# UNAPPROVED
# THE COURT OF APPEAL

**Appeal Number: 2019/107**
**Neutral Citation Number: [2021] IECA 174**

**Faherty J.**
**Murray J.**
**Collins J.**

**BETWEEN/**

**SEAN HARRIS**

**APPELLANT/PLAINTIFF**

**- AND -**

**PROMONTORIA (ARAN) LIMITED AND STEPHEN TENNANT**

**RECEIVER RESPONDENTS/DEFENDANTS**

**Judgment of Ms. Justice Faherty dated the 15th day of June 2021**

**1.** This is the plaintiff's appeal from the defendants' successful application to have his proceedings struck out as disclosing no cause of action pursuant to Order 19, r.28 of the Rules of the Superior Courts (RSC) and the inherent jurisdiction of the court.

**Background**

**2.** The first defendant is the successor in title to a debt of €5,203,082.96 which originally became due and owing by the plaintiff pursuant to a Facility Letter entered into between the plaintiff and Ulster Bank Ireland ("Ulster Bank") dated 4 February 2010. By

way of security for part of the debt, the plaintiff granted Ulster Bank a legal charge dated 6 October 2008 in respect of 60 acres of land at Straffan comprised in Folio KE3258F, a legal charge dated 6 October 2008 in respect of 48 acres of land at Straffan comprised in Folio KE3527 and a mortgage/charge dated 10 November 2006 granted in respect of approximately 61 acres of land at Ardclough comprised in Folio KE7991F.

**3.** By way of Mortgage Deed Sale dated 16 December 2014 between Ulster Bank and Promontoria Holding 128 B.V., Promontoria Holding acquired Ulster Bank's rights under the Facility Letter, the security documents and the debt.

**4.** On 12 February 2015, by Deed of Novation, Promontoria Holding transferred all its rights and title in the Facility Letter, the security documents and the debt to the first defendant.

**5.** On 8 February 2016, an agreement ("the Settlement Agreement") was reached between the plaintiff and the first defendant under which the first defendant agreed to forebear from taking any enforcement action in respect of the debt of €5,203,082.96 provided certain payments were made by the plaintiff and certain conditions precedent complied with in full.

**6.** Pursuant to clause 2.3 of the Settlement Agreement, the plaintiff agreed to pay the first defendant the sum of the full encashment of four investment bonds, as described in the Settlement Agreement, and €1,350,000 within twelve months of the date of the Agreement.

**7.** Clause 2.2 provided that should the plaintiff fail to make the payments set out at clause 2.3:

> "(a) This Agreement shall immediately terminate and the full amount of the Debt, together with any interest which may have accrued thereon, shall become immediately payable in accordance with the terms of the Facility Letter; and

(b) [the first defendant] shall be at liberty to take such enforcement action as it deems fit, without further notice to the Borrower."

**8.** Pursuant to clause 2.4, the plaintiff agreed that he had no claim whatsoever against the first defendant howsoever arising in relation to the said agreement and he irrevocably agreed to waive any such claim he may have against the first defendant.

**9.** Clause 6.1 provided:

"No modification, amendment, variation or waiver of any of the provisions of this Agreement shall be effective unless made in writing and signed on behalf of each of the Parties".

**10.** Pursuant to clause 8.1, it was agreed that the Settlement Agreement constituted the entire understanding and agreement between the parties and that [a]ny variation to this Agreement shall take effect only if agreed to by the Parties and made in writing".

**11.** Clause 9 provided that the Settlement Agreement would binding on and enure for the benefit of each party's successors and assigns and that unless terminated "may be relied on and/or pleaded as a full and complete bar to any proceedings, or other legal action commenced or brought in breach of, or contrary to, the terms of this Agreement."

**12.** In this appeal, no issue is taken by either side with the terms of the Settlement Agreement which are clear and unambiguous as to their meaning and effect. At the time of entering the agreement, the plaintiff had legal advice and his signature was witnessed.

***Events post the Settlement Agreement***

**13.** The terms of clause 2.3 (a) were complied with by the plaintiff. He duly encashed the four investment bonds and the proceeds were paid over to the first defendant. It had also been agreed that the plaintiff would pay legal fees of €3,850 plus VAT to the first defendant and this was complied with.

**14.** It is common case, however, that by 7 February 2017-the expiry of the twelve months provided for in clause 2.3(b)- the plaintiff had not paid the €1,350,000.

**15.** By email dated 9 February 2017 to Mr. Alan Bailey, the plaintiff's financial representative, the first defendant, through its agent Mr. David Geraghty of Capital Asset Services, agreed to extend the date for payment of the €1,350,000, subject to the following terms:

> "(1) €10,000 penalty to apply per month until settlement funds are received in full.
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> (2) Minimum payment of €350,000 in cleared funds to [the first defendant] by 28/02/2017.
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> (3) Minimum payment of €600,000 in cleared funds to [the first defendant] by 31/03/2017.
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> (4) Minimum payment of €130,000 in cleared funds to [the first defendant] by 28/04/2017.
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> (5) Remaining settlement funds + accrued penalty by no later than 31/07/2017."

**16.** While this extension agreement was in writing insofar as it was contained in an email, it was not signed by each of the parties, contrary to the requirements of clause 6.1 of the Settlement Agreement. The defendants do not dispute that an extension of time was agreed. Counsel for the defendants described it as an "indulgence" given to the plaintiff.

**17.** By the time the extended period expired on 31 July 2017, the €1,350,000 had not been discharged by the plaintiff. No demand, however, for payment was made by the first defendant at that time.

**18.** By 10 November 2017, Mr. Bailey was communicating with Mr. Tomás Treacy of Link Asset Services (a service provider to the first defendant) advising him that the plaintiff had discharged €300,000 of the sum outstanding and that he would repay a further €100,000 from the proceeds of sale of cattle by year end. Mr. Baily also advised that the

plaintiff had four sites sale agreed at €150,000 per site albeit no contracts had been exchanged with the purchasers. Mr. Bailey was, however, going to liaise with the plaintiff's then solicitors to have them confirm the timelines for the completion of the sale of the sites. Once the €100,000 from the sale of cattle and the site proceeds was paid over, Mr. Bailey anticipated that the balance of the sum due to the first defendant would be discharged from "cash reserves from liquidation of stock and machinery to clear".

**19.** On 20 November 2017, Mr. Treacy emailed Mr. Bailey confirming the first defendant's consent to the extension of the settlement date to 15 February 2018 subject to the plaintiff providing, before 30 November 2017, a letter from his solicitors in the terms referred to in Mr. Bailey's email and proof of address by way of utility bill duly certified by his solicitor. As with the previous extension of time, the variation made to the Settlement Agreement terms on 20 November 2017 was not done in accordance with clause 6.1 but, again, the defendants do not dispute that the plaintiff was given until 15 February 2018 to comply with the Settlement Agreement.

**20.** By January 2018, the plaintiff had paid in total some €550,000 of the €1,350,000 sum due under the Settlement Agreement.

**21.** According to the affidavit evidence of Mr. Albert Prenderville, a Director of the first defendant, sworn on 5 January 2019, certain "without prejudice" negotiations took place between the first defendant and Mr. Bailey in early 2018 but same did not prove fruitful.

**22.** On 9 March 2018, the first defendant issued a demand for the immediate repayment from the plaintiff of the full amount of the principal and interest owed in accordance with the terms of the Facility Letter of 4 February 2010, then standing at €3,040,222.48. This sum was to be paid on or before 16 March 2018 and was said to be without prejudice to any other rights of the lender. It will be recalled that clause 2.2 of the Settlement Agreement had provided that the "full amount of the debt" would become due and owing

should the plaintiff fail to make the payments set out at clause 2.3 and that the first defendant was at liberty to take such enforcement actions as it saw fit without recourse to the plaintiff. Clearly, as of 9 March 2018 (some three weeks or so after the expiry of the revised payment date of 18 February 2018), the first defendant appeared to consider the Settlement Agreement to be at an end and that it was entitled to pursue the original Facility Letter debt dated 4 February 2010.

