THE HIGH COURT

COMMERCIAL

[2023] IEHC 658
[2023 No.242 S]

BETWEEN

MGG CALIFORNIA LLC

PLAINTIFF

AND

JACOB E. SAFRA (ALSO KNOWN AS "JACQUI SAFRA" ALSO KNOWN AS "JACOB ELIE BEAUCAIRE SAFRA").

DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 30 November 2023

Introduction

1. In these proceedings the plaintiff seeks to enforce a judgment it obtained against the defendant in the Supreme Court of the State of New York on 7 October 2022 in the amount of $192,221,295.14 (the "**New York Judgment**"). The New York Judgment arises on foot of a personal guarantee given to the plaintiff by the defendant. Enforcement of the New York Judgment in Ireland is pursued by way of an application by the plaintiff to this court for summary judgment. The defendant resists the application on a number of grounds which are considered in detail in this judgment. Arguments were heard by this court from the parties over two days on 9 and 10 November 2023.

The parties

2. The plaintiff is a limited liability corporation incorporated under the laws of Delaware with its registered office at one Penn Plaza, 53rd floor, New York NY 10119, United States. The plaintiff carries on the business of issuing debt financing and other loans to borrowers for the benefit of its investors, who include pension funds.

3. The defendant is a businessman and Swiss citizen who resides at Garnish Island, Driminamore, Sneem, Co.Kerry. The defendant also resides from time to time in New York and in Switzerland.

4. It is in the following circumstances that this court must determine if the New York Judgment is enforceable in Ireland by way of summary judgment.

The borrowings and circumstances leading to the New York Judgment

5. On 11 October 2018, a Delaware corporation known as Spring Mountain Vineyard Inc ("**SMV**"), (a company beneficially owned by the defendant which carried on the business of a vineyard and winery), borrowed an aggregate principal amount of $185,000,000 from various lenders for whom the plaintiff acts as administrative agent and collateral agent. These borrowings were secured and documented by a credit and guarantee agreement dated 11 October 2018 entered into by SMV as borrower with the plaintiff and the various lenders, ("the **Credit Agreement**").

6. The recitals to the Credit Agreement confirm that the defendant agreed to provide a personal guarantee to the plaintiff to secure all of the obligations of SMV under the Credit Agreement. The Credit Agreement set out SMV's obligations in detail including the dates on which repayments were to be made (the first such payment date arising on 31 December 2018). The Credit Agreement also specified the interest rate payable by SMV on outstanding borrowings and the default interest rate applicable in the event of a default, as defined.

7. In compliance with the terms of the Credit Agreement and to secure SMV's obligations under it, the defendant executed a personal guarantee (unlimited) in favour of the plaintiff on 27 September 2018 which was effective from 11 October 2018 (the "**Guarantee**"). Section 2 (a) of the Guarantee provides that the defendant "*irrevocably, absolutely and unconditionally guarantees to the Agents and Lenders, as and for its own debt, until the final and indefeasible payment in full thereof in cash has been made, the prompt payment by [SMV], as and when due and payable (whether by scheduled maturity, required prepayment, acceleration, demand or otherwise), of all Obligations from time to time owing in respect of the Credit Agreement …, whether for principal, interest… or otherwise, and whether accruing before or subsequent to the commencement of any Insolvency Proceeding with respect to any Borrower…* ". The Guarantee is governed by and to be construed in accordance with the laws of the State of New York (section 12(h)).

8. The Guarantee records at Section 4 (c) (in block capitals) that the defendant waives all rights and defences that the defendant may have because SMV's debt is secured by real property. This waiver (which is stated to be "*an unconditional and irrevocable waiver of any rights and defenses the personal guarantor may have because the Borrower's debt is secured by real property*") includes that:

"(2) *If the collateral agent forecloses on any real property collateral pledged by the Borrower:*

The amount of the debt may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price".

9. Security was taken in the Credit Agreement over the Real Estate Assets belonging to SMV as set out at Schedule 4.12 of the Credit Agreement, being the property at "*2805 Spring Mountain Road, St. Helena, CA 84574*" ("the **Vineyards**"). The Vineyards

comprise four individual vineyard estates of approximately 845 acres located in Napa Valley, California- each having a winery permit.

10. The evidence is that SMV defaulted on its obligations under the Credit Agreement by failing to make the first repayment due on 31 December 2018. An amendment and waiver to the Credit Agreement was negotiated and executed on 25 March 2019 to facilitate extensions of credit to SMV rather than declaring an event of default. In fact, there were further defaults by SMV in April 2019 and between June 2019 and July 2020. A second amendment to the Credit Agreement was executed on 8 July 2020 to facilitate a further extension of time for repayment by SMV. With each amendment agreement the Guarantee was reaffirmed and confirmed formally by the defendant in terms expressly acknowledging that the plaintiff was relying upon the amendment agreement and the Guarantee in agreeing the further extensions of time for payment by SMV under the Credit Agreement.

11. Ultimately, on 22 February 2021, the plaintiff served a notice of default/reservation of rights on SMV relying on specified events of default under section 8.1 of the Credit Agreement. That same day, a notice of demand for payment on foot of the Guarantee was issued by the plaintiff to the defendant. The parties also entered into a forbearance agreement on 22 February 2021 (which was amended on 28 December 2021 and later amended and restated on 29 July 2022) (together and each described hereafter as the "**Forbearance Agreement**") pursuant to which the plaintiff on behalf of the lenders agreed to forbear from exercising its remedies under the Credit Agreement and the Guarantee, on specific terms identified in the Forbearance Agreement.

12. Further defaults arose however despite the extended periods for repayment which were outlined in the Forbearance Agreement. On 29 July 2022, the plaintiff served a

further notice of default on SMV in respect of the Credit Agreement and a further demand for payment on the defendant on foot of the Guarantee. This notice and demand coincided with the third Forbearance Agreement executed on 29 July 2022 which provided that the relevant forbearance period would expire on 30 September 2022.

13. The Forbearance Agreement executed on 29 July 2022 required the plaintiff and SMV to provide additional consideration in respect of the plaintiff's continued forbearance. Specifically, clause 4 (c) of the Forbearance Agreement provides as follows: – "*The Personal Guarantor shall have delivered to the Agents the executed affidavit of Confession of Judgment (the "**Confession of Judgment**") in the form attached hereto as Annex B, notarised in Geneva, Switzerland and with the executed certifications and apostille, which shall be held by the Agents and may only be used by the Agents and become effective as provided in paragraph 6(b)below*."

14. Paragraph 6 (b) of the Forbearance Agreement confirmed that if payment was not made by 30 September 2022, the plaintiff on or after that date and at its election and in its sole discretion, "*and without any further action or any notice to any Credit Party*" could immediately file the Confession of Judgment in the Supreme Court of the State of New York.

15. Clause 10 of the Forbearance Agreement dealt with the outstanding indebtedness at the time of execution of the Forbearance Agreement and specifically provided that the defendant "*hereby acknowledges and agrees… that, as of June 30, 2022, the aggregate outstanding amount of the obligations owing under the Credit Agreement… and the Personal Guaranty is $192,221,090.14*."

16. The Confession of Judgment was provided by the defendant on 8 September 2022, duly executed and notarised in compliance with the Forbearance Agreement. Relevant aspects of that sworn document include the following:

(a) The defendant confirms that he maintains a residence in New York County.

