THE HIGH COURT

[2021] IEHC 499

[2017/42 S]

BETWEEN

ALLIED IRISH BANKS PLC

AND

EVERYDAY FINANCE DAC

PLAINTIFFS

AND

PADDY MCKEOWN

AND

ADELAIDE MCCARTHY

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 16th day of July, 2021.

1. On the 12th of May 2017, Costello J. made Orders marking judgment in favour of Allied Irish Banks PLC ("AIB") against each of the Defendants. The judgment against the first Defendant was in the sum of €1,469,251.43. The judgment against the second Defendant was in the sum of €1,467,102.96. AIB was also granted an Order that the Defendants pay AIB's costs of the proceedings, when taxed and ascertained.

2. The judgment was unsuccessfully appealed by the Defendants to the Court of Appeal. Leave to appeal to the Supreme Court was refused by a Determination of that Court, dated 3rd March 2020.

3. After the judgment and Order of Costello J. in this Court, AIB transferred to Everyday Finance DAC ("Everyday") "the relevant facilities and guarantees on which judgment was granted against the Defendants […]" (see paragraph 109 of the judgment of Barniville J. of 1st April 2020).

4. In a very comprehensive judgment, to which I have just referred, Barniville J. ordered that Everyday be joined to these proceedings as an additional Plaintiff. Originally, Everyday had sought to be joined either as an additional Plaintiff or as the only Plaintiff in substitution for AIB. However, ultimately only the first of those two Orders were sought.

5. Everyday now seek to be substituted for AIB in the portion of the Order of Costello J. requiring each of the Defendants to pay fixed sums to the original Plaintiff. Everyday does not seek an amendment of the Order in as much as the Defendants are obliged to pay the costs of AIB.

6. This application in no way varies the fundamental obligations of the Defendants on foot of the original Order of Costello J. made over four years ago to repay debt that this Court has found they owe. That finding is now unchallengeable, given the complete failure of the appeals taken by the Defendants against the original Order.

7. The current application is one grounded upon Order 17 rule 4 of the Rules of the Superior Courts and/or in the alternative in the inherent jurisdiction of the Court. The nature of such an application is very fully set out in the judgment of Barniville J. to which I will repeatedly refer to in the course of this decision.

8. At paragraph 37 of his judgment, Barniville J. states:-

> "The Court of Appeal has made clear that an application for an Order under Order 17, rule 4 is intended to be a simple, straightforward and purely procedural application. It is not intended to be in the nature of a mini-trial."

9. Barniville J. goes on to consider (from paragraphs 38 – 42 of the judgment) the authorities which support this proposition. These authorities, including *IBRC v. Comer* [2014] IEHC 671 and *Bank of Scotland plc v. McDermott* [2019] IECA 142, unequivocally support the summary of the nature of this type of application set out at paragraph 37 of the judgment.

10. Significantly, in determining Everyday's application, Barniville J. imposed on Everyday a requirement to prove matters on the balance of probabilities, and not on the lesser *prima facie* standard which may have been thought applicable to add a party rather than to replace one. For the purpose of the application before me, the appropriate standard of proof is, on the authorities, proof on the balance of probabilities. However, the reason why Barniville J. applied the higher standard to the application before him is set out at paragraphs 54 and 55 of his judgment, and is of relevance to the decision I make on the current application.

> "54. In the present case, the application is merely now to add Everyday as a co-Plaintiff to the proceedings, on the basis of the transfer or assignment of the relevant facilities and the guarantees. If that Order was to be made, the Defendants would nonetheless be entitled to raise issues in relation to the transfer or assignment if and when Everyday comes to seek to enforce the judgment. An Order joining Everyday as a co-Plaintiff to the proceedings would, therefore, not determine those issues. The Defendants could subsequently raise issues in relation to them, at that later stage. On that basis, the position is more like that which pertains in *Halpin* and *O'Connor* rather than the position in *McDermott*.
>
> 55. However, the Defendants did seek to ventilate a range of issues in relation to the validity of the transfer or assignment of the facilities, guarantees and related security by AIB to Everyday. I have considered many of those issues in the course of this judgment. I have decided to do so on the basis of the balance of probabilities, rather than to a *prima facie* standard, in order to deal with the Defendants grounds of opposition at their highest at this point in time. I am satisfied that irrespective of whether the *prima facie* standard is applied or whether the approach to be taken is to consider the issues on the basis of the balance of probabilities, the Defendants fail on each of the objections they have raised. However what they have failed on is their objection to the application by Everyday to be added as a party to the proceedings. It may be that the Defendants will be in a position to raise other grounds of objection if and when it comes to Everyday's attempt to execute on foot of the judgment. It may, however, be of relevance and assistance to whatever Judge or Court is dealing with the issue at that later stage

to have regard to the conclusions I have reached in the course of this judgment. That would be a matter for the Judge or Court, as the case may be."