**23.** On 5 April 2018, the second defendant was appointed as Receiver over the plaintiff's assets including the lands comprised in folios KE3258F, KE3527F and KE7991F, another indicator that the first defendant considered the Settlement Agreement at an end.

**24.** On 2 May 2018, Mr. Treacy emailed Mr. Dermot Coyne, Solicitor, (by then retained on behalf of the plaintiff) advising that "the settlement agreement is terminated and no further forbearance has been granted by my client". This correspondence was preceded by earlier communications from Mr. Coyne to Mr. Treacy, of which more anon.

***Institution of the within proceedings***

**25.** The within proceedings were commenced on 18 July 2018. A statement of claim was delivered on 8 August 2018. At para. 9 thereof, the plaintiff pleads that further to the variations and extensions of time which had been afforded him, he had endeavoured to raise to the balance of the funds due, either through loans or through a sale of part of his farmlands and that to that end the first defendant, through its agents, had engaged directly with him and his financial consultant. He pleads that the when his solicitors sought confirmation of the specific sum due to the first defendant, the latter declined to disclose the sum in writing without first having sight of the plaintiff's arranged banking facilities. It is further pleaded that, in turn, the plaintiff's bank, Ulster Bank, were unwilling to provide a bank facility letter to him, without having sight of the exact sum outstanding to the first defendant.

**26.** Paras. 12-14 of the statement of claim go on to state:

> "12. The First Named Defendant had previously issued a demand in writing for the sum of €3,040,222.48 dated 9th March 2018 and to be paid on or before 5pm on 16th March 2018, but in April of 2018 the First Named Defendant remained willing still to accept the said outstanding sum of in or about €800,000 in full and final settlement, albeit not in writing.
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> 13. On or about the 5th April 2018, the First Named Defendant appointed the Second Named Defendant as Receiver over the Plaintiff's said Charged lands and premises aforementioned but informed and thus later agreed that the Plaintiff's Financial Advisor, the said Alan Bailey, that pending payment that the First Named Defendant and the said Receiver would 'hold off on further action'.
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> 14. Pursuant to the said forbearance for the part of the First Named Defendant the Plaintiff's Solicitor sought, on the 30th April 2018, a 10 week period to permit the raising of the said funds by the Plaintiff, but the First Named Defendant has through its Agent, Link Asset Services refused further forbearance or extensions of time and did so per email dated 2nd May 2018."

**27.** It is pleaded that by reason of the refusal to extend him time, the plaintiff had been caused to suffer extreme distress, and had been intimidated and harassed by the first defendant.

**28.** By way of relief, the plaintiff claimed specific performance of the Settlement Agreement "to include all Variations and Extensions of time whether as agreed and/or by necessary implication by the [Defendants'] Representations and actions in relation to same and which have been relied upon by the plaintiff". Injunctive relief was also sought preventing the sale of the lands comprised in folios KE3258F, KE3527 and KE7991F,

together with damages for breach of contract, damages for intimidation and damages for harassment including harassment constituting "elder abuse".

**29.** In tandem with the instituting of the proceedings, on 19 July 2018 the plaintiff registered a *lis pendens* in respect of the said three folios the subject matter of the security held by the first defendant.

***The motion to strike out***

**30.** On 9 October 2018 the defendants filed a notice of motion seeking:

> "1. An order striking out the Plaintiff's claim in whole or in part pursuant to O.19 of the Rules of the Superior Court and/or pursuant to the inherent jurisdiction of this Honourable Court on the grounds that they are an abuse of process, that they disclose no cause of action against the Defendants, that they are frivolous and vexatious and/or that they are bound to fail.
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> 2. An order pursuant to s.123(b)(ii) of the Land and Conveyancing Law Reform Act 2009 and/or pursuant to the inherent jurisdiction of this Honourable Court vacating the lis pendens registered in the within proceedings in the Register of Lis Pendens the Central Office of the High Court on 19 July 2018."

**31.** The motion was grounded on the affidavit of the second defendant sworn 2 October 2018. Therein, it is averred that the entire debt of €5,203,082.96 less payments made became due and owing as of 15 February 2018, pursuant to clause 2.2 of the Settlement Agreement. The second defendant further avers that the plaintiff "has no arguable right under the terms of the [Settlement Agreement] or at law" to seek the reliefs claimed in the statement of claim and that it is the second defendant's belief that the plaintiff's claim for damages for intimidation and harassment including for elder abuse was "particularly scandalous as at all material times the negotiations were conducted not directly with the Plaintiff but through his legal and financial advisors".

**32.** The plaintiff swore a replying affidavit on 7 December 2018. At para. 5 thereof, he makes reference to the defendants' willingness in April 2018 to accept €800,000 (which he describes as the final instalment of the Settlement Agreement figure of €1,350,000) but that they "failed to facilitate that repayment by co-operating with [his solicitors] and the Ulster Bank". He further avers that the first defendant albeit willing to accept the €800,000 sum "was not prepared to put that in writing". He goes on to state:

> "6. Furthermore, on or about 5th April 2018 the First Named Defendant agreed with my Financial Advisor Mr. Alan Bailey that if payment of €800,000 was made…that it would accept the same and would instruct the Second Named Defendant Receiver pending payment to 'hold off on further action'. There is no denial of that in [the second defendant's] affidavit…
>
> 7. I say that by these actions and words from the First Named Defendant that there has been either an express or implied further extension of time on the part of the First Named Defendant. Therefore, it necessarily follows that the First Named Defendant's demand in writing for the sum of €3,040,222.48 dated 9th March 2018 had been set aside by the First Named Defendant's said words, actions and promises."

**33.** At para. 10, he avers that the first defendant and its predecessor Ulster Bank had been "aware of his ill health" and the "very severe stress" from which he had been suffering since his initial borrowings with Ulster Bank. He asserts that "the claims and intimidating letters received from the First Named Defendant do constitute harassment and intimidation" and that as a result he was under the care of his doctor. At para. 11, he makes reference to the defendants' willingness in April 2018 to accept €800,000 and that if that sum had been permitted to be paid in April 2018, then the various charges over his lands "would have fallen". He avers that he is ready willing and able to pay the said sum.

**34.** Mr. Prenderville's affidavit (already referred to) was sworn in response to the plaintiff's affidavit. Therein he avers (at para. 6) that the plaintiff had not sought to assert that any agreement in writing had been made to vary the Settlement Agreement following the variation agreed on 20 November 2017 and which was evidenced by the email of the same date. Mr. Prenderville further avers that the variation being asserted by the plaintiff "would in any event be void both for uncertainty and for want of consideration" (at para. 7).

**35.** On 12 February 2019, Mr. Dermot Coyne, the plaintiff's solicitor, swore an affidavit. As Mr. Coyne's affidavit is central to the issues to be decided in this appeal it is necessary to refer to it in some detail.

**36.** Mr. Coyne avers that he was instructed by the plaintiff on 26 April 2018. After reciting a brief history of the plaintiff's dealings with Ulster Bank, the sale of the debt to the first defendant and the plaintiff's dealings with the first defendant thereafter, Mr. Coyne avers as follows:

> "8. By November 2017, the balance remaining due was €900,000 and the plaintiff managed, through sale of cattle, to pay a further €100,000 in January 2018.
>
> 9. He instructed your deponent to see if a further extension of time could be arranged as he was actively trying to sell assets to pay down the remaining balance of €800,000. He had received a Demand in Writing from the First Named Defendant dated 9th March, 2018 seeking payment of €3,040,222.48 at that stage.
>
> 10. Acting on his instructions, your deponent then made contact with Ulster Bank Limited, to see whether they would advance their customer the sum of €800,000 in order to clear this debt. I duly made contact with Ulster Bank, and specifically I dealt with Mr. Gerard McMahon and after discussions the Bank was willing to consider the said Loan of €800,000 on certain conditions including, the

professional valuation of the Plaintiff's remaining lands, audited accounts, timescale for repayment and, specific details in writing from [the first defendant] as to the amount then outstanding.