(b) The defendant expressly confirms that "*the full amount due and owing .., which I am personally obligated to pay, is $192,221,090.14*" and that his obligation to the plaintiff under the Guarantee "*is a valid obligation for which I am personally liable*".

(c) The defendant authorises and agrees to entry of judgment in the Supreme Court of the State of New York against him in favour of the plaintiff in the amount of $192,221,090.14, plus interest thereon (calculated in accordance with the Credit Agreement) accruing from 1 July 2022 through the date of entry of judgment and less any payments received by the plaintiff in respect of the defendant's obligations under the Guarantee.

(d) The defendant further agrees "*that the judgment may be entered against me without notice, hearing or an opportunity to be heard*".

(e) The defendant confirms that he makes the Confession of Judgment "*voluntarily, knowingly, and with the advice of counsel*".

17. On 28 September 2022, just before the expiry of the forbearance period on 30 September 2022, SMV issued a motion in the US courts seeking a temporary restraining order and a preliminary injunction to prevent the plaintiff taking possession of the Vineyards. That motion was refused on 29 September 2022. Immediately thereafter on that same day, SMV commenced a bankruptcy reorganisation in the U.S. Bankruptcy Court for the Northern District of California by filing a voluntary Chapter 11 petition.

18. The defendant did not file any bankruptcy proceedings and the evidence before this court is that he is not the subject of a stay or any other protection under United States law.[1]

19. On 30 September 2022, the Forbearance Agreement expired without amendment or extension, thereby triggering the termination date thereunder. The plaintiff then became entitled to and did file the defendant's sworn Confession of Judgment with the Supreme Court of the State of New York.

20. On 7 October 2022, the clerk of the New York Supreme Court entered judgment in favour of the plaintiff in the amount of $192,221,090.14 based on the Confession of Judgment and related papers filed in support thereof. Costs and disbursements measured in the amount of $205 were also awarded to the plaintiff. The plaintiff did not pursue pre-judgment interest on the judgment sum.

21. The New York Judgment was served on the defendant's designated agent for service on 14 December 2022 and was served on the defendant's New York residence on 16 December 2022. The New York Judgment was also emailed directly to the defendant at his personal email address and to his US attorneys on 16 December 2022.

The Bankruptcy of SMV

22. As outlined above, SMV filed its bankruptcy petition on 29 September 2022 with the United States Bankruptcy Court for the Northern District of California, Santa Rosa Division (the "**Bankruptcy Court**"). Under US law, SMV's filing of the bankruptcy petition resulted in an automatic stay of any actions against SMV, which prevented the plaintiff from resorting to its real property security over the Vineyards under the Credit Agreement or any associated agreements. [2]

[1] Para 27 of Affidavit of Michael Brasky sworn 10 July 2023

[2] Para 23 of defendant's affidavit sworn 8 September 2023 referencing 11 U.S.C. S 362 and para 3 of Affidavit of Gavin Schryver sworn 8 September 2023. Indeed, this appears to have been the intention of SMV in filing the

23. In order to fund SMV's ongoing operations and to preserve the value of its bankruptcy estate, the plaintiff extended additional funds to SMV pursuant to a Debtor in Possession Secured Multi-Draw Term Promissory Note. The further amount loaned by the plaintiff was $9,613,725.93 (the "**DIP Loan**"). The DIP Loan was repayable as a matter of law in priority to any other borrowings by SMV.[3] The defendant was not a party to the DIP Loan and was not obliged to repay the DIP Loan.

24. While not the position under Irish law, US bankruptcy procedure permits the company in bankruptcy to conduct the sale of its own assets. SMV hired an investment banker, BNP Paribas ("**BNP**"), to conduct the sales process for its assets. The evidence is that at all times SMV and its professionals controlled the process for the sale of SMV's assets, including marketing the assets and making the defendant's appraisals and other information available to the eighty potential purchasers they contacted over a five month period.[4] The evidence is that during the course of the bankruptcy proceedings, SMV operated as a "debtor in possession" under the US Bankruptcy Code.[5]

25. SMV obtained an order on 6 March 2023 from the Bankruptcy Court approving the auction and bid procedures for the sale of its "Wine Vineyard Business". The bidding procedures order called for an auction to be held for the Vineyards, the wine inventory, and the contractual and other rights that went along with the Vineyards. Those bidding procedures permitted the plaintiff to "credit bid" the entire amount of its claim against SMV pursuant to 11 U.S.C. section 362 (k).

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petition as confirmed by the quotation referenced in para 11 of the Third Affidavit of Michael Brasky sworn 26 September 2023 where SMV wrote that it "*commenced this bankruptcy case in order to prevent MGG from foreclosing on [SMV's} real and personal property on September 30, 2022*".

[3] Para 25 of Third Affidavit of Michael Brasky sworn 26 September 2023 quoting section 364 of the US Bankruptcy Code and section 507(b) of the Section 11 of the Bankruptcy Code.

[4] Para 40 Second Affidavit of Patrick Flynn sworn 26 September 2023

[5] Para 23 Third Affidavit of Michael Brasky sworn 26 September 2023

26. On 24 March 2023 an auction was held for the Vineyards and the remainder of SMV's assets (other than an insurance claim) in circumstances where there was more than one qualified bid for those assets. The plaintiff was deemed the successful bidder for the SMV assets (which included the Vineyards) with a credit bid of $42,000,000. Allowing for the immediate repayment of the DIP Loan, this left a net realisation of $32,386,274.07.

27. This court has been provided with an affidavit of Perry DeLuca, a licensed securities broker with BNP, who was instructed by SMV in this matter (Exhibit Book PF1). Mr DeLuca outlines in some detail the conduct of SMV/BNP regarding the marketing and sales process culminating in the auction on 24 March 2023, conducted in compliance with the Bankruptcy Court's directions for each stage. Mr DeLuca confirms the team "*had extensive experience and expertise in wine vineyard mergers and acquisitions*". He confirms that BNP engaged in "*a very active marketing campaign for the assets of [SMV]*" including considering the possibility of disposing of those assets in separate lots. BNP established a list of "*more than 80*" prospective buyers including financial and strategic buyers in the US and around the world. An "*extensive*" confidential information memorandum was prepared which provided detailed financial information regarding the SMV assets. A data room was set up (with appropriate non-disclosure requirements) to enable prospective buyers to conduct proper due diligence and the documentation provided included "*appraisals of the Vineyard Assets*". Mr DeLuca confirms that five different bids were received on 17 March 2023 - none for the entirety of the SMV assets. Four of the bids were for one or more of the Vineyards and one bid was only for the wine inventory. One bidder withdrew their bid prior to the commencement of the auction on 24 March 2023. BNP met with all bidders individually on the day of the auction and after a "*number of hours passed*" it was

decided that all bidders would openly bid against each other. The open bidding went on for "*about 1.5 hours*". The plaintiff submitted a credit bid of $42million which was $500,000 more than the amount of the next best cumulative bid and, at that point, SMV adjourned the auction.