11. While I have carefully considered each of the objections made by the Defendants to the current application, and have done so independently of the conclusions of Barniville J., those conclusions have been of significant assistance in confirming the views that I have formed which (in all cases) align with the views expressed by Barniville J. on the relevant issue in his judgment.

12. I should also observe that many of the issues raised by the Defendants have no relevance to the current motion. Not only are many of the objections raised irrelevant, they include allegations of an unfortunate and personalised nature. I will now give some flavour of these accusations:-

    (a) The staff of the Central Office of the High Court are alleged to have "tampered with" an Affidavit sworn on behalf of Everyday in August 2020. This led to complaints by the Defendants to the Minister for Justice and Equality and to the President of the High Court. When I come to consider this ground of objection by the Defendants, it will be immediately seen that there is no basis for this very serious allegation.

    (b) It is suggested that Barniville J. was biased and prejudiced against the Defendants. Anyone reading the careful judgments of Barniville J. in connection with these applications will be struck by the even handed way in which he dealt with all matters before him, including some of the more fanciful objections on the part of the Defendants.

    (c) It is alleged that the original judgment of Costello J. represents "*double dipping – thus serious fraud*" on the part of AIB. The basis of this very serious charge is that the individual sums for which judgment was marked against each Defendant had the effect of doubling their actual level of debt. In fact, it is clear that these amounts represent joint and several liability on the part of the Defendants as opposed to a multiplication of their debt.

    (d) It is stated on oath "*that Everyday are in Court in a fraudulent manner".* There is in fact no evidence for this charge.

    (e) The Defendants claim that "the CEO of the Property Registration Authority has been a party to 'criminal behaviour and actions […]'."

    (f) Referring to the Appellate Courts, the Defendants suggest that there has been "*blatant bias and prejudices as against us*" and also assert that the Court of Appeal and the CEO of the Court Service are answerable to a claim by the Defendants "*of a completely defective performance on their part to the contract*" that an expedited appeal be made available to the Defendants against an Order made in favour of the Receiver appointed to their properties in November 2017. Notwithstanding the

payment of €250 for the *"expedited"* appeal, three years later the appeal was still not concluded.

13. Needless to say, very few if any of these unfortunate allegations have anything to do with the "*straightforward and formal application*" currently before me. Not just the making of these allegations, but the way in which the Defendants have chosen to resist this motion, go some way to explaining why the motion papers (including submissions) before me ran to about a thousand pages, why the books of authority ran to three volumes (and 54 citations), and the hearing of this motion (in conjunction with a separate motion taken by the Defendants covering very similar ground) ran into two days. A straightforward procedural application, in respect of which the main areas of contention have already been addressed by Barniville J. in his judgment, has turned into another pitched battle in a war of attrition between the Defendants, AIB and Everyday. In order to try to return this application to the sort of focused dispute it should always have been, I will deal with the relevant arguments. The parties can be assured, nonetheless, that I have considered all of the evidence before me, the written submissions and the oral submissions in deciding what are in fact the relevant matters that I have to determine.

14. At paragraphs 13 to 17 inclusive of his affidavit grounding the motion, and also relying on his evidence in the earlier motion to add Everyday as a Plaintiff, Mr. Andrew McCudden carefully sets out (by reference to the relevant documents) the acquisition by Everyday from AIB of the Defendants' relevant facilities and guarantees. I agree with Barniville J. that Everyday has established, on the balance of probabilities, that such acquisition has taken place. Later in this judgment, I deal with a fresh argument raised by the Defendants in respect of the separation of the legal and beneficial ownership of these assets on their transfer from AIB.

15. I will now deal with the arguments made by the Defendants.

(a) No Constitutional Provision for the Motion.

16. This argument is premised upon the view that, having availed of Order 17 rule 4 in order to be joined as an additional Plaintiff to the proceedings, it is not open to Everyday to utilise that provision a second time in order to replace AIB in the proceedings and, in the main part, in respect of the Order made by Costello J. in May 2017. No authority is cited in support of the submission. I can also see no basis for it. If Everyday has now acquired the underlying facilities and guarantees on which the judgment was granted, it would seem perverse not to permit Everyday to be able to execute that judgment. The fact that, while the appeal process was underway, Everyday opted at that time to seek the more modest Order of being added as a co-Plaintiff does not and should not prevent it from seeking the current Order.