11. Your deponent then made contact with Mr. Tomas Treacy of Asset Link Services who were acting on behalf of [the first defendant] and in that regard I spoke with him by telephone on the 26th day of April, 2018. He explained to me that the Receivers had already been appointed at that stage but that given the expected progress in drawing down a Loan of €800,000 that he would instruct or direct the Receiver to 'hold off on any further action' while the funds were being arranged. I wrote a Letter to Asset Link Services [TomasTreacy] on 30th April 2018 confirming the said conversation...

12. Whilst it is a matter for submissions, your deponent honestly believed that [the first defendant], through Asset Link Services, had thus effectively agreed a further extension of time to the Plaintiff although not to any specific date but within a reasonable time scale that in order that the loan from Ulster Bank could be effected.

13. The Replying Affidavit of the Plaintiff Respondent herein and sworn on the 7th December 2018 is in error at paragraph 4 where he states that this Agreement to instruct the Receiver 'hold off on further action' was made between Alan Bailey and Tomas Treacy on or about the 5th April, 2018. And I apologise for not spotting that error in my engrossment of the Plaintiff's said Affidavit. In fact that discussion and Agreement was made on the 26th April, 2018 and was between your deponent and Tomas Treacy.

14. The Affidavit now filed on behalf of the First defendant by Mr. Prenderville admits of discussions between Alan Bailey [for the plaintiff] and Tomas Treacy [for the first defendant].

15. The discussions which I had and the Agreement to further delay Action was never said to me as being 'without prejudice'. In fact my letter exhibited above to Mr. Treacy was the first mention of the words 'without prejudice'.

16. In the event, [the first defendant] did not put the precise figure of €800,000 due in writing and the Plaintiff was thus unable to effect the Loan through Ulster Bank. The plain fact is that his bankers would probably have advanced that loan if the Defendant had been willing to comply with the Bank's condition. It appears thus to have been a classic 'catch 22' situation and the Plaintiff fell foul of a simple act of cooperation on the part of the First defendant."

Mr. Coyne goes on to exhibit two medical reports from the plaintiff's doctor dated 13 June 2018 and 18 June 2018 one of which opined as to the likely consequences for the plaintiff were his lands to be sold by the defendants.

**The High Court judgment**

**37.** The application to strike out the proceedings came on before the High Court (Pilkington J.) on 15 February 2019, following which she delivered her *ex tempore* judgment on 19 February 2019.

**38.** The trial judge noted that written extensions of time had extended the envisaged payment date in the Settlement Agreement of 8 February 2017 by in excess of one year. She noted that in resisting the application to strike out the proceedings, the plaintiff relied heavily on Mr. Coyne's affidavit. She observed that within the "reasonable time scale" of ten weeks, as referred to by Mr. Coyne in his affidavit, the second defendant had taken no particular steps to enforce the debt and that in fact it was the plaintiff who had taken the next step by instituting the proceedings. Insofar as the plaintiff was relying on receiving funding from Ulster Bank to clear the debt due to the first defendant, she considered that the terms of any prospective deal with Ulster Bank appeared "very much in their infancy"

and that Mr. Coyne appeared to have acknowledged a further impediment to receipt of such funds, namely that unless the plaintiff received an open letter or some written confirmation from the first defendant that €800,000 was the final balance due in respect of the Settlement Agreement, the loan application to Ulster Bank could not proceed.

**39.** The trial judge understood the plaintiff's case to be that "some form of explicit or implicit forbearance had been agreed by the defendants with regard to the strict enforcement of the terms of the [Settlement Agreement]. In other words, further time would be afforded to the plaintiff to obtain the moneys and perhaps, in addition, that in some way, some form of written confirmation would be furnished to Ulster Bank in that regard. In other words, there would be forbearance on the debt for an unspecified but reasonable period of time."

**40.** Commenting on his claim for damages for intimidation and harassment, including for elder abuse, the trial judge noted that the plaintiff had been legally advised throughout. She also noted the absence of any particulars of the alleged intimidation and abuse and that, moreover, the plaintiff had not expanded on those claims in his replying affidavit. She concluded that "no evidence of any type has been advanced… that in any sense satisfies me in respect of those claims." She accepted, however, that as the plaintiff was of advanced years when he borrowed the moneys initially, and was now 80 years of age, that throughout the entirety of the transaction he had suffered stress.

**41.** She considered the defendants' case as "entirely straightforward", noting that the first defendant had agreed to two written time extensions pursuant to the terms of settlement, that "thereafter no further extensions in writing or otherwise were agreed" and that "accordingly the terms of the [Settlement Agreement] are now enforceable in full".

**42.** Having discounted or dismissed the reliefs claimed by the plaintiff for alleged intimidation or harassment, she considered that the nub of his case was that following the

agreement to the two extensions of time given by the first defendant, thereafter, by their representations, the defendants had agreed a forbearance upon the actions of the Receiver which now disentitled them to refuse to assist the plaintiff in the process then underway whereby he was seeking to raise funds to discharge the debt. She considered that the plaintiff and his counsel "are emphatic that it is not an action in respect of the two written extensions, but on the matters that occurred thereafter as specifically averred to by Mr. Coyne in his affidavit. And it is their contention that those matters are sufficient to amount to some form of forbearance binding upon these defendants."

**43.** The trial judge went on to address the plaintiff's case in the following terms:

> "I have great difficulty in seeing any bases (sic) in law for any agreement for forbearance in respect of this loan. What is being sought is specific performance of an agreement and I cannot discern with any certainty what the terms of that underlying agreement were. If it were for a 10-week period as Mr. Coyne's without prejudice letter suggested, then that was in reality afforded him…I can fully appreciate that Mr. Dermot Coyne was properly and correctly striving to do his level best for his client to seek by private, without prejudice, negotiations to ensure that the agreement entered into could be in some sense extended for a longer period to try and affect (sic) a commercial agreement with the parties in order that all matters could be agreed, presumably to the effect that [the first defendant] would accept in the order of €800,000 in full an final settlement of this transaction and perhaps thereafter that some form of extension would be afforded to permit these funds to be raised, or in the alternative simply that some form of extension would be afforded simpliciter."

She went on to state:

> "In my view, I cannot see how any conversation between Mr. Coyne and Mr. Treacy is binding in any sense upon [the first defendant]. I fully appreciate that conversations of this type must often go on between those acting on behalf of a receiver and those acting on behalf of a borrower. Clearly some form of compromise or deal is being sought and canvassed in such circumstances and one can fully appreciate why this is so. However, how those conversations, albeit by definition exploring possibilities and therefore somewhat imprecise in their terminology and terms, can thereafter become legally binding upon [the first defendant] in such circumstances given the terms of the [Settlement Agreement] executed by the parties is difficult to discern."

**44.** The trial judge found that, in reality, the plaintiff had been offered a certain degree of time in the immediate period post April 2018 because no action had been taken in that period that could irreparably harm his interests. She noted that albeit he had had this period of time, "yet no further advances of money were made by him and nor does the position appear to have been explored further." She opined:

> "…One can appreciate why [the first defendant] were perhaps reluctant to formally issue any letter in the form contended for by Mr. Coyne and they were under no legal obligation to do so. Moreover, no legal or other documentation between Ulster Bank and the plaintiff was exhibited in this affidavit.
>
> That also raises another point as to whether such a letter of the type mentioned and headed without prejudice can, in reality, form part of the agreement contended for by this plaintiff. And it is noteworthy that without prejudice was placed by the plaintiff's solicitor and there was no reply without prejudice or otherwise on behalf of [the first defendant].

> It is also to be remembered that Mr. Harris, with the benefit of full legal advice, entered into this [Settlement Agreement]. Its terms were and are crystal clear and it appears that unfortunately ultimately the plaintiff did not have the financial resources to comply with its terms. I can appreciate and have sympathy with his efforts to now seek to do so, but in my view, there is nothing in the paragraphs of Mr. Coyne's affidavit recording one conversation with Mr. Treacy that in my view affords any equitable type reliefs open to this plaintiff. The fact that the correspondence, as I have said, is marked without prejudice by its author is also very telling. I can therefore find no agreement between the parties where it would be equitable (sic) or unfair not to permit this plaintiff to rely upon, to deviate and not to be held to the terms of [the Settlement Agreement]."

