| Neutral Citation No: [2022] NICh 3 | *Ref:* McB11740 |
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| | *ICOS No:* 2016/74047, 2016/74051, 2017/68784, 2014/113729, 2014/113732, 2014/113705, 2014/113744, 2014/113713, 2014/113723, 2014/113718, 2018/80440, 2017/81863 |
| *Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* 11/02/2022 |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION**

**BETWEEN:**

**ULSTER BANK LTD**

**and**

**NATIONAL WESTMINSTER BANK PLC**

**Plaintiffs;**

**and**

**RICHARD POLLOCK, SYLVIA POLLOCK, THOMAS POLLOCK, PAULINE POLLOCK, RAMSEY POLLOCK, SAMUEL POLLOCK AND RHODA POLLOCK**

**Defendants.**

**Mr Shaw QC with Mr Hopkins for the Plaintiffs**
**Mr Richard Pollock and Mr Thomas Pollock appeared as Litigants in Person**

**McBRIDE J**

**Applications**

[1] There are 12 actions before the court comprising:

(a) Three debt actions.

(b) Eight Order 88 actions, and

(c) An Article 367 claim (Action no. 2017/81863). This application hasbeen adjourned pending judgment in the debt and Order 88 actions.

**The Plaintiffs' Claims**

[2] Ulster Bank Ltd lent money to the defendants and despite demand for payment the plaintiffs ("the bank") allege that a debt of approximately £15.7M remains due and owing from the defendants ("the Pollocks"). The bank now seeks orders for possession of lands which the bank avers formed part of the security for the loans. In addition the bank seeks money judgments in respect of the various debts alleged to be due and owing by each of the defendants.

**The Defendants' Counterclaim**

[3] The Pollocks deny the claims and counterclaim that private trusts were created which settled the various debts. The Pollocks seek by way of counterclaim an order for specific performance to compel the trustees to fulfil their "specific duty of obligation as ordered in the private trust declaration."

**Representation**

[4] The bank was represented by Mr Shaw QC and Mr Hopkins of counsel. Mr Thomas Pollock and Mr Richard Pollock acted as litigants in person and were assisted by a McKenzie friend, Mr Thompson. There was no appearance by or representation on behalf of the other Pollocks.

**Preliminary Application**

[5] Ulster Bank Ltd applied to join National Westminster Bank plc as a plaintiff to all of the actions. By way of background the High Court on 7 April 2021 approved the transfer by Ulster Bank Ltd of its banking business to National Westminster Bank plc. This transfer took effect on 3 May 2021. Schedule 4 of the court order approving this transfer listed, in a schedule (the schedule) to that order, two of the present actions as being subject to an order under Order 15 Rule 6 of the Rules of the Court of Judicature (Northern Ireland) 1980 substituting National Westminster Bank plc in place of the Ulster Bank Ltd as the plaintiff. Ten of the present actions were not listed in the schedule. By affidavit sworn on 12 November 2021 Carley Chapman, solicitor in Arthur Cox, Solicitors, who acted for the bank in respect of that action avers that all of the present actions were not listed in the schedule due to an error on their part and all of the actions ought to have been listed in the schedule.

[6] Accordingly, National Westminster Bank plc has only been substituted for Ulster Bank Ltd in 2 actions. In these circumstances Ulster Bank Limited applied to have National Westminster Bank plc joined as a party in the other 10 actions and Ulster Bank Ltd applied to be joined as a co-plaintiff in the 2 actions in which they

had been substituted for National Westminster Bank plc. The effect of the application was to have Ulster Bank Ltd and National Westminster Bank plc the named co-plaintiffs in all 12 actions.

**Consideration**

[7] The addition of a party can be effected by amendment. Under Order 15 Rule 6 no proceedings are defeated by non-joinder of a party and the court can add a person who ought to be a party or whose presence is necessary for determination of all the matters in dispute.

[8] No objection was taken to the proposed amendment and Ulster Bank Ltd and National Westminster Bank plc consented to joinder.