17. As I find no reason why Everyday cannot seek relief under Order 17 rule 4, it may be unnecessary to consider the objection raised by the Defendants by the scope of the *"inherent jurisdiction"* of this Court. At paragraph 9 of Mr. McKeown's first Affidavit he says:-

> "[A]nd then as Judge and as per para 8 above there is no Court Order and Rule for this motion, thus it is defeated on the very logic relied upon by Everyday themselves, i.e. inherent jurisdiction of this Honourable Court."

18. The Defendants do not take on board the fact that the Court can have an inherent jurisdiction to deal with matters where it is necessary or appropriate to do so, even if such jurisdiction is not expressly provided for by any rule of Court. Therefore even if they are correct and Order 17 rule 4 is not available to Everyday, it may still invoke the inherent jurisdiction of the Court.

(b) Everyday not Entered as Plaintiff.

19. This is an involved objection, which is described at paragraphs 11 to 15 of Mr. McKeown's first Affidavit. The motion seeking substitution was issued out of the Central Office on the 6th of August 2020, but Everyday was struck out in the title of the motion by the Central Office staff. That is explained in a letter of 12th of August 2020, from the solicitors for Everyday (Byrne Wallace), in the following terms:-

> "You will note that the Court Office crossed out Everyday as co-Plaintiff on the face of the motion and Affidavit. The reason for this error is because their system was not updated with Everyday being added as co-Plaintiff (pursuant to Judge Barnivlle's Order dated 21st of April 2020) when the motion and Affidavit were filed. The Court Office has informed us that their system has now been updated accordingly."

This absolutely mundane reason is one which I accept. Nonetheless, the removal of Everyday from the title of the motion and Affidavit has led the Defendants to argue that the motion and the grounding Affidavit cannot be before this Court, as the motion was signed by Byrne Wallace who describe themselves as "*solicitors for Everyday"* notwithstanding that Everyday *"were not a party to the case*" on the date of the issuing of the motion. It is also alleged, as I have described earlier in this judgment, that the grounding Affidavit (of Mr. Andrew McCudden of Everyday) was "*tampered with*". These characterisations of the documents by Mr. McKeown are completely without foundation. A clerical error of the sort which I have described does not lead to a motion being improperly issued or being incorrectly before this Court; equally, such a clerical error does not mean that the Affidavit cannot be relied upon by Everyday or, indeed, that there has been tampering with the Affidavit.

(c) Barniville J. Should Recuse Himself from Hearing the Motion.

20. As I am hearing the motion, this does not arise. I do not intend to circulate further the allegations against Barniville J. by repeating them in detail here.

(d) Attempts to Pay the Debt.

21. In his first Affidavit, Mr. McKeown avers that on 3rd April 2020 (in other words, two days after the judgment of Barniville J.) the Defendant asked to be provided with figures that would allow them to pay off the debt. Had these figures been provided, Mr. McKeown avers, the current motion would be unnecessary. This is a "*further reason why it must fail and fail*" [sic].

22. In fact, in correspondence of 24th April 2020 (exhibited by Mr. McKeown himself) figures were given to Mr. McKeown by Link Asset Services, acting as service providers of Everyday Finance. Notwithstanding the provision of these figures, the issues between the parties have not been resolved.

(e) "Double dipping"

23. As I have said, on the 24th April 2020 the service providers for Everyday made available to the Defendants the figures due on foot of the relevant accounts. Contrary to the averment by Mr. McKeown at paragraph 21 of his first Affidavit, the amount due on the Court Order is therefore enumerated at least as far as Everyday is concerned. Mr. McKeown says that the figures on the Order of Costello J. come to a total of €2,936,350.39, but that the total indebtedness to AIB (as of December 2016) was a much smaller figure €1,469,714.82. As I said earlier in this judgment the reason for this apparent disparity is clear. As each Defendant is jointly and severally liable for almost all of the debt, judgment was entered against each Defendant for the full amount for which they are responsible, but obviously any reduction in the debt of one Defendant will result in an equivalent reduction in the debt of the other. Indeed, this was made plain by Donnelly J. in the judgment in the Court of Appeal of 28th November 2019, in a section actually quoted by Mr. Keown at paragraph 20 of his first Affidavit. Donnelly J. stated:-

> "The judgment was entered against each Appellant on the basis set out above. Any monies realised by the Respondents in executing against either of the Appellants will result in a *pro tanto* reduction of the respective indebtedness."