28. Following the auction, the defendant, through his investment banker, negotiated the terms of a settlement agreement with the plaintiff which was executed on 6 April 2023 (the "**Settlement Agreement**"). On foot of the Settlement Agreement, the defendant was granted a full release of all claims arising from the Guarantee and the New York Judgment conditional upon him paying the plaintiff $180,000,000 plus certain other costs no later than 28 June 2023. The plaintiff agreed to delay the closure of the sale of the Vineyards until that date.

29. On 7 April 2023 the Bankruptcy Court entered the order approving the sale of substantially all of SMV's assets to the plaintiff pursuant to the credit bid (the "**Sale Order**"). There were no relevant objections to entry of the Sale Order, including by the defendant. Nor did the defendant appeal the entry of the Sale Order. The Sale Order is very detailed. It states the Bankruptcy Court's finding that the sale "*is in the best interests of the Debtor's estate, its creditors, and other parties in interest*.." It confirms that a reasonable opportunity to object had been afforded to all known interested parties and that a reasonable opportunity had been given to any interested party to make a higher and better offer. It confirms that the plaintiff's credit bid was a valid and proper bid and that "*any other available transaction would not have yielded as favourable an economic result for the Debtor's estate, creditors, and other parties in interest*". It states that the plaintiff's bid constitutes "*reasonably equivalent value and fair consideration under the Bankruptcy Code*"; that the plaintiff was a good faith and arms-length purchaser of SMV's assets; that parties had a "*full, fair and*

reasonable opportunity" to submit bids and participate in the auction; that the credit bid represented the highest and best bid for SMV's assets, and that the Sale Order is a final order and is binding on SMV, "*all creditors of, and holders of equity interests in, [SMV], any holders of Liens, Claims or other interests (whether known or unknown) in, against or on all or a portion of the Acquired Assets*". The Sale Order also confirms that the Bankruptcy Court "*retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation and enforcement of this Order.*"

30. The defendant did not make the required payment under the Settlement Agreement but instead requested an extension, which the plaintiff declined. The sale of the Vineyards closed on 3 July 2023, at which point the plaintiff took possession of and title to the Vineyards and related assets in exchange for its $42 million credit bid.

31. On 9 August 2023 the defendant filed a motion in the Supreme Court of the State of New York seeking an order directing entry of a "satisfaction piece" equivalent to the fair value of the property that the plaintiff had purchased at the bankruptcy auction (the "**Satisfaction Motion**"). The Satisfaction Motion is yet to be determined by the New York Supreme Court.

The relevant evidence on matters of US Law

32. The underlying documents in this case are subject to US law (New York). The Vineyards are located in the US (California). The New York Judgment which is sought to be enforced was granted by the New York courts. The bankruptcy process was conducted entirely in the US and approved by the Bankruptcy Court in the US. The defendant has issued his Satisfaction Motion in the New York courts which remains pending before those courts. All of these matters required this court to obtain evidence of US law. This evidence was provided on behalf of the plaintiff by Michael

Brasky and on behalf of the defendant by Gavin Schryver, both US attorneys, who provided very helpful affidavits of US law for this court.

33. Mr Brasky confirms that under New York law, service of a money judgment is not necessary for enforcement. Instead, the judgment need only be entered. Nonetheless, service was effected on the defendant's designated agent for service and on the defendant's residence in New York. Mr Brasky states that the service was effective as a matter of New York law.[6]

34. Mr Brasky also confirms from his knowledge of New York law that[7]: –

(a) The New York Judgment is final and conclusive.

(b) The New York Supreme Court had jurisdiction over the defendant who voluntarily agreed to submit to the jurisdiction of the New York Supreme Court under section 10 of the Guarantee.

(c) The New York Judgment is for a fixed sum of money - US$192,221,295.14. (comprising $192,221,090.14 agreed judgment debt and $205 for measured costs and disbursements).

(d) The New York Judgment was not obtained by any fraud.

35. Mr Brasky also confirms that judgment by confession is a type of judgment that a creditor can obtain from a New York court by filing an affidavit of confession of judgment, which is a debtor's sworn admission that he owes the plaintiff a certain sum of money and that he consents to the court entering a judgment against him for that amount. A judgment by confession may be entered upon an affidavit executed by the debtor, without litigating the underlying claim, either for money due or to become due. A legally sufficient affidavit of confession of judgment must state the sum for

[6] Para 34 of Affidavit of Michael Brasky sworn 10 July 2023
[7] Para 37 of Affidavit of Michael Brasky sworn 10 July 2023

which judgment may be entered and must authorise the entry of judgment. It must also state the county where the debtor resides and the facts out of which the debt arose. It must show that the sum confessed is justly due or to become due and the affidavit must be executed by the debtor under oath. The Confession of Judgment in this case satisfies all these requirements and is valid under New York law.[8]

36. Mr Brasky also confirms that where an affidavit of confession of judgment is filed in the New York courts, a clerk enters judgment by confession for the sum confessed. The matter is not assigned to a judge, the debtor need not be served, no hearing is required, and the merits of the dispute are not litigated. The judgment by confession may then be enforced in the same manner as a judgment that is entered as a result of the plaintiff winning an action by summary judgment or at trial.[9] He also confirms that a judgment by confession is not amenable to challenge by a debtor on a direct appeal, or even by motion in most cases. Rather the debtor must commence a separate plenary action to contest the validity of the judgment by confession.[10]

37. The defendant in this case has neither appealed, nor moved to vacate, nor commenced plenary proceedings to challenge the New York Judgment.

38. Mr Brasky confirms that a judgment by confession is enforced in the same manner and with the same effect as a judgment in an action in the New York Supreme Court. He confirms that US Courts have held authoritatively that judgments by confession do not violate the due process clause of the Fourteenth Amendment in the United States Constitution, because parties to contracts are free to agree to a waiver of their due process rights.[11] He confirms that judgments obtained in such manner have been held

[8] Para 40 of Affidavit of Michael Brasky sworn 10 July 2023
[9] Para 42 of Affidavit of Michael Brasky sworn 10 July 2023
[10] Para 44 of Affidavit of Michael Brasky sworn 10 July 2023
[11] Para 46 of Affidavit of Michael Brasky sworn 10 July 2023 and para 43 of the Third Affidavit of Michael Brasky citing *D.H Overmyer Co. v. Frick Co.,* 405 U.S. 174,185 (1972).

not to violate a defendant's US federal or state due process rights where, as here, the defendant executed an affidavit of confession of judgment voluntarily and knowingly (and while being advised by New York counsel).[12]

39. In New York, a judgment by confession may be entered, without an action, for money due upon an affidavit executed by the defendant. CPLR 3218 provides that "*A confession of judgment dispenses with an adversary proceeding and gives the creditor the fruits of a successful one by permitting the creditor merely to file a judgment voluntarily confessed by the debtor*". A judgment by confession "*has all of the qualities, incidents and attributes of a judgment on a verdict, including a presumption as to its validity*".[13] A judgment by confession in New York is given both res judicata and collateral estoppel effect. It is a conclusive adjudication of all matters embraced in it and a bar to any subsequent action on the same claim.[14]

40. Mr Brasky confirms that pursuant to New York law, CPLR 5004, the rate of interest on a New York court judgment is 9% per annum.[15]