[9] I acceded to the application so that National Westminster Bank plc was joined as a co-plaintiff in all of the actions. In the two actions where Ulster Bank was substituted by National Westminster Bank plc by reason of the previous order of the court I amend the proceedings so that Ulster Bank is now named as a co-plaintiff. Accordingly, the plaintiffs in all the actions are the Ulster Bank Ltd and National Westminster Bank plc (hereinafter referred to as "the bank").

[10] I granted the application for the following reasons. Firstly, where there is doubt about the plaintiff's title to sue a new plaintiff can be added. Secondly, the order was required to ensure all the relevant parties were before the court in relation to the matters in dispute. Thirdly, there was no objection to the application and finally I considered that there was no prejudice to the Pollocks in granting the application.

**Background**

[11] The Pollocks were customers of the bank from in or around 2004. Richard, Thomas, Sylvia, Pauline and Ramsey Pollock were shareholders in Pollock Developments Ltd ("the Company") which was a building company involved in residential development. In addition, all of the Pollocks excepting Pauline were involved in a farming business in North Antrim which was conducted by way of a partnership known as S Pollock & Partners Ltd ("the Partnership"). In addition Richard, Thomas, Sylvia, Pauline and Ramsey Pollock were personally involved in property investment and had built up a substantial investment portfolio in Northern Ireland and Great Britain. Mr Ramsey Pollock is now an adjudicated bankrupt.

[12] As appears from the affidavit evidence of Paul McCrissican, bank official, dated 16 November 2021, the bank lent money for these various business activities to:

(a) Individual Pollock family members.

(b) The Company and

(c) The Partnership.

[13] In or around 2008 there was a downturn in the property market and the Pollocks experienced cash flow problems. The bank afforded banking facilities to the Pollocks by way of the following facility letters:

- By facility letter dated 26 June 2008 facilities were provided by the bank to Richard and Sylvia Pollock.

- By facility letter dated 27 June 2008 facilities were provided by the bank to Ramsey Pollock.

- By facility letter dated 10 December 2008 banking facilities were provided by the bank to Thomas and Pauline Pollock.

- By facility letter dated 10 December 2008 banking facilities were provided by the bank to the Company.

- By facility letter dated 30 October 2009 banking facilities were provided by the bank to the Partnership.

[14] The style and scheme of the various facility letters were similar in nature. In particular each of the facility letters set out the facility afforded, its purpose and set out the terms and conditions upon which the facilities were provided. The most relevant conditions which appeared in all of the facility letters are as follows:

(i) Clause 6 – which provided for repayment on demand.

(ii) Clause 7 – which set out details of the security provided for the facility.

(iii) Clause 9 – paragraph (k) which provided that the proceeds of sale from the secured properties would be used to reduce the debt due.

(iv) Clause 12 - dealt with assignment. It provided as follows:

> "The Bank shall have the right to assign or transfer the benefits or obligations of the facility or any part thereof to another entity within the Ulster Bank Group and may with the borrower's prior consent, assign or transfer the benefits or obligations of the facility to any person not within the Ulster Bank Group. The borrower is not permitted to assign or transfer the benefits or obligations of the facility or any part thereof to any other party without the prior written consent of the bank."

[15] All the relevant facility letters were signed by the Pollocks.

**Security**

[16] As appears from the various facility letters all the loans was secured. Security for the loans to individual Pollock members were secured by way of legal charges over various lands and properties and or equitable deposit of title deeds of lands owned by them.

[17] The loan to the Company was secured inter alia by two personal guarantees; one signed by Thomas and Pauline Pollock and one signed by Richard and Sylvia Pollock.

[18] The personal guarantees by Thomas and Pauline Pollock and Richard and Sylvia Pollock were both executed on 15 May 2007. Thomas and Pauline Pollock executed a deed in writing with the bank whereby they, by way of guarantee agreed to guarantee payment and to indemnify the bank in respect of the liabilities of the Company to the extent of £1.5M. Richard and Sylvia Pollock entered into a guarantee in the same terms.