24. This could hardly have been made clearer. This is not double dipping, let alone "*serious fraud*". It is simply the logical and inevitable upshot of the form of borrowing in which the defendants initially engaged.

(f) The Court Order is not Assigned by AIB to Everyday.

25. Ordinarily, one would expect this to be the real battleground on a motion such as this. The argument is summarised as follows (at paragraph 26 of Mr. McKeown's first Affidavit):-

> "26. I say that the 'unliquidation' of the Court Order back into alleged loan/facility letters allegedly assigned/transferred to Everyday on 2nd August 2018 made a mockery of any such Perfected Order of 18th May 2017 and indeed is making a mockery of the Court. The Order then died as a negotiable enforceable instrument at that juncture in August 2018, notwithstanding the Defendants seeking release from the Court Order in full and notwithstanding the Defendants had constitutional right of appeal on same which they availed of. The Order and Loans simply cannot coexist."

26. I do not accept this submission. The Order of Costello J. provided for the enforcement of the obligations undertaken by the Defendants when they entered into the relevant facilities and guarantees. These facilities and guarantees have, on the evidence before me, been transferred to Everyday. This "change or transmission of interest […]", as is referred to in Order 17 rule 4, has taken place after the Order was granted. It is on the basis of this transmission of interest (in the underlying facilities and guarantees) that the

Court can order Everyday to be substituted for AIB in the proceedings (including the Order made by Costello J.). To allow such Orders to be made, it is not necessary that the Court Order granting judgment to AIB against the Defendants is expressly agreed to be transferred to the benefit of Everyday. It is sufficient if the underlying entitlement are so transferred. That is what has happened here. There is no basis for suggesting that the Order ceased to exist when the Loans were transferred.

(g) Vat Fraud

27. At the outset of this judgement, I observed that Everyday is not seeking to have transferred to it the entitlement under the Order of Costello J. that the Defendants pay the costs of the Plaintiff (at that time AIB) up to the date of the Order of May 2017. While this gives rise to what I have described at the hearing as a hybrid form of order, that in itself is hardly objectionable. The Order in the proposed amended form reflects the commercial reality that the debts of the Defendants have been transferred to Everyday, but that the costs awarded by Costello J. have not been so assigned.

28. I therefore think that issues about the correct VAT position in respect of the costs claimed by AIB on foot of the Order of Costello J. is of no relevance to whether I should make the Order sought by Everyday on this motion. It is, however, really unacceptable that Mr. McKeown has used the need for some clarification about VAT to make an allegation of a very serious nature.

29. It appears to be the case that the taxation of AIB's costs was adjourned generally on the 13th of June 2018 "*pending clarification of the position concerning VAT*". That could have meant anything. There is no reason to believe that it involves any wrongdoing. However, Mr McKeown (at paragraph 32 of his first Affidavit) extrapolates the following:-

> "That clarification of VAT for the Plaintiff was never forthcoming and so a process of Taxing commenced but could not be finalised. Everyday now, very conveniently, over and above all else, are attempting to undergo a process whereby said costs will merely vanish as a claim on the Perfected Order of 18th May 2017, albeit making the Order nonsensical as per paragraph 30 above. This is not safe and *serious VAT fraud* may be covered up by such a motion application by Everyday as per para 5 of Mr. McCudden's tampered with Affidavit."

30. In a way, this paragraph summarises much of the approach taken by the Defendants to this motion.

31. It refers to a "*tampered with Affidavit*", when the reason for the striking out of Everyday in the title of the Affidavit is explained in a letter (to which I have already referred), which is itself exhibited by Mr. McKeown himself.

32. Secondly, it extrapolates from the a requirement that a VAT position be clarified the possibility that there is serious revenue fraud being perpetrated by somebody.

33. Thirdly, Mr. McKeown also postulates the possibility that the VAT fraud may well be covered up, should the Court grant Everyday relief in terms of the motion it now brings. There is no reason to believe that that is the case.

34. Fourthly, it is stated that allowing Everyday to substitute for AIB in part of the Order would make the Order, nonsensical (it does not) and that the costs "*would merely vanish*". They do not.

35. This objection to the making of the Order has no merit.

(h) The Comma

36. The Defendants argue that the motion does not go far enough, in that they say the correct title of AIB is "*Allied Irish Banks, plc*". This has been a persistent theme of the Defendants in this litigation. During the oral submissions before me, the Defendants were scrupulous about reminding each other about the need to emphasise the perceived need for a comma whenever the title of the original lender featured in their address to the Court. Even as framed by Mr. McKeown in his Affidavit, this is quite irrelevant to the matters I have to decide on this motion. In any event, this contention is dealt with by Barniville J. in his judgment at paragraph 79, where he refers to a similar argument made in other proceedings, such as for example, *Ben Gilroy and Jerry Beades v. The Governor of Mountjoy Prison* [2019] IEHC 71. Barniville J. describes the argument as one "*devoid of any merit*" and I agree.