41. Mr Brasky confirms that under the terms of the Order governing the DIP Loan, SMV was solely liable for the DIP Loan, and the plaintiff was entitled to a "*superpriority claim*" under section 507 (b) of section 11 of the US Bankruptcy Code. This means that the DIP Loan was to be repaid before any other claim.[16] Because the DIP Loan is afforded superpriority status under the Bankruptcy Code it was first applied to the credit bid. Since SMV is the sole obligor on the DIP Loan, it cannot be used to reduce

[12] Para 34.1 Third Affidavit of Michael Brasky sworn 26 September 2023
[13] Per *Giryluk v Giryluk*, 289 N.Y.S.2d 458, 459 (N.Y. App. Div. 1968),aff'd, 23 N.Y.2d 894 (N.Y. 1969) and Para 39 Third Affidavit of Michael Brasky sworn 26 September 2023.
[14] Para 40 Third Affidavit of Michael Brasky sworn 26 September 2023 and *Canfield v,. Elmer E. Harris & Co*., 252 N.Y. 502, 505 (N.Y. 1930).
[15] Para 18 Third Affidavit of Michael Brasky sworn 26 September 2023
[16] Para 25 Third Affidavit of Michael Brasky sworn 26 September 2023

the defendant's debt under the New York Judgment.[17] There does not appear to be any dispute between the US attorneys on the priority status of the DIP Loan.

42. Under the Bankruptcy Court-approved bidding procedures for the sale of SMV's assets, the plaintiff was entitled to "credit bid" the entire amount of its claim against SMV pursuant to section 363 (k) of the US Bankruptcy Code. A credit bid under US law allows a secured creditor to offset its secured debt as payment for secured assets. This assists the creditor to ensure as best it can that secured assets are not sold for a depressed price. [18]

43. A debtor in possession under US bankruptcy law has a great deal of discretion to determine the method of conducting the sale of its assets, subject to its paramount duty to obtain the best price for its assets.[19] It would have been open to the defendant, as an interested party, to oppose the proposed sale of SMV's property upon a timely request for a hearing. Unless higher bidders are present, the objecting party carries a substantial burden in convincing the court that a proposed sale is not a valid exercise of the debtor in possession's business judgment.[20]

44. Where a sale order contains a finding of good faith pursuant to section 363 (m) of the Bankruptcy Code (as is the case here), parties are precluded from collaterally attacking the sale order. Section 363 (m) was specifically designed to protect the economic integrity of court-approved sales.[21]

45. Mr Schryver says the reality of the SMV auction was a sale in bankruptcy with the looming threat of a credit bid of up to $200 million and that "*it is commonly*

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[17] Para 73 Third Affidavit of Michael Brasky sworn 26 September 2023
[18] Paras 27 and 66 of Third Affidavit of Michael Blasky sworn 26 September 2023 citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639,644 n.2 (2012).
[19] Para 64 Third Affidavit of Michael Blasky sworn 26 September 2023 citing *Gluckstadt Holdings, L.L.C v. VCR 1, L.L.C. (in re VCR 1, L.L.C.)*, 922 F.3d 323,327 (5th Cir. 2019)
[20] Para 65 Third Affidavit of Michael Blasky sworn 26 September 2023 citing *2 Collier Bankruptcy Practice Guide P43.02 (2023)*.
[21] Para 68 Third Affidavit of Michael Blasky sworn 26 September 2023 citing *In re CHC Indus, Inc*, 389 B.R. 767,775 (Bankr. M.D. Fla 2007)

understood .. that such sales achieve less than "fair market value", as that term is defined in New York law."[22]

46. Mr Schryver confirms that as a matter of the law of New York, there is authority to the effect that when a judgment debtor's assets are sold at auction, the judgment debtor is entitled to the satisfaction of the judgment to reflect the value received by the judgment creditor. Thus, where the judgment creditor purchases the judgment debtor's assets, the court may reduce judgment by the fair market value of those assets if greater than what was paid by the judgment creditor at auction.[23] While various cases were cited by Mr Schryver to support this proposition it is not apparent to this court that any of those cases arose in the context of a court-approved bankruptcy sale. Mr Schryver says that as part of its opposition papers to the Satisfaction Motion, the plaintiff has not exhibited any appraisal of its own to contradict the evidence offered by the defendant as to the fair market value of the Vineyards and associated assets.[24] He says that New York procedural rules do not stipulate a specific timeline within which the Satisfaction Motion should be determined and that in his experience it may take a number of months for the Satisfaction Motion to be resolved. He says that if the New York court accedes to the application and the Satisfaction Motion, this will have the result of discharging in full (or in part), the indebtedness claimed by the plaintiff against the defendant.[25]

47. Mr Brasky outlines in some detail in his third affidavit the reasons for his contention that the defendant's Satisfaction Motion does not affect this application. He says the Satisfaction Motion is in the nature of a post judgment motion and therefore could only affect the extent to which the plaintiff is entitled to *collect* in respect of the

[22] Para 7 Second Affidavit of Gavin Schryver
[23] Para 6 Affidavit of Gavin Schryver sworn 8 September 2023
[24] Para 10 Affidavit of Gavin Schryver sworn 8 September 2023
[25] Para 12 Affidavit of Gavin Schryver sworn 8 September 2023

judgment sum. It does not reverse the New York Judgment in any way nor does it have the effect of suspending its enforceability.[26] Mr Brasky points out that the Satisfaction Motion was not brought before the Bankruptcy Court who oversaw the sale of the Vineyards and the other SMV assets. Instead he says that the defendant seeks that "*the New York court gainsay the Bankruptcy Court to determine that the New York Judgment be deemed satisfied based on the Defendant's related assertion of SMV's "fair market value*"."[27] He says the Satisfaction Motion is "*fundamentally and clearly flawed; it effectively seeks an order from the New York Court, pursuant to CPLR 5021, that the Plaintiff's $192 million judgment should be deemed satisfied based on a court- approved bankruptcy sale of SMV's property for $42 million, which the U.S. Bankruptcy Court concluded was the highest and best offer for the subject assets*."[28]

48. Mr Schryver says the Bankruptcy Court was not addressing the question of whether the $42 million bid was equivalent to the property's "*fair market value*" because "*that question would have been irrelevant to the Bankruptcy Court. The only thing the Bankruptcy Court determined was whether the auction (and the final bid) was fair "under the circumstances"-i.e., under the circumstances of a fire-sale bankruptcy auction, under the shadow of Plaintiff's massive credit bid and led by an unmotivated banker*."[29]

49. Mr Brasky says that he is not aware of any authority under New York law which states that an application brought pursuant to CPLR 5021 (seeking an entry of satisfaction of a judgment) has any bearing on the finality of the judgment or supports staying enforcement during the pendency of a motion for satisfaction of judgment.