[19] The loan to the partnership was secured by way of equitable deposit of lands certificates in respect of lands at Cabra Lane and 15 Meadowview Ballymoney together with solicitors' undertakings in respect of other lands at Bendooragh contained within Folio AN104200 County Antrim.

[20] By 2014/15 the loan to value was over 100% and the bank at that stage made a formal demand for repayment to each defendant on 23 April 2014 and again on 20 November 2015. Further by letter dated 4 January 2016 the bank's solicitors called upon the Pollocks to comply with their obligations under the personal guarantees namely to pay the bank the sum of £1.5M together with interest pursuant to the terms of the personal guarantees entered into by Richard and Sylvia and Thomas and Pauline Pollock.

[21] The demands were not met.

[22] Mr McCrissican in his affidavit dated 25 November 2021 avers that as of 15 November 2021 the indebtedness of the Pollocks was as follows:

(i) The Company owed the bank in excess of £10M. On foot of their personal guarantees to secure the Company debt Thomas and Pauline Pollock owed the bank £1.5M and Richard and Sylvia Pollock owed a similar sum.

(ii) £313,000 approximately was owed by the Partnership to the bank and Ramsey, Rhoda, Samuel, Sylvia, Richard and Thomas Pollock as partners in the Partnership were jointly and severally liable in respect of this debt.

(iii) £2,209,710.59 was due by Richard and Sylvia Pollock on foot of facility letter dated 26 June 2008. This was a personal debt owed by them to the bank.

(iv) £28,410.78 was due from Ramsey Pollock on foot of facility letter dated 27 June 2008 and again this represented a personal debt he owed the bank.

(v) £2,266,886.84 was due from Thomas and Pauline Pollock on foot of facility letter dated 10 December 2008 which again represented a personal debt owed by them to the bank.

[23] Proceedings for money judgments for the sums owed and for possession orders in respect of the charged properties were issued by the bank before the Chancery Master.

[24] Due to the nature of the defence raised by the Pollocks the Master thereafter transferred all the cases to the Chancery Judge.

[25] Initially the Pollocks were represented by counsel and solicitors who signed off the formal pleadings. As appears from the pleadings the Pollocks made a number of admissions as follows:

(a) They admit that the bank granted facilities to them on foot of the various facility letters as set out above.

(b) Thomas and Pauline Pollock and Richard and Sylvia Pollock admit that they executed personal guarantees to guarantee payment of and to indemnify the bank in respect of liabilities of the Company to a maximum limit of £1.5M respectively.

(c) The Pollocks accept that the bank holds charges over property owned by them and/or the Partnership and Company. In particular they accept the bank holds charges over the lands in respect of which they now seek possession orders. This was confirmed in paragraph 8 of the affidavit of their solicitor Neville Kerr, sworn on 24 November 2016.

**Issues to be Determined**

[26] The Pollocks put the bank on strict proof of its claim. In addition, they positively defend the actions on the basis that they are not indebted to the bank because it acted in breach of contract and in breach of consumer credit legislation. In particular the Pollocks allege that the bank in selling its economic interest in the debt to Promontoria (Aran) Ltd acted in breach of Clause 12 of the facility letters. As a result of this breach of contract they submit that they are not liable or indebted to the bank.

[27] The Pollocks further allege that the assignment of the debt to an entity which is not authorised to enter into regulated mortgage contracts and which is not a licensed consumer credit business constitutes a breach of the consumer credit legislation.

**Representation**

[28] I am grateful to all parties for their helpful written and oral submissions which clearly distilled the issues in dispute and thereby enabled the court to focus on the matters which required determination.

**Evidence before the Court**

[29] The evidence before the court consisted of the following:

(a) Affidavits sworn by Mr Paul McCrissican on 13 March 2017, 16 November 2021 and 25 November 2021. In addition Mr McCrissican gave oral evidence.

(b) Affidavit evidence of Carly Chapman sworn on 28 June 2016.

(c) Affidavit of Neville Kerr Solicitor sworn on 24 November 2016.