(i) Can Personal Guarantees be Assigned or Transferred?

37. At paragraph 42 of his first Affidavit, Mr. McKeown alleges that the Global Deed of Transfer on foot of which the relevant facilities, securities and guarantees have been acquired is an illegal instrument as personal guarantees cannot lawfully be assigned or transferred. However, this argument was not elaborated on at all by the Defendants, and in any event is not one which I accept is made out.

(j) The New Information.

38. From paragraph 44 onwards of his first Affidavit, Mr. McKeown relies upon information which was not placed before Mr. Justice Barniville, as it was unavailable to the Defendants at the time. He says that this evidence shows that Everyday "*are false claimants*". He also says that it provides "*conclusive evidence of offences before the Court*" by Everyday.

39. Mr. McKeown avers that Promontoria (Redwood) DAC claimed to be the beneficial owner of all rights and interests in respect of all facilities and securities (including guarantees) relating to the Defendants. He suggests that Everyday acquired the Defendants' loans on the 16th of May 2018, that the notification by AIB of the sale to Everyday was dated the 23rd of May 2018, and that therefore there was no Notice of Assignment pursuant to Section 28 (6) of the Supreme Court of Judicature (Ireland) Act 1877 issued to the Defendant's prior to the transaction; the notice was issued one week after the transfer.

40. Mr. McKeown goes on to say that there is no record showing that Everyday purchased the loans and that in the absence of any such record the transaction involving Everyday is "*merely a paper balance sheet accounting readjustment*" and not a "*true sale*".

41. Mr. McKeown goes on to say that on the 1st of August 2018 Promontoria (Redwood) DAC agreed to assign all rights, title, interest and benefit in the loans to Link Corporate Trustees (UK) Ltd. That company is now known as Apex Corporate Trustees (UK) Ltd. From all of this, Mr. McKeown concludes (at paragraph 49) that the redacted deeds of the 2nd of August 2018 and the 22nd of 22 October 2018 "*are false instruments created to make gain and to deceive, at least in their redacted state. They may not be false instruments in their unredacted state, a matter which is not known, unless and until they are so unredacted.*" However, Mr. McKeown suggests unequivocally that Everyday (and Everyday's deponent, Mr. McCudden) have not given a full or truthful account of the transactions by which it is claimed Everyday acquired the relevant facilities and guarantees, and have misrepresented the true nature of the documents upon which Everyday relies.

42. In light of these allegations, in his second Affidavit, Mr. McCudden set out (in some detail) the relevant transactions.

43. Mr. McCudden swears that pursuant to a Deed of Transfer dated the 2nd of August 2018 and a Restatement Deed dated the 22nd of October 2018, AIB's interest in the facilities and guarantees pursuant to which the summary judgment was entered and related security was transferred to Everyday.

44. Mr. McCudden states categorically (and consistently) that Everyday holds the legal title to the Defendants facilities (by which it means the facilities and guarantees on foot of which the Order of Costello J. was made, and related security).

45. Mr. McCudden says that a mortgage sale agreement was entered into between Everyday, AIB, AIB Mortgage Bank and EBS DAC on the 16th of May 2018. On the same day a Declaration of Trust was entered into between Everyday and Promontoria Holding 238BV under which the beneficial interest in the Defendants facilities vested in that latter company. Mr. McCudden says that on the 18th of June 2018 and the 2nd of August 2018 respectively, the declaration of Trust was supplemented by a supplemental Trust Deed and a second supplemental Trust Deed which transferred the beneficial interest in the Defendants facilities from Promontoria Holding 238BV to Promontoria (Redwood) DAC. He exhibits redacted copies of the Declaration of Trust and of the supplemental Trust Deeds.

46. Mr. McCudden swears that, while the Defendants facilities were included in the Declaration of Trust and supplemental Trust Deeds, Everyday retained the legal title in the Defendants facilities.

47. In his second Affidavit, Mr. McKeown states that the Defendants had never claimed that Everyday had transferred or assigned "legal title in the Defendants facilities". Having made that concession (at page 13 of his second Affidavit) Mr. McKeown somewhat undermines the appearance of consensus by stating that the reason why legal title in the Defendants facilities had never been transferred by Everyday was because "*maintaining*

those false claims in the superior Courts and Property Registration Authority is a very requirement of […] Apex UK".