**45.** The trial judge next addressed the other relief sought by the first defendant in the Notice of Motion, namely the removal of the *lis pendens*, which she duly directed. While this aspect of the trial judge's judgement and Order was also appealed, it is agreed that the appeal in respect of the *lis pendens* has been rendered moot as the lands in question have been sold by the second defendant.

**46.** In considering whether the plaintiff's proceedings should be struck out either pursuant to O.19 RSC or the inherent jurisdiction of the court, the trial judge noted that, as set out by Costello J. in *Barry v. Buckley* [1981] I.R. 306, the court could only make an order under O.19, r.28 RSC *"when a pleading discloses no reasonable cause of action on its face".* She noted that for the purpose of striking out proceedings pursuant to its inherent jurisdiction, the court was not limited to the pleadings and could hear evidence on affidavit relating to the issues in the case. The trial judge was cognisant that the jurisdiction to strike out was to be exercised *"sparingly"* and only in clear cases.

**47.** Noting that in the case before her, no additional consideration had been offered for the alleged extension of time and that the rule in *Pinnels* case (1602) 5 Co rep 177a, [1558-1774] All ER 612 thus applied, the trial judge repeated her view that the principal difficulty in the case was that she could not "discern any reasonable bases to infer or suggest any form of equity or agreement to forbear as contended for by this plaintiff." She considered that "on one view, the forbearance sought on the timeline set out above, was actually afforded" but that "on the other hand, this settlement agreement is clear in its terms and those terms are agreed between the parties. In my view, one can only deviate from those terms if there is a clear bases for doing so."

**48.** Ultimately, she concluded:

> "… in my view, there is no agreement capable of enforcement on equity, the only document that's marked without prejudice by the parties seeking to rely upon it and any variation is itself not… did not form the part of any written agreement. In my view it is also void for uncertainty…nor can I see any stateable bases(sic) for any claims for damages for breach of contract…
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> …
>
> The defendants, in my view, were entitled to rely upon the terms of the settlement agreement, each party had the benefit of legal advice. It was freely entered into and I also note the terms of clause 9.2 which I set out earlier, whereby it was entitled to be used as a full defence if required to be done so at a later stage.
>
> I cannot again see that any purported agreement between the parties constitutes the bases for any equitable relief."

**49.** Having so found, the trial judge directed that the plaintiff's claim in whole be struck out pursuant to O19, r.28 and the inherent jurisdiction of the court.

**The appeal**

**50.** Essentially, as explained by his counsel in oral submissions, the plaintiff's appeal falls under three limbs. Firstly, it is contended that the trial judge erred in deciding the case on a summary basis where issues of fact as to whether or not an agreement to extend time had been agreed were in contention and where the plaintiff's contention is that he had a concluded agreement as of 26 April 2018 with the defendants which he was entitled to enforce. Secondly, it is argued that the trial judge wrongly concluded that there was no basis for the plaintiff's claim for damages for intimidation and harassment including elder abuse. Thirdly, it is said that the trial judge fell into error in concluding that there was no legal basis underlying the plaintiff's assertions since she failed to consider the plaintiff's entitlement to rely on the principle of estoppel by convention. The overarching complaint is that the threshold for the High Court to exercise its jurisdiction to strike out the proceedings was not met in this case.

**51.** It was confirmed at the hearing of the appeal that the plaintiff's claim now lay solely in damages, the lands which comprised the security for the plaintiff's loans having been sold post the judgment of the High Court and where no stay had been sought pending the within appeal.

**The law governing the defendants' motion**

**52.** Before considering the plaintiff's arguments, it is useful to recall the jurisdiction of the court in an application to strike out proceedings.

**53.** The defendants' application invokes both Order 19, r.28 RSC and the inherent jurisdiction of the Court on the basis that the proceedings are "an abuse of process…disclose no cause of action…are frivolous and vexatious and/or they are bound to fail".

**54.** The law pertaining to Order 19, r.28 is well established. As explained by Costello J, in *Barry v. Buckley* [1981] I.R. 306 (cited by the trial judge), *"the Court can only make an order under this rule when a pleading discloses no reasonable cause of action on its face".*

**55.** The power of the court to strike out proceedings pursuant to its inherent jurisdiction was confirmed in *Barry v. Buckley*:

> *"But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on application made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case…The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear the plaintiff's claim must fail …*
>
> *This jurisdiction should be exercised sparingly and only in clear caes; but it is one which enables the Court to avoid injustice, particularly in cases where the outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant…"*

**56.** As *Barry v. Buckley* makes clear, an application to dismiss proceedings as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. As said by Clarke J. (as he then was) in *Salthill Properties Ltd. v. Royal Bank of Scotland* [2009] IEHC 207, *"in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the*

*document could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established".*

**57.** Clarke J. observed, however, that *"more difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence".* He recognised that *"at this end of the spectrum, it is more difficult to envisage circumstances where an application to dismiss as bound to fail could succeed."* As Clarke J. also noted, while contemporary documentation is very often a valuable guide to what is the factual matrix, it was none the less *"important…not to confuse cases which are dependent on documents themselves with cases where documents may be a guide, albeit often a most reliable guide, to the underlying facts which need to be determined in order to resolve the issues between the parties".* These principles require to be borne in mind in this case, in light both of the defendants' contention that the case here is largely documents based and hence lends itself to the invocation of the jurisdiction to strike out, and the plaintiff's argument that the trial judge trespassed impermissibly into the determination of a factual dispute, matters to which I will return in due course.

**58.** On the question of factual disputes generally, while it clear that the jurisdiction to strike out is primarily invoked where there is little or no dispute over the facts of a case, that does not mean, however, that the court is precluded from examining the facts as pleaded, or engaging in some analysis, in determining whether an application to strike out should be granted pursuant to the inherent jurisdiction of the Court. As said by Clarke J. in *Salthill Properties*:

> *"3.12 It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would,*

*if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr. Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. On examining the document the terms may not be found, or may not be found in the form pleaded. On an application to dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim."*

**59.** In an application to strike out proceedings, the onus rests on the defendant, explained by Clarke J. in *Salthill Properties,* as follows:

*"3.14 It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a prima facie case to the contrary effect."*

**60.** It is against the backdrop of the principles outlined in *Barry v. Buckley* and *Salthill Properties*, and indeed other similar jurisprudence, that the plaintiff's claim that the trial judge erred in striking out the proceedings must be adjudged.

***Have the defendants met the requisite threshold in contending that the claim that the plaintiff had a concluded agreement with the defendants is bound to fail?***

**61.** As deposed to by Mr. Coyne in his affidavit, the plaintiff's primary contention is that on 26 April 2018, in the course of a telephone conversation, the first defendant's agent, Mr. Treacy, advised Mr. Coyne that in light of a possible offer of a loan to the plaintiff from Ulster Bank for €800,000, as advised by Mr. Coyne to Mr. Treacy, he would instruct the second defendant to desist from taking any action until the plaintiff had arranged the necessary funding. This, it is said, constituted an agreement that the first defendant would forbear further from pursing the plaintiff for the full debt pending the arrangement of funding from Ulster Bank. It is acknowledged in oral submissions by counsel for the plaintiff that neither the affidavits sworn by the plaintiff and Mr. Coyne nor Mr. Coyne's letter of 30 April 2018 refer to what the consideration was for the agreement to extend the time, save that counsel surmised that it perhaps could be inferred into the agreement that the penalties that had been provided for in the February 2017 extension agreement would also operate post 26 April 2018. In truth, the issue of the existence or otherwise of consideration is not the salient question here (a matter, in any event, more properly for determination at trial), rather the issue is whether the defendants are correct in asserting that the proceedings advance no stateable basis for an agreement having been concluded on 26 April 2018.