(d) Oral evidence by Mr Thomas Pollock together with a number of documents which were headed affidavits by members of the Pollock family.

[30] The bank relied in proof of its case upon the oral and affidavit evidence of Mr McCrissican.

**Issues to be Determined**

[31] The following issues require determination:

(i) Issue 1 – Has the bank proved the Pollocks are indebted to it in the sums claimed?

(ii) Issue 2 – Has the bank established that it has security for the debts in which it seeks possession orders?

(iii) Issue 3 - Did the arrangement with Promontoria constitute a breach of contract?

(iv) Issue 4 – Was the arrangement with Promontoria in breach of consumer credit legislation?

(v) Issue 5 – If there was a breach of contract what loss have the Pollocks sustained?

(vi) Issue 6 - What remedy, if any, are the Pollocks entitled to?

(vii) Issue 7 – Has the counterclaim been made established?

**Consideration**

**Issue 1 – Proof of indebtedness.**

[32] The bank relies on the undisputed evidence of Mr McCrissican, senior bank official, to prove the indebtedness of the Pollocks to the bank.

[33] Mr McCrissican swore affidavits on 16 November 2021, 25 November 2020 and 13 March 2017 which he adopted these as his evidence. He averred that the bank lent money to various Pollock family members personally, monies to the Company and also monies to the Partnership. He further averred that the loans were secured by various charges and personal guarantees. Mr McCrissican then set out the necessary proofs in respect of each debt action and in respect of each Order 88 action.

[34] In particular in respect of the debt actions Mr McCrissican set out details of the various facility letters, the fact demands were made for payment and details of the calculation of the monies due and owing after deduction of sale proceeds obtained from the sale of various properties and averred the demands were not met and the monies remained due and owing. In respect of the Company debt he set out the liability due and owing thereby making the personal guarantees operative.

[35] Mr McCrissican confirmed the total amounts due and owing by the Pollocks as of 15 November 2021 in the three debt actions were as follows:

(a) Thomas and Pauline Pollock – Action 2016/740151:- £2,266,886.84 was due on foot of the facility letter together with the sum of £1.5M due and owing on foot of the personal guarantee together with a claim for interest.

(b) Richard and Sylvia Pollock – Action 2016/74047:- £2,209,710.59 was due on foot of the facility letter together with the sum of £1.5M due and owing on foot of the personal guarantee together with a claim for interest.

(c) Ramsey, Rhoda, Samuel, Thomas, Richard and Sylvia Pollock – Action 2017/68784:- jointly and severally liable as partners of the Partnership for the sum of £313,756.15 together with interest.

[36] In respect of the Order 88 actions Mr McCrissican set out the necessary proofs in respect of the various charges given by the Pollocks to secure the facilities afforded by the bank. He further confirmed that despite demand for payment no

monies had been paid and accordingly pursuant to the terms of the loans the bank were entitled to orders for possession.

[37] The Order 88 actions are as follows:

(i) Claim for possession against Pauline Pollock (Action 2014/113729) in respect of lands in folios AN124415, AN124416, AN124418, AN124881 and AN124882 County Antrim which lands the bank averred were secured by legal charge dated 29 September 2006.

(ii) Claim for possession against Richard Pollock (Action 2014/113705) in respect of lands in folios 26302 and AN121212 County Antrim which the bank averred were secured by legal charge dated 29 September 2006.

(iii) Claim for possession against Richard and Sylvia Pollock (Action 2014/113744) in respect of lands in folio 5979 and 5980 County Antrim which the bank averred were secured by a legal charge dated 29 September 2006.

(iv) Claim for possession of lands in folio 12142 and AN25059 County Antrim (Action 2014/113713) against Samuel Pollock which the bank averred was secured by legal charge dated 15 October 2004.

(v) Claim for possession against Thomas and Pauline Pollock regarding lands in folio AN43867 and 30152 County Antrim (Action 2014/113723) which the bank averred was secured by legal charge dated 22 October 2004.