48. In the main, the acceptance by both parties that Everyday continues to be the legal owner of the Defendants facilities means that the essential issue for me to decide in respect of this line of objection by the Defendants is whether or not the alienation of the beneficial ownership to another company or companies is an obstacle to the Order currently being sought. I have decided that it is no such obstacle. This is plain from the decision of Peart J. in *Wellstead v. Judge Michael White* [2011] IEHC 438, *Kearney v. KBC Bank Ireland plc* [2014] IEHC 260, *Freeman v. Bank of Scotland* [2016] IESC 14 and *Bank of Ireland v. McMahon* [2017] IEHC 600.

49. The allegations against Everyday contained in the relevant part of Mr. McKeown's first Affidavit (paragraphs 43 to 49 inclusive) are not made out. In the light of Mr. McCudden's response, I do not believe that the redacted Deeds of August and October 2018 are "*false instruments created to make gain and to deceive*". I do not accept that Mr. McKeown has established that Everyday have behaved in a fraudulent manner. I do not accept that in this or any other regard the motion is "*misleading the Court and also inducing the Court to make an illegal Order*". As a matter of law, I do not accept the submission that the Defendants had to be notified prior to any transmission of interest in their facilities and guarantees; Section 28(6) of the 1877 Act does not so stipulate, as it refers solely to the transfer or assignment being "*effectual in law*" from the date of the notice.

50. I therefore find that none of the objections raised under this heading by the Defendants, in as much as they are relevant at all to the issue I have to decide, persuade me that I should not make the Order sought by Everyday.

(k) Deception, Litigation Trafficking, Champerty and Maintenance.

51. In this portion of his first Affidavit, Mr. McKeown puts forward a number of surprising propositions. He suggests that, as this Court has no jurisdiction over Apex UK, it cannot make an equitable Order in terms of this motion. Not only is there no precedent for this proposition, it is entirely without sense.

52. Secondly, he says that Apex UK is "*merely using Everyday as a front*" as this Court has jurisdiction over Everyday and therefore can make an Order in Everyday's favour. As I have said, this is a proposition which I do not accept. This Court can make an Order in favour of bodies outside the jurisdiction. However, from this erroneous proposition the Defendants extrapolate that:-

> "This is all conclusive of litigation trafficking, champerty and/or maintenance and the same are offences in the jurisdiction of the State of Ireland. We now call on the Court to action on these offences, especially whereby a Judgment now exists on the record 1st April 2020 whereby a Superior Court Judge in Ireland has been induced to make conclusive findings as to matters of contract, all in both unrevealed contracts and claimants."

53. I cannot speak for Barniville J. I would be surprised if the existence of the securitisation or trust arrangements would have made any difference to his Order on the application to join Everyday as a co-Plaintiff. The authorities are clear that a legal interest is enough for such an Order to be made.

54. It is also clear that the allegations of litigation trafficking, champerty and/or maintenance are not grounded on any satisfactory evidence. There is no proof that those offences have occurred. There is therefore no reason to refuse the Order sought on the basis that Everyday has been involved in such improprieties.

(l) Admissions by Everyday of Criminal Activity.

55. In his second affidavit, Mr. McKeown makes a series of complaints about Everyday and Mr. Ned Murphy, the Receiver appointed to the Defendants properties. These complaints run from paragraph 4 to paragraph 25 inclusive of Mr. McKeown's second Affidavit. I agree with the submissions of Everyday that that, in large measure, these complaints arise from the Defendants failure to distinguish between the enforcement of a summary judgment *in personam* against the Defendants and the entitlement of AIB or Everyday to appoint a Receiver over secured properties. As Everyday submits, that latter right arises not from the judgment of this Court but rather than the security offered by the Defendants for their facilities. I do not think that, on proper analysis, the issues raised by the Defendants sustain an allegation of criminality on the part of Everyday or other people alleged to have acted in concert with Everyday, namely the Receiver and the CEO of the Property Registration Authority (see paragraph 2 of Mr. McKeown's second Affidavit). In any event, Mr. McKeown has already indicated in that Affidavit, that it is the intention of the Defendants to refer these matters *"to the relevant national and international authorities […]"*. No doubt, such a reference will include the suggestion (at paragraph 10 of the Affidavit) that a certain named official of the Property Registration Authority and her colleagues might "*scrub the records*" in some way so as to facilitate Everyday. Much of the contents of this section of Mr. McKeown's second Affidavit is of this nature. It also includes allegations of "*monies been stolen/misappropriated*" and allegations of perjury.