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[26] Paras 3a Third Affidavit of Michael Brasky sworn 26 September 2023
[27] Para 54 Third Affidavit of Michael Brasky sworn 26 September 2023
[28] Para 61 Third Affidavit of Michael Brasky sworn 26 September 2023
[29] Para 12 Second Affidavit of Gavin Schryver

The defendant's expert, Mr Schryver does not appear to dispute this position. However, Mr Schryver disagrees with Mr Brasky that the Satisfaction Motion does not affect this application and he believes the Satisfaction Motion is well-founded. He says the effect of what the plaintiff seeks in these proceedings is to proceed against the defendant's assets in Ireland or within the EU, notwithstanding that the Satisfaction Motion, if successful, will have the effect that the New York Judgment "*will be satisfied in full*". He says that this approach is "*unnecessary and is apt to visit obvious and irreparable material prejudice on the defendant*." [30]

50. Mr Brasky confirms that the defendant bears the burden of proof under CPLR 5021 to demonstrate that the New York Judgment should be satisfied.[31] Mr Schryver agrees this is correct but states that the burden is not an unusually high one; the moving party must show that it is more likely than not that the fair market value of the assets in question was higher than the amount paid.[32]

51. Mr Brasky says the defendant has not applied to vacate or otherwise challenge the New York Judgment through any legally recognised mechanism under New York law. Mr Brasky states that under New York law a defendant may vacate a judgment "*entered in violation of the terms of the affidavit*" or if the judgment by confession violates due process. The court's decision on any such motion may be appealed pursuant to standard appellate procedures in New York and a defendant may seek to stay enforcement of a judgment pending appeal. To date, the defendant has not sought to vacate, appeal, stay the enforcement of or in any way challenge the finality or merits of the New York Judgment.[33]

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[30] Para 4 Second Affidavit of Gavin Schryver
[31] Para 57 Third Affidavit of Michael Brasky sworn 26 September 2023 citing *Beal v. Beal* 818 N.Y.S.2d 557,558 (N.Y. App. Div. 2006).
[32] Para 11 Second Affidavit of Gavin Schryver
[33] Paras 46- 50 Third Affidavit of Michael Brasky sworn 26 September 2023

The arguments advanced by the parties

52. The plaintiff's position is that the New York Judgment should entitle it to summary judgment against the defendant in Ireland such that the plaintiff will then be at liberty to enforce that judgment against the defendant's Irish assets. The plaintiff says that a similar application has been successfully brought before the courts in the British Virgin Islands ("**BVI**") where the defendant is also believed to have assets. The plaintiff's evidence is that no sum whatsoever has been received by it against the New York Judgment save for the credit bid made by the plaintiff in the bankruptcy auction sale. The plaintiff says it is prepared to give full credit to the defendant for the amount of that credit bid less the DIP Loan, resulting in a net reduction of the New York Judgment in the amount of $32,386,274.07. The plaintiff says that despite engagement with the defendant and attempts to enforce the New York Judgment in New York and BVI it has not been possible to recover any payment to date.[34]

53. The plaintiff says that the New York Judgment refers to a sum certain which the defendant voluntarily, and on advice, accepted was due and owing, given the history of default that had occurred by the time the defendant swore his affidavit of Confession of Judgment. The plaintiff says the defendant has no defence to the plaintiff's claim in these proceedings either in law or on the facts.

54. The defendant opposes the plaintiff's application for summary judgment. A number of arguments are advanced by the defendant in his affidavit sworn 8 September 2023, as follows:

(1) The plaintiff has acquired the Vineyards and associated assets which the defendant claims to have a value of approximately €350 million. This is considerably in excess of the amount of the New York Judgment. The defendant

[34] Para 14 of Affidavit of Patrick Flynn sworn 10 July 2023

says the plaintiff "*deliberately engineered a situation in which it acquired these assets for a fraction of their appraised value*"[35]. He says these proceedings would result in the plaintiff recovering multiples of any debt due to it, thereby unjustly enriching the plaintiff and so would assist in the promotion of an inequitable and manifestly unjust result that would be contrary to public policy. The plaintiff says that the Vineyards and associated assets were appraised by Newman Knight Frank in August 2021 as having a value of $204,100,000. The same assets were appraised in August 2022 as having a value for the four Vineyards in the amount of $218,700,000 (and total value of $347,450,960 when other assets namely the wine inventory and insurance claim are included). Furthermore, the defendant says the plaintiff has received more than $100 million in payments but that given the applicable post default penal interest rates, the balance on the SMV loan had increased rather than decreased, despite these payments having been made.[36]

(2) The defendant says that a facility exists under New York law by which a court can declare that a judgment has been satisfied (in whole or in part), by the value received by the judgment creditor. Where the judgment creditor has purchased assets of the debtor, the appropriate reduction is the fair market value of those assets. The defendant has filed an application in the New York court seeking an order that the New York Judgment has been satisfied by reason of the fact that the value of the assets obtained by the plaintiff vastly exceeds the amount of any debt due. The defendant says that application, if successful, will result in no judgment sum being due to the plaintiff, and there would thus be no basis for seeking judgment in any amount in these proceedings. The defendant complains that the

[35] Para 3a of defendant's affidavit sworn 8 September 2023.
[36] Para 20 of defendant's affidavit sworn 8 September 2023

plaintiff deployed its credit bid in a manner designed to avoid the sale of the Vineyards at a proper or fair market value.[37] He argues that the Order from the Bankruptcy Court approved the sale but did not acknowledge (or purport to acknowledge) the market value of the Vineyards purchased by the plaintiff through the bankruptcy auction.

(3) The defendant argues that the amount for which judgment is sought in these proceedings is not clear and does not appear to properly (or at all) give account for credits obtained through the sale of the Vineyards.

(4) The defendant argues in his affidavit that these proceedings seek the recognition and enforcement of a judgment, the amount of which is significantly comprised of punitive interest and penalty clauses which are contrary to Irish law and thus should not be enforced here, as amounts which, if sought in Ireland, would not be available to the plaintiff.

(5) The defendant also complains that he was given no opportunity to appear in court in advance of, or to make arguments in respect of, the Confession of Judgment.[38] He says that the concept of a "confession" judgment is not known to Irish law nor has it any direct equivalent in Irish procedural or substantive law. He says the New York Judgment involved no judicial consideration of the underlying merits of the case nor was he provided with any advance notice of it. He argues that such a procedure is inconsistent with basic principles of fairness under Irish law.[39]

55. The plaintiff objects to the suggestion that it is attempting to make a windfall profit from the defendant's default. It is argued that it was SMV, under the control and direction of the defendant, who petitioned for bankruptcy in order to ensure that the

[37] Para 26 of defendant's affidavit sworn 8 September 2023
[38] Para 32 of defendant's affidavit sworn 8 September 2023
[39] Para 61b. of defendant's affidavit sworn 8 September 2023

plaintiff could not exercise certain security rights which it held [40]. The bankruptcy sale was conducted by a representative of SMV and the plaintiff did not control the process at all. It is argued that the amounts which were bid for the SMV assets clearly demonstrates the actual value that bidders attributed to those assets at that time.

Legal submissions

56. There was agreement between counsel that this application for judgment must be determined according to the same standards as any application for summary judgment. The relevant authority on that point is *Bussoleno Ltd v Kelly* [2011] IEHC 220 where Ms Justice Finlay Geoghegan, in an application to enforce a judgment obtained in Florida, cited with approval (at para 8) the test summarised by Hardiman J in *Aer Rianta v Ryanair* [2001] 4 I.R. 607 in the following terms:

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

57. She noted that the mere assertion of a defence alone is not sufficient to avoid summary judgment. She stated, at para 10 of her judgment that "[*I]n summary, the issue is whether a defendant has satisfied the court that he has an arguable defence*". It is not necessary for a defendant to show that this defence is one that will necessarily succeed or is even likely to succeed. It must however be established as an arguable defence.