(vi) Claim against Sylvia Ann Pollock regarding lands in folio 19136 and 19138 County Antrim (Action 2014/113718) which the bank averred were secured by legal charge dated 29 September 2006.

(vii) A claim that the debt was well charged against the interest of John Ramsey Pollock in lands in folio AN104200 County Antrim (Action 2018/80440) which the bank averred was secured by way of deposit of lands certificate on 18 September 2006 and the bank in addition sought an order for sale and possession.

(viii) Claim against Pauline Pollock regarding lands in folio 1626, 1623, 1867, 1921 and 1922 County Antrim (Action 2014/113722) which the bank averred was secured by legal charge dated 15 June 2005.

[38] Mr McCrissican's evidence was subject to cross-examination by Mr Thomas Pollock. He sought to question him about sale of properties at an undervalue. As this was never an allegation made in any of the pleadings I did not permit this line of questioning to be pursued. Otherwise Mr Pollock did not challenge Mr McCrissican's evidence.

[39] I am satisfied on the basis of the uncontested affidavit and oral evidence of Mr McCrissican that the Pollocks in each debt action borrowed monies on foot of the various facility letters; that the bank has demanded payment and that the monies have not been paid. I am further satisfied that Thomas and Pauline Pollock and Richard and Sylvia Pollock each executed personal guarantees to secure £1.5M together with interest of the indebtedness of the Company. I am satisfied that these sums have been demanded and have not been repaid. I note that the Pollocks assert that the debt has been paid by way of private trust and for reasons which I will set out later in my judgment I am satisfied that the debts have not been paid.

[40] I accept the figures set out by Mr McCrissican in respect of the sums due and owing from each defendant is as set out in his affidavit and in his oral evidence. These figures have not been challenged. The bank indicated to the court that it seeks judgments in the sums stated in Mr McCrissican's affidavit and does not seek to include a claim for interest on the sums up until the date of judgment.

[41] Accordingly I find that the bank has proved the debt actions and in particular that Thomas and Pauline Pollock in Action 2016/74051 are liable to the bank in the sum of £3,766,886.84; that Richard and Sylvia Pollock in Action 2016/74047 are liable to the bank in the sum of £3,709,710.59 and Rhoda, Samuel, Thomas, Richard and Sylvia in Action 2017/68784 are liable jointly and severally to the bank in the sum of £313,791.32.

[42] The question whether judgment should be entered against the Pollocks in respect of these debt actions depends on the court's determination of the remaining issues and the counterclaim to which I will turn shortly.

**Issue 2 – Proof of security.**

[43] The uncontested evidence of Mr McCrissican on behalf of the bank is that the Pollocks executed a number of legal charges and deposited title deeds as security for the various facilities provided by the bank. This is explicitly accepted on behalf of the Pollocks by their solicitor Neville Kerr in his affidavit sworn on 24 October 2016.

[44] Secondly, I am satisfied on the basis of the uncontested evidence that the bank has demanded payment and no payment has been made. Therefore, subject to the other issues which I have to determine I am satisfied the bank is entitled to possession orders in respect of all of the Order 88 actions.

**Issue 3 – Did the Bank act in breach of the contract?**

[45] In his affidavit sworn on 13 March 2017 Mr McCrissican deals with the sale of assets by the bank to Promontoria. He avers that Promontoria (Aran) Ltd (Promontoria) purchased from the bank a portfolio of loan facilities defined within a mortgage sale deed dated 16 December 2014. The mortgage sale deed provided a mechanism whereby the relevant assets would be acquired by Promontoria and the

method of acquisition could be either by way of formal assignment or by way of the creation of a declaration of trust. Pursuant to the mortgage sale deed it was agreed that the bank would execute a formal declaration of trust in respect of the facilities provided to the Pollocks together with their related security. The declaration of trust declared that the bank would hold the assets on trust for Promontoria and Mr McCrissican avers that the legal interest in the title to the loans and related security under the Pollocks' facilities remained with the bank. Carly Chapman, solicitor, in her affidavit sworn on 25 September 2017 confirmed that this was the arrangement. The mortgage sale deed dated 16 December 2014 was executed by Promontoria Holdings 128BB but it was later novated on 12 February 2015 to Promontoria (Aran) Ltd.