56. Deciding these issues, and even engaging with them, is to do the very thing which I am required not to do, namely transform a simple procedural motion into not just a mini trial, but effectively a roving enquiry into the propriety and legality of the actions of a range of persons, including persons and institutions not before the Court. I will not do this. If there is any reality to the allegations of criminality, then it is best that I do not trespass upon them as doing so could well prejudice any steps that might be taken by responsible authorities. Indeed, a similar point is (as I read it) made at paragraph 55 of Mr. McKeown's second Affidavit when he says:-

> "I say of course Everyday's motion cannot be determined as they have set it forth, especially as it crosses into the criminal jurisdiction"

57. If it was necessary or me to express views about allegations of criminality in order to decide this motion, I may well baulk at doing so. However, it is not necessary for me to

do any more than to consider whether there is any reason put up on behalf of the Defendants which persuades me I should not make the Order sought. Contested allegations of criminality and fraud are best not dealt with in this type of motion. They can be dealt with elsewhere, if they have any traction at all.

(m) The Order Cannot Legally be Assigned.

58. In two sets of written submissions on this motion, the Defendants say that a Court Order cannot be assigned "*whereby it is inclusive of an Order for costs*". Firstly, as I have already considered, the basis for the application is the assignment of the underlying facilities and guarantees and not of the Court Order itself. Secondly, the Order for costs has not been assigned, itself a factor identified by the Defendants in the submission they make about the fact that the Order for costs remains to the benefit of AIB. For these reasons, I do not think that the reliance placed by the Defendants upon *Chung Kwok Hotel Company Ltd v. Field* [1960] 1 W.L.R. 1112 assists them, even if that authority established the proposition asserted by the Defendants.

(n) Everyday Does not Come to Court with Clean Hands.

59. The Defendants rely upon the well-known decision of Finlay P. in *McMahon v. Kerry County Council* [1981] ILRM 419 in suggesting that the Court must act as "a court of conscience". Of course, the issues in *McMahon* were very different involving, as they did, the possibility that landowners could obtain possession of their property together with the benefit of dwellings which Kerry County Council had built upon it without averting to the fact that the local authority did not own the property, in circumstances where the landowners had done absolutely nothing to ensure that their property was not trespassed upon in this way. In the current motion, the particular allegation set out in the written submissions of the Defendants (both those dated 28th of October 2020 and those dated December 2020) reads:-

> "The Defendants claim the Plaintiffs have attempted to unjustly enrich themselves whether estate of approximately €7 million was under attack, their annual income of circa €220,000 […] removed from them in 2017 to prevent them from servicing the then fully performing loans, their constitutional rights have been set to nought, their statutory right to equity of redemption removed and they stand the victim of acid theft fraud."

60. No authorities have been opened to me suggesting that, for a simple procedural motion such as this, the general behaviour of the Applicant has to be scrutinised to the extent that I am satisfied that they come to the Court with clean hands in seeking such an Order. However, I am prepared for the purpose of this motion to take the view that such a rule applies. Even if it does, I have already dealt with the allegation that the equity of redemption on the part of the Defendants has been "removed". I do not think any plausible evidence of asset theft fraud has been provided particularly since, as I have already found much of the complaints of the Defendants about the activities of the Receiver and of Everyday fails to take into account the entitlement of Everyday as the owner of the relevant facilities and securities to enforce against the Defendants, even without the benefit of the Court Order. There is no evidence that annual income of the

Defendants (whatever it may have been) was *"removed"* in 2017, in order to prevent the Defendants from servicing their fully performing loans. The *"estate"* of the Defendants may well have been worth in the region of €7 million at one time. I do not know whether this was a gross or net value but, assuming that €7 million was the net value of the assets owned by the Defendants it is difficult to understand how they were unable to refinance or otherwise raise money to pay debts to AIB of less than €1.5 million; on the basis of the Order of Costello J., that was the amount due to AIB as of May 2017. Given that the Defendants were represented by lawyers up to and including the hearing before Costello J., the possibility of such an approach was something on which they could not have been advised and which, where commercially possible, should have been capable of being achieved. In any event, no credible evidence is placed before me to establish that Everyday does not come to court with clean hands.

(o) Other Arguments.