**62.** The plaintiff maintains that the contents of Mr. Coyne's affidavit support his contention that agreement was reached on 26 April 2018, particularly in circumstances where Mr. Treacy was the person who had agreed on 20 November 2017 to extend the

time for repayment to 15 February 2018. Counsel points out that there is no suggestion that Mr. Treacy did not have the authority to bind the first defendant. It is not in issue but that Mr. Treacy would have such authority. Counsel also contends that it is no answer for the defendants to say that the plaintiff cannot point to any agreement in writing in April 2018 varying the Settlement Agreement given that Mr. Treacy has not sworn an affidavit denying the contents of Mr. Coyne's affidavit. It is further submitted that Mr. Prenderville's affidavit evidence does not contradict the plaintiff's and Mr. Coyne's averments that assurances were given.

**63.** The crux of the plaintiff's case, therefore, is that the conversation between Mr. Coyne and Mr. Treacy on 26 April 2018 constitutes a binding agreement whereby Mr. Treacy agreed to continue to forbear from seeking payment for a period of time (albeit the time period was not stipulated) so as to allow the plaintiff to arrange for funding to be obtained from Ulster Bank. It is in those circumstances that the plaintiff contends that the trial judge was wrong to conclude, in the context of an application to strike out, that no agreement was reached between Mr. Coyne and Mr. Treacy and that the terms of any prospective deal were in their infancy. It is submitted that the trial judge's conclusions in this latter regard do not accord with Mr. Coyne's letter of 30 April 2018 to Mr. Treacy. The plaintiff also contends that the trial judge was wrong to conclude that the absence of an agreement in writing bore on whether or not an extension of time had been agreed in April 2018. It is argued the trial judge wrongly focused on the absence of a written agreement in circumstances where neither of the prior two extensions of time given to the plaintiff (albeit set out in emails to Mr. Bailey) had been signed by both parties.

**64.** The plaintiff's case is that it was impermissible for the trial judge to draw the conclusions she did in circumstances where there were clear conflicts of fact arising in the affidavits in the case. He asserts that for the purposes of the application to strike out the

conflict of evidence should have been resolved in favour of the plaintiff and the matter let go to plenary hearing in circumstances where it is only in the context of a plenary hearing that a fair determination of whether an extension of time was agreed on 26 April 2018 can be made.

**65.** I consider that the starting point as to whether the trial judge failed to take the plaintiff's pleaded case must be the pleas actually advanced in the statement of claim. Albeit that the plaintiff's position in the High Court, and on appeal, is that an enforceable agreement to extend the timeframes provided for in the Settlement Agreement was concluded on 26 April 2018 between Mr. Treacy and Mr. Coyne, it is noteworthy that that is not the claim made by the plaintiff in his pleadings, or indeed what is averred to by him on affidavit. What is pleaded at para. 12 of the statement of claim is that "in April of 2018 the First Named Defendant remained willing still to accept the…sum of …€800,000". There is no reference there to a concluded agreement on 26 April 2018. At para. 13, reference is made to the first named defendant (*via* Mr. Treacy) having informed "and thus later agreed with the Plaintiff's Financial Advisor …Mr. Alan Bailey, that pending payment the First Named Defendant and the said Receiver would 'hold off on further action'". At para. 14, the plaintiff pleads that "[p]ursuant to the said Forbearance" his solicitor (Mr. Coyne) sought on 30 April 2018 a 10-week period to pursue the raising of funds with Ulster Bank but that that extension was refused by the first defendant on 2 May 2018. At para. 6 of his affidavit the plaintiff again refers to the agreement for the extension of time as having been reached between Mr. Bailey and Mr. Treacy.

**66.** Mr. Coyne, in his affidavit, avers that the plaintiff was in error in stating that the agreement whereby the first defendant would instruct the second defendant to "hold off on further action" was concluded between Mr. Bailey and Mr. Treacy on 5 April 2018, Mr. Coyne averring that the agreement extending the time was concluded between himself and

Mr. Treacy on 26 April 2018. Mr. Coyne apologises for his failure to spot the plaintiff's error when engrossing his affidavit. I accept what Mr. Coyne says in this regard.

**67.** Therefore, the plaintiff's case is that the agreement whereby he got an extension of the end date of 15 February 2018 (as had been provided for by way of a second extension on 20 November 2017) was reached by Mr. Coyne and Mr. Treacy on 26 April 2018 and that this is confirmed by Mr. Coyne in his letter to Mr. Treacy of 30 April 2018.

**68.** In relevant part, Mr. Coyne's letter to Mr. Treacy of 30 April 2018 reads as follows:

> "As outlined in our telephone conversation, out client has been endeavouring to raise the balance due pursuant to the settlement Agreement dated 8th February 2016. He had instructed Coonan Estate Agents to sell a portion of the land and sites. Due to funding and planning difficulties those sales did not materialise, Our client has had difficulties securing any favourable banking facilities given his age and circumstances.
>
> Ulster Bank have now at this late point come back and indicated that they will entertain a loan application and we have had discussions with the Bank on behalf of Mr. Harris. Before completing a credit application for him, the Bank require confirmation of the net amount which [the first defendant] are due pursuant to the Settlement Agreement and a reasonable timescale (up to 10 weeks from today's date) to discharge that sum.
>
> Our client is currently arranging all paperwork required for the banking application including a) land valuation b) up-to-date audited accounts c) management accounts d) stock valuations e) potential site disposal appraisals f) single farm entitlement schedule.

> To enable our client to work with Ulster Bank, he requires a 10 week window from today's date and certainty in relation to the amount due to [the first defendant]. Please indicate if you can accommodate on both fronts."

**69.** Contrary to the plaintiff's counsel's submissions, Mr Coyne's letter of 30 April 2018, on its face, contradicts the suggestion made in his affidavit that an agreement was reached between him and Mr. Treacy on 26 April 2018. Mr. Coyne's letter constitutes in effect a request for and not a confirmation of a further agreement to forbear. Indeed, the plaintiff's case on his pleadings is that Mr. Coyne's request of 30 April 2018 for further forbearance "fell on deaf ears". Taking the plaintiff's case at its height, which I must do, neither the claim as pleaded nor the contents Mr. Coyne's letter of 30 April 2018 lend support to the claim made at para.11 of Mr. Coyne's affidavit that he was "confirming" an agreement reached with Mr. Treacy.

**70.** Regard must also be had to the wording of para. 12 of the affidavit, where Mr. Coyne avers that he "honestly believed" that the first defendant (*via* Mr. Treacy) "had thus effectively agreed a further extension of time…." I must take it that that will be the evidence that Mr. Coyne would tender at the trial. However, the difficulty remains that the letter sent by Mr. Coyne on 30 April 2018 (a near contemporaneous document which can reasonably be assumed to reflect the contents of Mr. Coyne's and Mr. Treacy's discussion on 26 April 2018) does not in any sense reflect an agreement concluded some four days earlier. One would reasonably expect Mr. Coyne's correspondence to have made specific reference to the agreement reached with Mr. Treacy on 26 April 2018. That reference however is conspicuous by its absence. What is also strikingly absent is any evidence of an immediate response to the defendants' correspondence of 2 May 2018, which one would reasonably have expected had a concluded agreement to extend time to the plaintiff been effected on 26 April 2018.

**71.** Furthermore, as is clear from her judgment, the trial judge was unable to discern from the case as pleaded what the terms of the alleged agreement of 26 April 2018 were. Counsel for the plaintiff, in response to questions from the Court, could not point to any pleading or affidavit evidence (or document exhibited on affidavit) which outlined the timeframe that is said to have been afforded to the plaintiff to allow him to secure the necessary funding from Ulster Bank. This is in stark contrast to the two prior extensions of time that were afforded to the plaintiff, where specific end dates were expressly set out.