[46] The mortgage sale deed provided as follows:

> "A. The sellers (the Bank) are the legal and beneficial owners of the mortgage assets.
>
> B. The sellers intend to and have agreed to sell and the buyer intends to and has agreed to purchase and accept an absolute and unconditional assignment of or transfer of and/or a declaration of trust … over all rights to under or in connection with the mortgage assets."

[47] "Mortgage assets" is defined as "any and all of the seller's rights, title and interest in and to security documents, principle amounts, interest …"

[48] Clause 2 provided that on completion the sellers shall grant and the buyer shall enter into a declaration of trust. Clause 9.2 provided that on completion the buyer would receive the economic benefit under and in respect of the assets.

[49] The schedule confirmed that all of the Pollocks' mortgage assets formed part of the mortgage sale agreement.

[50] On 12 February 2015 the bank then entered into a declaration of trust with Promontoria (Aran) Ltd. Under paragraph C the parties agreed that the legal title or any equitable or beneficial title in relation to any trust assets shall not be transferred and that the grantor shall hold such trust assets on trust for the grantee.

[51] The Pollocks' facilities were listed in the schedule and therefore formed part of the assets to which the declaration of trust applied. The trust assets were defined in the global deed of transfer as loans, finance documents and security relating to each borrower. Again at schedule 1 the Pollock loans and security were listed as part of the deed of transfer.

[52] The Pollocks submit that the bank's action in entering into the declaration of trust and mortgage sale agreement were in breach of contract and in particular breached Clause 12 of the facility letters.

[53] There is no dispute that the Pollocks did not consent to a transfer of their debts to a third party. In such circumstances the Pollocks submit that the bank acted in breach of contract and as a result they are no longer indebted to the bank. The bank submits that the declaration of trust was not in breach of Clause 12 as there was no transfer or assignment as the loan facilities remained within the legal ownership of the bank. The bank further submits that even if there was a purported assignment this would not invalidate the bank's entitlement to demand and enforce the facility letters, personal guarantees and charges as they remain the legal owners and original parties to the contract.

**Relevant Jurisprudence regarding assignment of a contract**

[54] The court was referred to a number of authorities including *Don King Productions Inc v Warren* [2000] Ch 291, *Re Turcan* (1888) 40 Ch D 5, 335, *Linden Gardens* [1994] 1 AC 85 and *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148 which considered the relevant principles governing declarations of trust of contracts and the assignment of such rights where the contracts either involved the rendering of personal services and or included express provisions prohibiting assignment of the contract.

[55] *Don King* involved a dispute between boxing promotors and the court had to determine whether certain contracts which had been assigned to the partnership formed part of the partnership assets. The relevant contracts all involved the rendering of personal services and most of them contained express provisions against assignment. Resolution of the dispute required the court to consider the relevant principles governing assignment of contracts involving personal services where there was a prohibition against assignment. Lightman J at p 318, paragraph (D) following set out a number of general principles which may be summarised as follows:

1. Generally it is not possible to transfer the burden of a contract to a third party.

2. Where the obligation under the contract is such that the identity of the person performing it (obligor) is a matter of indifference to the other contracting party for whose benefit it is performed (obligee) then the obligator can delegate performance of the obligations under the contract to a third party.

3. It is legally possible to assign the benefit of a contract (i.e. the rights thereby created) or some benefit (e.g. the profits) derived by the assignor under the contract.

4. Whether or not the benefit can be assigned depends primarily upon the terms of the contract and secondly upon the character of the obligations.

5. A contract may prohibit assignment of rights and such a provision is legally effective. The purpose of such a non-assignment clause is the genuine commercial interest of a party ensuring that contractual relations are only with the person he has selected as the other party to the contract and no one else. Such clauses are important in areas such as building disputes – See *Linden Gardens.*

6. Unless the contract expressly or impliedly otherwise provides the character of an obligation precludes assignment of the benefit of the obligation if the identity of the obligee is important to the obligor. Any purported assignment or contract to assign will have no effect at law or in equity.