58. There was also general agreement between counsel as to the relevant rules which govern the criteria for enforcement of a foreign judgment and the basis for validly objecting to enforcing such a judgment -being those rules ("the **Rules**") set out in

[40] Para 3d. Third Affidavit of Michael Brasky sworn 26 September 2023

Dicey, Morris and Collins on *The Conflict of Laws,(Vol 1,16th ed., Sweet and Maxwell 2022).*

59. Rule 51 provides that "*A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 52 to 55 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either (1) of fact or (2) of law*".

60. Rule 46, in essence, provides that, unless impeachable under any of Rules 52 to 55, a foreign judgment given by a court of a foreign country with jurisdiction to give that judgment, may be enforced by the claim for the amount due under it if it is for a debt or "*definite sum of money*" and is "*final and conclusive*". While there is no dispute on the finality or conclusivity of the New York Judgment, the defendant argues that it is unclear how the amount realised from the SMV asset sale has reduced the amount owed under the New York Judgment, and that the calculation of net realisation from the plaintiff's credit bid is unverified. The plaintiff says the New York Judgment which it wishes to enforce could not be clearer. It reflects precisely the figure and calculation consented to by the defendant. What occurred post judgment (the auction of March 2023, the closing in July 2023), is irrelevant as is how much more the plaintiff may collect under the New York Judgment in light of its post-judgment acquisition of SMV's assets. In that regard the plaintiff relies on *La Societe Anonyme La Chemo Serotherapie Belge v Dominick A Dolan & Co Ltd* [1961] IR 281.

61. The Rules potentially relevant on the defendant's arguments on which the New York Judgment might be impeached are Rules 54 and 55. Rule 54 provides that "*A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy".*

62. In his written submissions, the defendant raises two separate "public policy" arguments that he says should persuade this court not to enforce the New York Judgment. First, he says that because the plaintiff has acquired secured assets with a market value substantially in excess of the debt due to the plaintiff, an award of summary judgment in favour of the plaintiff would be in furtherance of a concerted attempt at unjust enrichment by the plaintiff, and would be contrary to public policy.

63. Second, the defendant argues that these proceedings seek the recognition and enforcement of a judgment, the amount of which is comprised to a significant extent of punitive interest and penalty clauses which are contrary to Irish law. In that regard, the court should not recognise and/or enforce (or permit summary judgment to be entered based upon) a judgment for amounts which, if sought in Ireland, would not be available to the plaintiff.

64. Counsel for the plaintiff says that it is hard to see how complaints about the auction (post the New York Judgment) could fit into the sort of public policy concerns about the propriety of a judgment that are at the heart of all the authorities on this point. Put simply, he says the "double recovery" argument has nothing to do with the New York Judgment. Rather it relates to events which occurred after that judgment was obtained.

65. At the hearing of this application a more nuanced argument was advanced by counsel for the defendant on this point. Rather than frame this defence as an "unjust enrichment" point, counsel for the defendant argued that the defendant's obligation has been "discharged" because no creditor was entitled to recover an asset in lieu of a debt which would exceed the total amount that they could recover under the loan agreement. Counsel argued that this position is entirely independent of the outcome of the Satisfaction Motion - although he reserved his position on the Satisfaction Motion

if it were necessary for him to seek a stay on any order for judgment made by this court.

66. Counsel for the defendant argued that there is evidence that the plaintiff has an asset with the value of $350 million which it acquired for a price of $42 million. He says this situation clearly covers any obligation that the defendant would have to the plaintiff because the plaintiff has been made whole, and indeed more than made whole. He says it is a good defence to show that the obligation on foot of which the defendant is being sued has been discharged. He says the theory of obligation rather than the comity of courts should be what persuades the court in this case. Counsel says this is not a collateral attack on the New York Judgment. He is not saying there is something wrong with the New York Judgment or that it lacks any validity. What he is saying is that the New York Judgment has been satisfied because of the asset that the plaintiff acquired and that is a full defence. He also argues that if this needs to be described as a public policy ground then it can be recast as being unacceptable as a matter of public policy in this jurisdiction that a creditor gets full satisfaction for the debt and yet is still able to pursue the debtor or a guarantor. Counsel for the defendant says this argument stands even where the defendant does not impugn the auction process or the US bankruptcy rules. He says the court simply has to be satisfied for the purpose of this application that there is sufficient evidence before the court to support an arguable defence, not a defence that is necessarily going to succeed. If there is a conflict of evidence the court cannot resolve it on this application nor could the court prefer the evidence of one party over another. Counsel points to the valuations exhibited to the defendant's affidavits and points out that the defendant has put in issue any suggestion that what was done in the auction reflected the true market

value of the assets sold. He says the plaintiff has never provided any appraisal of its own to contradict the defendant's evidence of market value.

67. Counsel for the plaintiff said it was not surprising that the defendant was unable to find authority for his position on enforceability. He said that counsel for the defendant did not refer his argument back to the Rules to explain how his argument comes within the basic parameters that are applied by the courts in relation to the enforcement of foreign judgments. He says there is no authority to support or even suggest that this "double recovery" or "satisfaction" argument raises any public policy concerns such as would cause the final and conclusive New York Judgment not to be enforced. Counsel says there is simply no authority to support the proposition that recognition will be refused because the plaintiff has recovered assets whose value is disputed.

68. Counsel for the plaintiff says that as a matter of simple contract law, a credit bid can only reduce the debt by the amount of the credit bid. The debt is not reduced by more because that happened to be a good bargain or less if it was not a good bargain. He says a reduction of debt has to be by reference to what you paid for it or you agreed to pay for it, and not by fair market value. Counsel also argued that if the defendant really believed this argument one would expect that he would have challenged the New York Judgment or the Sale Order, which he did not. He points out that the assets sold belonged to SMV and not the defendant. He says it is nonsensical to suggest that notwithstanding the fact that $42 million was paid for the assets, actually the claim by the plaintiff in the bankruptcy must be reduced by €350 million. He says the Bankruptcy Court looked at the deal and unambiguously approved it. The amount of the debt due by SMV to the plaintiff was reduced by the amount of the credit bid. Counsel for the plaintiff also says that there is no evidence before the court adduced

by the defendant as to what the appraised market value of the SMV assets was at the time the assets were bought, as opposed to some earlier point. He says the defendant could have acquired the assets after the auction for $180 million under the Settlement Agreement but did not do so. In circumstances where the defendant is now alleging those assets were worth €350 million, this he says, strains credulity.

69. Rule 55 provides that "[*A] foreign judgment may be impeached if the proceedings in which the judgment was obtained where opposed to natural justice*". I will deal with this argument in the next section of this judgment.

70. There were also legal submissions made in relation to the penalty clause arguments and regarding the adequacy of pleading in the summary summons itself. To avoid repetition, I will deal with those submissions in the next section of this judgment.

Analysis and decision

71. There is no argument that the correct test to be applied on an application for summary judgment is whether the defendant has satisfied the court that he has an arguable defence. This test is not altered by the fact that this application for summary judgment seeks to recognise and enforce a foreign judgment. The defendant does not need to establish a defence which is likely to succeed but merely that he has an arguable defence or that it is probable he has a bona fide defence. While this bar is a relatively low one, the mere assertion of a defence, without more, is insufficient.