**72.** In stating that she could see no basis as to how any conversation between Mr. Coyne and Mr. Treacy could be binding on the first defendant (in the absence of any certainty about what the terms of the agreement were), the trial judge nevertheless fully appreciated that the conversation alluded to by Mr. Coyne "must often go on between those acting on behalf of [a] receiver and those acting on behalf of a borrower". As noted by the trial judge, Mr. Coyne was endeavouring to do the best he could for his client. I do not doubt that that was the case. The trial judge further mused as to whether Mr. Coyne's letter of 30 April 2018, which was written to Mr. Treacy "without prejudice" "could, in reality, form part of the agreement contended for by this plaintiff". To my mind, bearing in mind the "without prejudice" nature of the letter of 30 April 2018, coupled with the fact that its contents read, in large part, as an entreaty to Mr. Treacy to accommodate the requests being made in the letter, the trial judge's surmise was entirely reasonable.

**73.** Counsel for the plaintiff, in his submissions, highlighted the absence of any affidavit sworn by Mr. Treacy taking issue with the contents of Mr. Coyne's affidavit. Given the nature of Mr. Coyne's correspondence, and the absence of any reference therein to a concluded agreement, I do not consider that the absence of a sworn affidavit from Mr. Treacy is a decisive factor in this case. Nor is it decisive that Mr. Prenderville, in his affidavit, does not take issue with Mr. Coyne's assertion that he had concluded an

agreement with Mr. Treacy. What militates against the plaintiff's arguments in these regards is the very clear nature of Mr. Coyne's correspondence of 30 April 2018, which, as I have already said, can only be described (even taking the plaintiff's case at its height) as a request for forbearance and/or an extension of time, and not a confirmation of a concluded agreement extending the time for payment.

**74.** Here, the defendants contend that the plaintiff's claim that he had an enforceable concluded agreement is without merit and is bound to fail. I am constrained to agree with the defendants' submissions in this regard. That is the conclusion reached by the trial judge and I am satisfied she did not err in so concluding. In my judgment, the requisite threshold for strike as out set out in *Barry v. Buckley* has been met in this case. Insofar as there may be a dispute about what was said in the course of the telephone discussion between Mr. Coyne and Mr. Treacy on 26 April 2018, to my mind, and accepting, as I must, that Mr. Coyne's evidence at trial would be that an extension of time (albeit unspecified as to duration) was agreed on 26 April 2018, the contents of his letter of 30 April 2018 and the absence of any response to Mr. Treacy's correspondence of 2 May 2018 are strong countervailing factors, which militate against an agreement having been concluded on 26 April 2018. While it is the case that Mr. Coyne's letter cannot be said to a document which governs the legal relations between the plaintiff and the first defendant (and which would thereby have allowed the court to consider the terms of the document on their face and come to a clear view as to the legal consequences for the parties), nevertheless the contents of the letter of 30 April 2018 coupled with the absence of any immediate response to Mr. Treacy's email of 2 May 2018 to the effect that the defendants were in breach of contract, permits me to conclude, unlike in *Ruby Property Ltd. v Kilty* [1999] IEHC 50 (on which the plaintiff relies), that the dispute here *is* capable of resolution by admitted documents. In all of the circumstances of this case, I cannot disagree with the trial judge's conclusion that

the plaintiff's claim as to the existence of a concluded agreement is bound to fail pursuant to the inherent jurisdiction of the Court. In light of the conclusion reached on the *Barry v. Buckley* jurisdiction, it is not necessary to reach a conclusion as to whether the proceedings should be dismissed pursuant to Order 19, r.28 RSC.

***The claim for damages for alleged intimidation and harassment***

**75.** It will be recalled that the trial judge, albeit accepting that throughout the entirety of the loan transaction the plaintiff had suffered stress given that he was of advanced years when he borrowed the monies, was not satisfied that any evidence of any type had been advanced to satisfy her that the plaintiff had any basis for arguing at trial the claims of alleged intimidation and harassment including harassment by way of elder abuse alluded to in the pleadings. She was of the view that the plaintiff had not advanced any particulars in writing of these claims, nor had the claims been expanded on either in the plaintiff's affidavit or orally before the Court.

**76.** The plaintiff submits that the trial judge erred in finding that the claim for damages on these bases was unsustainable. It is contended that the claims of harassment and intimidation are not unstateable given the contents of the medical reports exhibited in Mr. Coyne's affidavit, and the definition of what constitutes the tort of intimidation.

**77.** Even taking, as I do, the pleadings and the affidavit evidence at their height, I am constrained to agree with the defendants' submission that the plaintiff has not made out in any manner the constituent elements of the tort of intimidation, defined in McMahon and Binchy: Law of Torts (2013 Bloomsbury 4th ed.) as "a threat delivered by the defendant to a person, whereby the defendant intentionally causes that person to act or refrain from acting in a manner in which he is entitled to act, either to that person's own detriment or to the detriment of another". It is not pleaded or averred to with any degree of reasonable

precision that any act of the defendants caused the plaintiff to do or refrain from doing an act as a consequence of which he suffered detriment.

**78.** Nor, save the bare assertion in the pleadings, and the reference in the plaintiff's affidavit that both the first defendant and its predecessor, Ulster Bank, knew of the plaintiff's ill-health and the pressures he was under, is there any elaboration on the claim of harassment /elder abuse. Moreover, the plaintiff cited no authority supporting the claim of elder abuse. In my view, the trial judge was well entitled to take account of the absence of any details pertaining to the alleged harassment/elder abuse claims. She was also entitled to take into account that the plaintiff had the benefit of full legal advice when he entered into the Settlement Agreement. Furthermore, it appears that, thereafter, all of the plaintiff's dealings with the defendants were conducted his behalf by his financial advisor, Mr. Bailey and, latterly, by his solicitor, Mr. Coyne, all factors which strongly militate against the alleged intimidation and harassment of the plaintiff.

**79.** For the reasons set out above, the plaintiff has not succeeded in persuading this Court that the trial judge erred in concluding that his claim for damages for intimidation and/or harassment was bound to fail.

***Is there an arguable case that the defendants are bound by the principle of estoppel by convention?***

**80.** By way of alternative to the claim that a concluded agreement was reached on 26 April 2018 whereby the time period for complying with the Settlement Agreement was extended for an unspecified time, the plaintiff asserts that the trial judge erred in failing to consider that a legally binding obligation arose on the part of the defendants to permit the plaintiff to pursue his endeavours to raise funds in order to meet his obligations under clause 2.3 of the Settlement Agreement. The plaintiff's argument is premised on the fact that notwithstanding the express terms of clause 2.3, the first defendant did not enforce its

entitlement under the Settlement Agreement, instead it agreed to variations and extensions of time in February 2017 and November 2017. It is argued that this pattern continued in April 2018.

**81.** The plea advanced at para. 12 of the statement of claim is that albeit having issued a demand on 9 March 2018 for repayment of the balance of the €3,040, 222. 48 outstanding on the original debt, the first defendant remained willing to accept the €800,000 figure and that even after the appointment of the second defendant as Receiver, the defendants had agreed to "hold off on further action" pending arrangements by the plaintiff to secure funding to discharge his indebtedness. As this was the position with the earlier extensions of time, there was, therefore, a sufficient basis for the plaintiff to assume that the first defendant would further forbear from taking action, particularly in light of the interaction between Mr. Coyne and Mr. Treacy on 26 April 2018 following which Mr. Coyne wrote to Mr. Treacy on 30 April 2018 seeking a ten-week period to allow the plaintiff to secure the necessary funding.

**82.** Essentially, the plaintiff maintains that the parties had a common assumption that time was not of the essence, and that time would be extended to allow him pay off the balance of the €1,350,000 sum agreed in the Settlement Agreement, including any penalties which had been provided for by the February 2017 variation. He also contends that there was a common assumption that the provision in the Settlement Agreement which provided that any variations could only be agreed in writing was not being enforced or relied on by either party. Counsel submits that the plaintiff's assumption in this latter regard is borne out by the fact that neither of the documents evidencing the February 2017 and the November 2017 extensions were signed by the plaintiff.

