come within the strictures identified in *Keohane v. Hynes* [2014] IESC 66, (Unreported, Supreme Court, 20 November 2014), nonetheless the legal issues or questions concerning the proper interpretation of documentation are complex. In such cases, the very complexity of the issues (even if the court has a fairly clear view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff's case is such that it can safely be said that it is bound to fail.'

59. In my view, whether s. 28(6) of the Judicature Act operates to render the assignment of a debt subject to any and every prior agreement on the legal rights and obligations associated with the debt, as well as subject to all equities entitled to priority over the assignee's rights in that debt, is not so straightforward a legal issue that it would be safe to reach a conclusion on it on the hearing of a motion to dismiss. Differently put, as Mr Fannon claims damages in tort for the alleged negligence of Ulster in failing to apprise Promontoria of the existence and terms of the separate repayment agreement for which he contends, I do not think that any unliquidated damages that may be awarded to him on that basis can be regarded as – in the formulation of Lord Hobhouse in the *Government of Newfoundland* case – so obviously *'flowing out of and inseparably connected with the dealings and transactions which gave rise to the subject of the assignment'* that it would be safe to conclude that he must pursue that claim exclusively against Promontoria, rather than Ulster.

60. Further, considering the analogy drawn by Clarke J with the test for summary judgment; having regard to the decision of the Court of Appeal in *Allied Irish Bank plc v Cuddy* [2020] IECA 211, (Unreported, Court of Appeal, 30 July 2020); and bearing in mind the affidavit sworn by Mr Fannon's accountant Ms Kingston supporting his claim of a separate or collateral repayment agreement, I cannot be satisfied that the correspondence exhibited to Ms Mulvey's affidavit amounts to incontrovertible evidence that no such agreement exists.

61. Accordingly, Ulster has failed to persuade me that Mr Fannon's claims against it are bound to fail.

62. In the circumstances, it is not strictly necessary to go on to weigh in the balance the extent to which the exclusion of Ulster from the proceedings would place Mr Fannon at a litigious disadvantage. However, for two reasons it is difficult to see how it would not.

63. The first is this. Mr O'Brien and Promontoria have not yet delivered an amended defence in response to Mr Fannon's amended statement of claim. It is unclear whether they intend to argue that Promontoria has no liability for the tortious conduct that Mr Fannon alleges against Ulster. They do plead in their original defence that they are strangers to the alleged repayment agreement, the existence of which they deny. Thus, were the present application to succeed, Mr Fannon would certainly be on the hazard of having to face that argument, which hardly seems appropriate or fair.

64. The second reason is that, if Ulster does not remain a party to the proceedings, Mr Fannon will not be able to seek discovery against it, other than on a non-party basis. To meet the associated claim of litigious disadvantage, Mr White informed me during the hearing of the application that, if Ulster's application to have the proceedings against it dismissed is successful and should Mr Fannon then seek and obtain an order for non-party discovery against it, Ulster would consent to a stay on its costs of making that discovery pending the determination of Mr Fannon's proceedings against Mr O'Brien and Promontoria. While that would go some way towards meeting the potential unfairness of depriving Mr Fannon of the entitlement to seek *inter partes* discovery from Ulster, I do not think it would eliminate it because the test for, and procedural implications of*, inter partes* discovery and non-party discovery are not the same in all other respects.

65. In summary, were it necessary to place the potential for litigious disadvantage on the scales of justice in this case, I conclude that it would weigh significantly against the dismissal of Mr Fannon's claims against Ulster.

66. As Ulster has failed to persuade me that Mr Fannon's claims against it are bound to fail, and as no other basis in law has been identified for its alternative contention that I should strike out Mr Fannon's proceedings against it, under O. 15, r.13 of the RSC, because it has not been properly joined as a necessary defendant, I must refuse that application also.

67. There is one other matter to address. Although it was not flagged in either the affidavits or the written submissions exchanged on the application, there was some argument at the hearing of the motion on whether it would be appropriate to make an order under O. 19, r. 27 of the RSC striking out that part of the amended statement of claim that alleges that Ulster (as well as the other defendants) defamed Mr Fannon on diverse dates by wrongfully and without lawful excuse informing the tenant of the property that, amongst other things, Mr Fannon was in arrears on his mortgage loan repayments.

68. In denying that claim in its defence, Ulster goes on to plead that any such claim is, in any event, statute-barred under s. 11 of the Statute of Limitations Act 1957, as amended by s. 38 of the Defamation Act 2009. That provision requires a defamation action to be brought within one year, or such longer period as the court may direct not exceeding two years, from the date on which the cause of action accrued. The logic underpinning it invocation is that, under O. 15, r. 13 of the RSC, the present action was brought against Ulster when it was joined as a defendant to the proceedings by order made on 14 October 2019, whereas Ulster transferred the mortgage loan to Promontoria on 19 December 2016 and Promontoria was duly registered as the owner of the charge on the property on 9 March 2017. Thus, the suggestion appears to be that the words attributed to Ulster could not, or would not, have been published by it after 9 March 2017, so that any claim in respect of any such publication must have been statute barred when the proceedings commenced against Ulster on 14 October 2019.

69. Although it seems unlikely that Ulster would have informed the tenant of the property that Mr Fannon was in arrears with the mortgage loan after it had transferred that loan to

Promontoria, I do not think that I can determine an application to strike out a pleading under O. 19, r. 27 on the basis of what seems probable or very likely. Mr Fannon's plea is no more specific than that the words were published 'on diverse dates'. There is no suggestion that Ulster has so far requested particulars of that pleading. While, in giving judgment for the Supreme Court in *Croke v Waterford Crystal Ltd* [2005] 2 IR 383 (at 402), Geoghegan J emphasised that, if there is an answer to the invocation of statute bar, it must be pleaded in a reply, that proposition was immediately qualified by the observation that there would have to be extraordinary circumstances for a court to deprive a plaintiff of the right to adduce a perfectly good answer to that plea, where one exists. And while, in *O'Connell v Building and Allied Trades Union* [2012] 2 IR 371, the Supreme Court confirmed the existence of a discretion to dismiss a claim that is manifestly statute barred, that does not extend to the dismissal of claim that is quite possibly, or even probably, statute barred.

70. For those reasons, I do not propose to make any order under O. 19, r. 27 of the RSC on the present application.

Conclusion

71. The application for the reliefs set out in the notice of motion is refused.

Final matters

72. On 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, due to the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered electronically and posted as soon as possible on the Courts Service website. The statement continues:

> 'The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate.'

73. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be electronically delivered to the registrar within 14 days, to enable the court to adjudicate upon it.