72. The New York Judgment is not entitled to automatic recognition in this jurisdiction nor is it enforceable either automatically or pursuant to any international convention. The plaintiff relies upon well-established common law rules on the enforcement and recognition of foreign judgements, including the applicable conflict of laws principles set out in *Dicey, Morris & Collins*, which I have discussed previously in this judgment and on which there is broad agreement.

73. I will now deal with each of the arguments advanced by the defendant, albeit in a different order:

(a) That the New York Judgment was obtained in circumstances which lacked fair procedures and so should not be enforced as a matter of public policy.

74. This is the argument advanced by reference to Rule 55. I am not persuaded that there is any merit in the defendant's argument that the Confession of Judgment was obtained in circumstances which would prevent this court enforcing it on the grounds of natural and constitutional justice. I note that while this matter was canvassed in written submissions it was sensibly abandoned by counsel for the defendant at the hearing of this action. It is clear that New York law presumes that a judgment by confession will have been entered without affording notice or a hearing.[41] I am satisfied that the defendant in this case knowingly and voluntarily waived his rights to notice and a hearing and that he was advised and represented by US counsel when doing so. The defendant expressly acknowledged at para 4 of the affidavit of confession that judgment may be entered against him without notice, hearing or an opportunity to be heard and he confirmed that he made that affidavit voluntarily, knowingly and with the advice of counsel. The uncontroverted evidence before the court is that the defendant is a sophisticated borrower well-versed in the terms of complex financing transactions and commercial loans[42] and is well advised.

75. This court has been provided with evidence that the Supreme Court of the United States has held that judgment does not violate the defendant's federal or due process rights when predicated on an affidavit of confession that was voluntarily and knowingly executed. In my view the circumstances pertaining to the present case

[41] Para 42 Third Affidavit of Michael Brasky sworn 26 September 2023
[42] Para 13 Second affidavit of Patrick Flynn sworn 26 September 2023

clearly satisfy those parameters on the face of the documentation sworn by the defendant, and no issue otherwise has been raised by him. Furthermore, it is clear that under EU law a party can waive one's rights to notice and to participate in a hearing in the context of the European Convention on Human Rights[43] and I am satisfied that the defendant voluntarily and with the benefit of legal advice did so in this case. An argument concerning lack of natural justice under Irish law is not supported on the facts of this case and there are no public policy issues on this ground that would cause this court not to enforce the New York Judgment for that reason.

(b) That the New York Judgment should not be enforced on grounds of public policy because it permits recovery of penalty interest not recoverable under Irish law.

76. The defendant says these proceedings seek the recognition and enforcement of a judgment which, to a significant extent, is comprised of punitive interest and penalty clauses which are contrary to Irish law. It was not clear precisely what aspects of the judgment sum are alleged to be penal but, at a minimum, the defendant focused on the 2% default interest rate and on other post default interest and fees. The defendant says that these amounts could not be described as a genuine pre-estimate of damage and are therefore penal in nature.

77. While the affidavits filed by the plaintiff contained some reference to the justification for a higher interest rate in circumstances where a borrower has defaulted, I do not believe that I need to consider whether the particular rates were or were not penal. This is because I agree with counsel for the plaintiff that the rule against penalties

[43] *Dolenc v Slovenia* (Application no. 20256/20) at para 72: "*The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, his entitlement to the guarantees of a fair trial. However, a waiver of that right must be established in an unequivocal manner and must not run counter to any important public interest*…".; See also *Golubovic v. Croatia* (Application no. 43947/10).

operates only in respect of secondary obligations that are engaged as a result of a breach. The rule has no application to a primary obligation, such as, in this case, to pay a specified amount by a particular date, failing which judgment for that amount will be obtained. As the UK Supreme Court held in *Cavendish Square Holding BV v. Makdessi* [2016] AC 1172 at para 13 "*the penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves*". I appreciate that *Cavendish*, although commented on by Irish courts, is not accepted as a case that is binding in this jurisdiction, and that the test for determining whether a payment is a penalty remains that set out by the Supreme Court in *Pat O'Donnell and Company Limited v. Truck and Machinery Sales Limited* [1998] 4 I.R.191. On this particular point however, I do not believe there is a divergence between these authorities. The Supreme Court in *O'Donnell* were clear that "[*T]his doctrine of penalties applies only where there has been a breach of contract".*[44]

78. This principle is also clear in my view from the decision of the Supreme Court of Victoria in *Cameron v UBS AG* [2000] VSCA 222 where an action was brought in Victoria by a judgment creditor to enforce a Swiss judgment there. The facts of that case, though not identical to the present case, are materially similar. In *Cameron* it was accepted by the court that the parties had executed a deed by which the appellant acknowledged that the judgment debt was due and payable by him and he agreed that if he did not meet the conditions upon which the forbearance was granted to him (allowing him to pay a lesser sum in settlement), he would submit to judgment in the amount of that judgment; thereby giving up any defences which he claimed to have. In the judgment of Winneke P. at para 3 the court held that "..*in my opinion, there is nothing inequitable or penal about such a compromise. In substance it amounts to a*

[44] Per Barron J at page 217

concession by the appellant that the debt is owed and will be paid if he fails to meet the terms of the indulgence granted by the respondent."

79. In the present case, the Forbearance Agreement was a fresh agreement concerning enforcement of a judgment in consideration of forbearing from enforcing for some time. The defendant became obliged to pay this amount and agreed that judgment could be entered against him without notice if he failed to pay. I do not see that there is any question of a penalty in those circumstances when judgment is sought to be entered for the agreed amount. Parties sue on settlement agreements all the time - a court in those circumstances is not required to look behind the settlement to ascertain if the agreed settlement sum comprised an historic penalty component.

(c) That enforcing the New York judgment would be contrary to the justice of the situation in circumstances where that judgment has already been satisfied.

80. SMV petitioned for its own bankruptcy at a time when it was under the direction and control of the defendant. It appears clear on the evidence that this step was taken by SMV to prevent the plaintiff from realising its security over the Vineyards and other secured SMV assets. While it did indeed have that consequence, it also led to a situation where the plaintiff could, nevertheless, acquire those assets through a credit bid as part of the bankruptcy process. This latter process had the potential to allow the Vineyards to be acquired by the plaintiff at whatever price it had to bid in order to be the highest bidder – even if this was less than the value the assets would have been ascribed had the plaintiff taken them directly on foot on its security. Indeed this very possibility is expressly referred to and accepted by the defendant in the Guarantee at clause 4 (c), discussed previously. I do not accept, on the evidence, that the plaintiff "*engineered*" this situation, as is alleged by the defendant. The plaintiff had no role in commencing the bankruptcy process for SMV.

81. It is certainly a principle under Irish law that where a bank or a financial institution appoints a receiver and a receiver takes possession of a secured property and sells it, the receiver must use his best efforts to achieve the best price possible. A receiver owes that duty not just to the debtor (whose agent he generally is), but also to any guarantor of that debt because the guarantor would be adversely affected by a failure to achieve the best price possible. The present case does not however involve a mortgagor and a receiver. Even if it did, the plaintiff would not be responsible for the acts of the receiver unless it expressly instructed and controlled the receiver. There is a confusion here in the defendant seeking to equate a receivership process under Irish law with a bankruptcy court-approved process under US law.