**83.** It is submitted that in light of those shared assumptions, or, alternatively, the first defendant's acquiescence in the assumptions held by the plaintiff, which arose from the

course of dealing between the plaintiff and the first defendant post the conclusion of the Settlement Agreement, the defendants' refusal on 2 May 2018 to afford any further extension of time to the plaintiff, or extend any further forbearance, was unconscionable in circumstances where the plaintiff was deprived of a reasonable time period within which to pay the balance of the €1,350,000 sum.

**84.** The plaintiff contends that he has an arguable case for trial, namely that the defendants were precluded from proceeding as they did by the doctrine of estoppel by convention. It is submitted that post 26 April 2018, the plaintiff acted to his detriment in proceeding on the assumption that he still had time to raise the necessary funds. It is also contended that albeit the trial judge was alert to the representation of the first defendant of 26 April 2018 upon which the plaintiff had placed reliance, she failed to appreciate, and to thus take into account, the actions of the second defendant in refraining to enforce the debt from 26 April 2018 onwards pursuant to the representations which had been made by the first defendant's agent, Mr. Treacy. It is in these circumstances that the plaintiff says the High Court judge erred in holding that there was no basis in law for the forbearance the plaintiff contends for.

**85.** At the outset of the appeal hearing, counsel for the defendants objected to the plaintiff's reliance on the doctrine of estoppel by convention, stating that the estoppel case had not been pleaded or made in the High Court. Nor had it featured in the plaintiff's notice of appeal. Counsel for the plaintiff countered this criticism by asserting that his submissions were merely a new formulation of arguments that had been canvassed in the High Court based on the pleadings and affidavit in the case, namely that it had been represented to the plaintiff, by dint of the defendants' erstwhile forebearance, that he would be afforded further forebearance and that the plaintiff had relied on that representation, and had done so particularly in light of the course of dealing between the

plaintiff's representative and the first defendant's various representatives post the signing of the Settlement Agreement. Counsel accepted that the arguments made in the High Court in aid of the case that the defendants were estopped from reverting to the original debt were perhaps not as refined as those now being made.

**86.** The Court permitted the plaintiff to advance the estoppel argument on appeal, being satisfied that no prejudice arose to the defendants by so doing. I accept that while estoppel by convention was not pleaded *per se*, the matters raised in the plaintiff's pleadings, and the affidavit evidence, and indeed the matters alluded to in the High Court judgment itself, were sufficient for counsel to seek to argue that the trial judge erred in failing to permit the case to go to plenary hearing on this basis.

***Estoppel by convention***

**87.** An estoppel by convention arises where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. In *K. Lokumal and Sons (London) Limited v. Lotte Shipping Co. PTE. Ltd*. [1985] 2 Lloyds Rep. 28, Kerr L.J. explained the operation of the estoppel in the following terms:

> *"There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that – across the line between the parties - his action or inaction has induced some belief or expectation in the mind of the alleged representee, so that, depending upon the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered."*

**88.** In *Furness Withy (Australia) PTY. Ltd. v. Metal Distributors (U.K.) Ltd.* [1990] 1 Lloyds Rep. 236, Dillon L.J. observed:

> *"The modern formulation of the question to be asked where this is a question of estoppel by convention is that the court should ask whether in the particular circumstances it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he has allowed or encouraged another to assume to his detriment."*

In *India v. Indian Steamship Co. Ltd*. [1998] A.C. 878 at p. 913, Lord Steyn described the doctrine as precluding a party *"from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption.* He further opined that *"a concluded agreement is not a requirement for an estoppel by convention."*

**89.** In *Ulster Bank Ltd. v. Rockrohan Estate Ltd*. [2015] IESC 17, [2015] 4 I.R. 37, Charleton J. observed that the *"[e]stoppel may go beyond unequivocal oral or written representation"* and that it may arise *"through an assumption shared by those interacting".* The estoppel *"does not necessarily always have to be written or spoken once the state of affairs is clear, and therefore obvious, and the parties act upon it"*. What would give rise to the estoppel was explained by Charleton J. in the following terms:

> *"For estoppel to arise, it is essential that there is conduct which establishes an objective state of affairs, whereby the party to be estopped, who would otherwise be bound by the legal relations, is placed in circumstances whereby it is clearly understood that a new state of affairs governs the rights and obligations as between the parties. This requires some demonstrable action, behaviour or representation by the party who is to be bound by the altered state of affairs. It is insufficient, to establish estoppel, merely for the party later pleading that defence to conclude that matters must be so. There must, instead, be a foundation in the behaviour of the party who is to be estopped from asserting a legal entitlement, either pursuant to contract or otherwise. The same applies where estoppel is used not as a shield but*

*as a sword. It would be an unwarranted and dangerous extension of the doctrine of estoppel to permit it to be one-sided; which it would be if based on bare assumption. It has always been central to the equitable principle of estoppel that it derives either from representations or from situations of behaviour that, reasonably construed, clearly withdraw or alter the strictures of legal obligations in such a way that circumstances may later arise whereby it would be unfair to enforce these. Where the matter is one of representation, it should be relatively simple to identify the legal term supposedly set aside thereby, and where, and in what terms, the representation had been directed in this regard. Where, on the other hand, it is a matter of both parties proceeding on the basis of a clear common understanding, the mutual convention of the parties may suffice as a foundation for estoppel. Depending on the facts, estoppel may become operative in that situation, but only because of that common understanding."*

**90.** The doctrine was also considered by Whelan J. in *Knockacummer Windfarm Ltd. v. Cremins* [2018] IECA 252:

*"135. ...The appellants rely on Hodge, "Rectification, the modern law and practice governing claims for rectification for mistake", 2nd Ed., 2016, which provides:*

> *'The common assumption shared by the parties must be both unambiguous and unequivocal. Estoppel by convention is generally concerned with post-contractual rather than pre-contractual matters. In relation to pre-contractual matters the appropriate remedy is rectification, although the principle of estoppel by convention may be available where a particular clause or expression has an agreed mutually-understood meaning.'*

...

*137. Estoppel by convention differs from other categories of estoppel, particularly proprietary estoppel, where frequently there will have been an expenditure of money or other acts of forbearance characterised as detrimental in nature.*

*138. Estoppel by convention finds its expression in the modern times in cases such as Moorgate Mercantile Co. Ltd. v. Twitchings [1977] A.C. 890 and the court generally considers it sufficient that if the party to whom an assurance is given acts on the faith of it in such circumstances it would be unjust or inequitable for the party making the assurance to go back on it."*

**91.** The defendants' substantive response to the plaintiff's reliance on the doctrine is that it cannot avail him in circumstances where he cannot establish any stateable detrimental reliance on his part, or unconscionable behaviour on the part of the defendants, such as might invoke the estoppel.

**92.** I accept that the plaintiff's case at trial would be that the overall actions, behaviours and/or representations of the first defendant from 9 February 2017 (the date of the first extension) to April 2018 (including the restraint exercised by the second defendant), together with the representations of 26 April 2018 made by Mr. Treacy to Mr. Coyne, induced in the plaintiff a belief or expectation that time would be afforded to him to secure funding from Ulster Bank. That being so, the question is whether there is a stateable case that the plaintiff acted to his detriment in proceeding on the shared assumption or, perhaps, to put it in more modern terms, whether there is a stateable case that it was unconscionable for the defendants, by their action on 2 May 2018 in terminating the Settlement Agreement, to have denied the plaintiff that which theretofore, knowingly or unknowingly, they had allowed or permitted him to pursue.

**93.** As put by Charleton J. in *Ulster Bank Ltd. v. Rockrohan,* for the plaintiff to lay claim to the doctrine of estoppel by convention, there must be a *"foundation"* for the estoppel in the behaviour of the party who is to be estopped (here, the defendants).

**94.** The defendants say that the unconscionability asserted by the plaintiff has to be considered in light of the entire dealings between the parties, commencing with the Settlement Agreement and including the events post the expiry of the twelve months provided for in the Settlement Agreement for the plaintiff to discharge the €1,350,000.00 sum.