61. I have taken into account all other arguments raised by the Defendants. These include, for example, the submission made in the December 2020 written submissions about their discussions with Eugene McDermott and the argument that that case is distinguishable. I do not believe that it is, and I do not think that any of the reasons put forward in those submissions establish a genuine material distinction between *McDermott* and these proceedings. To give just one instance, I do not think that any valid distinction is to be found in the fact that in McDermott the original Plaintiff was replaced entirely with Ennis Property Finance DAC whereas in these proceedings Everyday will not replace AIB in the entirety of the Order. That seems to me a distinction without a difference.

62. By way of further example, I have considered the complaint made by the Defendants that this motion was due to be heard on the 30th of October 2020, that it was adjourned, and that this was prejudicial to the Defendants as they had already delivered their written submissions and Everyday was then (because of the adjournment) able to deliver a further Affidavit (on the 11th of November 2020). In fact, as is mentioned at paragraph 3 of Mr. McKeown's second Affidavit, on the 16th of October 2020 the Defendants unsuccessfully sought an Order from this Court (Barniville J.) directing the Property Registration Authority not to register any sales by the Receiver of the Defendants properties. The Defendants then brought a motion dated the 23rd of October 2020 returnable for the 30th of October, covering very similar ground to the original Everyday motion (at least as that latter motion developed having regard to the evidence produced by the Defendants). I felt it appropriate that both motions be heard together. The second motion was clearly not in a position to be heard. Directions were then given in both motions to ready them for hearing. On this motion, while Everyday were permitted to put in a further Affidavit so were the Defendants, who had the last word in the Affidavits filed. In a separate judgment, I refuse the Defendants any relief in the motion issued by them. Had that fruitless motion not been brought by the Defendants, therefore, the Everyday motion would have proceeded on the 30th of October and the prejudice alleged by the Defendants could never have arisen. As it happens, I do not believe that the Defendants were prejudiced, in that they had the final say on the evidence in this motion. Having considered the opening submissions of the Defendants, I

do not agree that they were prejudiced unfairly by the delivery of Mr. McCudden's subsequent affidavit.

63. I will briefly give two further examples of the evidence and submissions of the Defendants which I have considered. Firstly, there is a frequent complaint by the Defendants that these proceedings are still being litigated four years after the judgment of Costello J.. That is unfortunate, but the Defendants must bear some significant responsibility for this. The appeal process which they launched from the judgment of Costello J. lasted until the determination of the Supreme Court in March 2020. The original addition application was resisted tooth and nail by the Defendants, as was the current motion. As Everyday have succeeded in the motion determined by Barniville J. and in this current motion any delays to the process caused by the brining of these two motions can, by and large, be laid at the door of the Defendants.

64. The second example relates to the complaints against Barniville J. At paragraph 41 of his first affidavit, Mr. McKeown suggests that Everyday was favoured by Barniville J in his judgment of the 1st of April 2020 in these ways:-

(i) In applying the requirement of proof on the balance of probabilities, the judge gave 'the green light to this motion [...]' In fact, by applying the higher standard Barniville J. made in more difficult for Everyday to obtain the order joining it as a Plaintiff to the action.

(ii) The Defendants could not appeal, or successfully appeal, such a comprehensive procedural judgment. Of course, the Defendants could have sought to overturn the judgment on appeal, though for my part I cannot see any grounds for them to do so.

(iii) The judge's production of an exhaustive, 137 paragraph judgment on a procedural motion is 'most beneficial' to Everyday, and therefore 'prejudicial to the Defendants'. Anyone familiar with Barniville J.'s canon of work will know that a judgment of this length is by no means unusual. Reading the decision, it is clear that its length is a product of the numerous issues raised by the Defendants, and not by any desire to advantage Everyday.

(p) Conclusion

65. I have decided that the legal interest in the facilities and guarantees which led to the judgment of Costello J. in May 2017, have been validly and effectively assigned to Everyday. I have decided that none of the objections raised by the Defendants to the making of an Order in terms of paragraph (1) of the Notice of Motion justify the refusal of the Order sought. As is plain from this judgment, I am deeply unhappy at the way in which the Defendants have chosen to meet this motion. They are, of course, entitled to resist the making of any Order in favour of Everyday. However, they have chosen to do so by making unpleasant and baseless allegations and insinuations against individuals, both named and unnamed which should never have been made.

66. I will therefore, make an Order in terms of paragraph (1) of the Notice of Motion dated the 16th of August 2020.

67. While I had previously informed the parties that this judgment would be delivered in August, and that all outstanding issues would be dealt with then, I have been able to complete this (and the associated judgment) earlier than anticipated thanks to the time freed up by the settlement of a lengthy trial.

68. I will now deal with all outstanding matters, including costs, at 10am on the 29th of July 2021.