82. It is of the utmost importance to this court's determination that as a matter of US law the experts are agreed that the New York Judgment is final and conclusive. It has never been challenged by the defendant and there is no stay on its enforcement. Any action (such as the Satisfaction Motion) to deem the New York Judgment satisfied, even if it were to be successful (and I must assume that possibility for the purposes of this application), would not set aside, reverse or otherwise undo the New York Judgment. It would of course mean that the plaintiff could not recover beyond what is due to it -but that is a very different scenario to the New York Judgment itself being impeached in any way. In those circumstances, I do not believe that the defendant has raised a bona fide arguable defence on this point.

83. I also do not believe that the defendant's assertion that the underlying contractual obligation is satisfied (irrespective of the outcome of the Satisfaction Motion) of itself raises an arguable defence such as would prevent this court granting summary judgment on foot of the New York Judgment. This assertion remains simply that – there is no evidence before the court of the satisfaction of the New York Judgment

beyond the net credit bid. The appraisals on which the defendant relies were fully disclosed to all potential bidders for the Vineyards. Such bidders must therefore have bid with knowledge of them. The plaintiff was the highest bidder for the assets and the Sale Order reflects the supervision of the Bankruptcy Court and compliance with its directions. There is no challenge to the Sale Order which is binding on all parties. The dollar for dollar reduction in the debt in such circumstances was expressly agreed to by the defendant in the Guarantee.

84. While there are undoubtedly differences in the bankruptcy procedures in Ireland compared to those that pertain in the US, I find no public policy considerations under Irish law that would prevent enforcement of the New York Judgment here.

(d) That the Summary Summons in this case does not adequately plead the debt claimed.

85. The defendant says that the amount for which judgment is sought in these proceedings is not clear and does not appear to properly (or at all) give account for credits obtained through the sale of secured assets. Counsel for the defendant argues that the summons seeks judgment in respect of the full amount of the New York Judgment and does not subtract the sum received from the bankruptcy sale albeit that this figure is identified. He says this is confusing and unclear. He also says that the summons is unclear in relation to the plaintiff's intention to pursue interest accrued on the Judgment sum pursuant to New York law. If the plaintiff does intend to pursue interest, the defendant says there is no calculation of this and it cannot in those circumstances meet the requirement for clarity in a summary summons. He says the figures subsequently provided by the plaintiff on affidavit are confusing and in any event are tendered too late to cure the deficiencies with the summary summons.

86. Counsel for the defendant acknowledged that even if he is correct on this point, it may not be fatal to the plaintiff's claim and that there might perhaps be an ability to amend the summons. However he said it would have implications for the present application if his argument is accepted.

87. The level of detail required in a summary claim for debt was set out by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84. At paragraph 5.1 of his judgment Clarke CJ stated that :

"*The defendant to a summons is entitled to have sufficient particulars to enable him "to satisfy his mind whether he ought to pay or resist" "*.

88. He continued at para 5.2 to say that *"The jurisprudence on the question of what a defendant must do to resist summary judgment primarily focuses on cases where a prima facie claim to a debt is established and the defendant wishes to put forward a positive defence. In such cases, it is necessary for the court to assess, in accordance with the detailed requirements which can be found in the relevant jurisprudence, whether what is said to amount to a defence amounts to mere assertion or meets the threshold for entitling the defendant to a full or plenary hearing".*

89. Clarke CJ went on to say that if the plaintiff did not put sufficient evidence before the court to establish a *prima facie* debt, then a plaintiff could not be entitled to summary judgment in any event. In *O'Malley* the court found that because no details whatsoever were given as to how the sum claimed was calculated, the summons was not sufficient. On the level of particularity required, Clarke CJ held at paragraph 5.6 that *"[I]f the indorsement specifies the liquidated sum due but says it is calculated in accordance with some detailed document or documents already sent to the defendant, then [the defendant] has sufficient information, provided that those documents, in turn, themselves provide the necessary detail*".

90. The plaintiff says that the amount of the New York Judgment is absolutely certain and there can be no mystery about what that sum is. Indeed, it is the sum that the defendant confirmed he owed in the affidavit of confession, where a breakdown of that sum was set out and agreed.[45] The plaintiff also argues that the net realisation for which credit will be given against the judgment amount is clearly specified in the summons as $32,386,274.07. While the mathematical calculation of subtracting one figure from the other is not carried out in the summons, the plaintiff says that it is readily understandable that the balance outstanding is the figure which reflects the subtraction of the net credit bid from the judgment sum. I calculate that to be $159,835,021.07. The summary summons also claims "*Interest pursuant to statute or otherwise*". No calculation of that amount is specified.

91. The plaintiff seeks recognition of the judgment sum in the New York Judgment and undertakes to give credit for realisations or any payments made upon the enforcement of the New York Judgment. In my view it would have been preferable in the interests of clarity for the summons in this case to specifically identify the sum remaining due after the identified credit was applied to the New York Judgment. To give such credit is clearly the plaintiff's intention as stated and there are numerous references and explanations of this credit figure contained in the summons and the affidavits grounding this application. I am satisfied that there is sufficient evidence and explanation before the court confirming that the applicable amount of the credit bid to reduce the New York Judgment was $32,386,274.07 (namely $42 million minus the DIP Loan amount of $9,613,725.93). Because both the amount of the New York Judgment and the amount of the net credit are clearly identified in the summons, I believe that the defendant could easily understand that what remains due by him is the

[45] To which the New York court added measured costs and disbursements of $205.

figure achieved by subtracting the net credit bid from the New York Judgment. The plaintiff says it is entitled to judgment in the amount of the New York Judgment, of course giving credit to the defendant for any sums later received, and this explains the plaintiff's approach in seeking judgment on that basis by reference to the New York Judgment itself.

92. To avoid any confusion in the matter however I propose to specify the outstanding figure in the order of this Court. I therefore direct that the plaintiff is entitled to summary judgment against the defendant in the sum of **$159,835,021.07**, (being the amount of the New York Judgment less credit for the net credit bid as specified in the summary summons).

93. I agree with counsel for the defendant that if the plaintiff is claiming post judgment interest on the New York Judgment, it is required to set out the basis for that claim, particularly where it is said to be based on foreign law. I am not satisfied that the particulars of interest are properly set out or particularised as required by *O'Malley*, even if based solely on US contractual interest applicable to US judgments. Any explanations later provided by the plaintiff (for example in para 75 of the Third Affidavit of Michael Brasky) are advanced too late in the process for summary judgment and cannot be inferred or understood from the summons itself. Therefore, the interest aspect of the plaintiff's claim cannot be determined on a summary basis and must be remitted to plenary hearing if it is intended to be pursued by the plaintiff.

94. I propose to list this matter before me on Thursday 14 December at 10 am in circumstances where the defendant has indicated that, reflecting the outstanding Satisfaction Motion, he intends to apply for a stay on this court's order in the event that it grants summary judgment to the plaintiff. In that regard I will permit the parties, should they wish, to file any additional written submissions on this point by

Wednesday 6 December. Those submissions, if they are filed, should not exceed 1500 words in circumstances where detailed written submissions have already been delivered by the parties. I will also hear from the parties on that date in relation to the costs of this application and the final form of order.