**95.** In the first instance, they contend that the Settlement Agreement itself was an entirely advantageous one from the plaintiff's perspective in circumstances where in excess of €5.2m was due and owing by him on foot of the Facility Letter of 4 February 2010 and the first defendant had agreed to his paying substantially less in full discharge of the debt within a total period of twelve months. Essentially, the plaintiff got a debt write down from €5.2m to approximately €3m. The *quid pro quo* for that write down was that the plaintiff was bound by the terms of the Settlement Agreement (presumably absent any agreed extension of the agreed timeframe). It is difficult to disagree with the defendants' arguments in this regard.

**96.** It is common case that post 8 February 2017, the first defendant afforded the plaintiff two extensions in writing, namely Mr. Treacy's email of 9 February 2017 extending the time for payment to 31 July 2017, on terms, and the extension afforded on 20 November 2017 which ran until 15 February 2018, again on terms. Between 31 July 2017 and 20 November 2017 there was something of a hiatus, where no demand was made by the first defendant and, indeed, no further extension was sought by the plaintiff. Following the expiry of the November 2017 extension on 15 February 2018, there followed a three-week period of inactivity on both sides until a demand was made by the first defendant on 9

March 2018 for the full debt amount as per the Facility Letter. Notwithstanding that demand, by the beginning of April 2018, the first defendant had not moved against the plaintiff. The second defendant was only appointed as Receiver on 5 April 2018.

**97.** Furthermore, albeit Mr. Coyne's requests as set out in his letter of 30 April 2018 were not granted, no action was in fact taken by the first defendant, or the second defendant post 5 April 2017, to realise the first defendant's security by the time the plaintiff's institution of the within proceedings on 18 July 2018. The defendants contend that nothing in that history suggests that the defendants' actions were draconian or unconscionable. Again, it is difficult to disagree with the defendants' argument.

**98.** It is also the case that, the ten weeks which Mr. Coyne had sought in his letter of 30 April 2018 were, in effect, available to the plaintiff for him to pursue his efforts to obtain funding from Ulster Bank, by dint of the defendants not having taken any step to realise the secured assets during that timeframe. While it is the case that on 2 May 2018, Mr. Treacy emailed Mr. Coyne advising that the Settlement Agreement had been terminated, and that "no further forbearance has been granted by [the first defendant]" (which counsel for the plaintiff says belies the defendants argument that they had not taken any step against the plaintiff), in my view, the salient factor is that it remained the case that the defendants had not moved to realise the secured assets by the time the plaintiff instituted his proceedings. I struggle, therefore, to comprehend the unconscionability which the plaintiff asserts was at play here.

**99.** Looking at the issue from the perspective of detriment is equally problematic for the plaintiff, in my view. In replies to questions from the Court, counsel for the plaintiff could not point to what detriment was suffered by the plaintiff in the period post 26 April 2018 and up to 2 May 2018 (when the plaintiff was informed in writing that the Settlement Agreement had been terminated). Even accepting, as I must for the purpose of the

application to strike out, that the parties' common assumption (or, alternatively, the defendants' acquiescence in the plaintiff's belief) was that time was not of the essence, there is no suggestion that the plaintiff was in any way inhibited from pursuing his objective during this timeframe. It also remains the case that post 2 May 2018, save for Mr. Treacy's letter of that date terminating the Settlement Agreement and advising that no further extensions would be forthcoming, no further step had been taken by the defendants to enforce their security by the time the plaintiff took his own step of instituting the within proceedings.

**100.** In my view, the arguments raised by the plaintiff do not point to a stateable case for unconscionability on the part of the defendants, or detriment suffered by the plaintiff, such as might provide a basis for invoking an estoppel of the kind contended for here. At its height, the plaintiff's case is not stateable. As a matter of fact, the plaintiff had an extended period of time post the events in April 2018 in which to pursue his objective of securing funds to pay off the first defendant. No evidence was put before the trial judge that he was impeded in this regard by any action or inaction on the part of the defendants in the relevant time period. While Mr. Coyne in his affidavit refers to the plaintiff being in a "Catch-22" situation because his request to the defendants for a final figure with which to go to the Ulster Bank was not forthcoming, I note that neither the plaintiff's nor Mr. Coyne's affidavits exhibit documentation from Ulster Bank seeking such a figure.

**101.** In any event, I cannot see how the defendants' failure to furnish such details can assist the plaintiff in his estoppel argument in circumstances where no evidence was adduced that the course of dealing between the parties to that point in time had included the provision by the defendants to the plaintiff of information on demand, from which the plaintiff could then have safely assumed that he would be provided with such information whenever he sought it.

**102.** Nor was there any evidence put forward that, either prior to or post 2 May 2018, the plaintiff was in a position to advise the defendants that he was capable of meeting his obligation under clause 2.3 of the Settlement Agreement. As far as the question of unconscionability is concerned, the position, perhaps, might be different if the plaintiff's case was that he had tendered the amount outstanding on foot of clause 2.3 at a point post 26 April 2018 and before 17 July 2018 but that, nevertheless, the defendants had persisted in pursuing the original debt due on foot of the Facility Letter. But that is not the situation here.

**103.** In all the circumstances, the plaintiff has failed to establish that the trial judge erred in failing to extrapolate from the pleadings and affidavit evidence that the principle of estoppel by convention arose in the case. or that she erred in concluding that there was no reasonable basis "to infer or suggest any form of equity or agreement to forbear".

***Overview***

**104.** For the reasons set out above, I am satisfied that the trial judge did not err in striking out the proceedings pursuant to the inherent jurisdiction of the Court. In doing so she was cognisant of and applied the guidelines set out in *Barry v. Buckley*. The present case is not one where the pleadings and the affidavit evidence disclose that "*the legal issues or questions of construction arising are themselves complex and such as would require the type of careful analyses which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored"* as per Clarke J. in *Moylist Construction v. Doheny* [2016] IESC 9 (at para. 3.12), and more recently rehearsed by Clarke C.J. in *Jeffrey v. Minister for Justice* [2019] IESC 27, [2020] ILRM 67 (at para. 7.4).

**105.** In line with *Sun Fat Chan v. Osseous Ltd.* [1992] 1 I.R. 425, before concluding that the trial judge did not err, I bore in mind the possibility that certain matters might arise in

the future and affect the outcome of the proceedings such that striking out the proceedings would not be appropriate. In *Sun Fat Chan* McCarthy J. commented 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."*

**106.** In *Salthill Properties Ltd.*, Clarke J. was also alert to this possibility. He stated:

> *"3.13 …There have been many cases where the crucial evidence which allowed a plaintiff to succeed only emerged in the course of the proceedings. At the level of principle, this is likely to be particularly so in cases alleging fraud or other similar wrongdoing which is likely to be clandestine, if present, and where a plaintiff may only be able to come across admissible evidence sufficient to prove his case by virtue of the use of procedural devices such as discovery and interrogatories. That is not to say that it is legitimate for a party to instigate such proceedings when the party concerned has no basis for so doing. However there is, in my view, a significant difference between circumstances where a plaintiff has a legitimate basis for considering that it may have a claim at the time of commencing proceedings, on the one hand, and a situation where that party has, at that time, available to it, admissible evidence which it can put before the court to establish a prima facie claim, on the other hand."*

**107.** However, in the present case, I comprehend no circumstance where it could be said that the plaintiff had a legitimate basis for commencing the proceedings. For the reasons already set out, neither the pleadings nor the affidavit evidence meet the legitimate basis threshold and, accordingly, the defendants have established that the proceedings are bound to fail.

**Summary**

**108.** Accordingly, I would uphold the decision of the trial judge and dismiss the appeal.

**109.** The plaintiff has not succeeded in his appeal. Accordingly, it follows that the defendants should be entitled to their costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the Order of the Court, including the proposed costs order, will be drawn and perfected.

**110.** As this judgment is being delivered electronically, Murray J. and Collins J. have indicated their agreement therewith and the order I propose.