7. A declaration of trust in favour of a third party of the benefit of obligations or the profits obtained from a contract is different in character from an assignment of the benefit of the contract to that third party. Whether the contract contains a prohibition prohibiting such a declaration of trust must be determined as a matter of construction of the contract. Such a limitation upon the freedom of a party is not lightly to be inferred and a clause prohibiting assignments is prima facie restricted to assignments of the benefit of the obligation and does not extend to declarations of trust of the benefit.

[56] In *Re Turcan* a marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest purchase or otherwise. He afterwards effected some policies of insurance one of which was subject to a condition that "it should not be assignable in any case whatever." The court held that the effect of the condition against assignment was merely to make the policy non-assignable at law but did not prevent the settlor from dealing with the beneficial interest in it in accordance with his covenant. Cotton LJ in construing the clause held that although the settlor could not assign the policy he could execute a declaration of trust.

[57] In *Barbados Trust* there was an admitted debt due from Bank of Zambia under a facility letter dated 19 July 1985 which had been traded in the distressed debt market. Article 12 of the facility letter prohibited assignment without consent. The debt was assigned to the Bank of America who then declared a trust in favour of Barbados Trust. The Bank of Zambia defended the claim by Barbados on a number of grounds but of relevance to present case was the defence that the assignment of the debt to Bank of America was invalid as it was in breach of contract Article 12 of the facility letter, as no consent was given. The court held on the proper construction of the contract the declaration of trust did not constitute a breach of contract. Further, even if it was a breach, the court held it would not be a defence to a claim by the original party to the contract. Waller LJ stated at paragraph 44:

> "I cannot see how Bank of Zambia would by reference to Article 12 have an answer to a claim by Bank of America simply because they had declared a trust of the right to a debt or the proceeds of the debt in favour of a third party, about the existence of whom Bank of Zambia was unaware and to whom thus Bank of Zambia had not consented."

[58] In *Linden Gardens* the court had to determine the effect of an express contractual provision prohibiting a party from assigning the benefit of a building contract. One of the questions which arose was whether it should be construed to permit assignment of the fruits of performance. The House of Lords rejected this construction on the grounds stated by Lord Bowne Wilkinson that, "the reason for including the contractual prohibition viewed from the contractor's point of view must be that the contractor wishes to ensure that he deals and deals only, with the particular employer with whom he has chosen to enter into a contract. Building contracts are pregnant with disputes; some employers are much more reasonable than others in dealing with such disputes." The House further held that an attempted assignment of the contractual rights in breach of the contract was ineffective to transfer contractual rights to the assignee.

**Relevant legal principles in respect of assignment of a contract**

[59] As Lightman J in *Don King* noted this is a field that is still under-developed. With this caveat, I consider that the following principles, relevant to the determination of the present case, emerge from the existing jurisprudence in this field.

(1) A party can assign at law

   (i) the benefit of a contract i.e. the rights thereby created; and

   (ii) some benefit (for example, the profits) derived under the contract – what is commonly referred to as "the fruits" – see *Don King v Warren* at p 318G.

(2) An assignment can be precluded either as a result of the nature of the contract and or the terms of the contract.

(3) If the contract involves, for example, personal services or there is a genuine commercial interest of a party in ensuring that contractual relations are only with the person he has selected as the other party to the contract and no one else – see p 319B *Don King* and *Linden Gardens* then it may be that the benefit of the contract cannot be assigned.

(4) It is a question of construction of the contract whether a prohibition against assignment prohibits the creation of a declaration of trust.

(5) As a general rule limitation upon the freedom of the parties to assign will not be lightly inferred by the court as there is a public policy that property rights be freely alienable.

(6) A prohibition on a legal assignment is not a prohibition on an assignment in equity. In *Re Turcan* [1888] 40 Ch D 5 at 335 the court held that a condition that a policy of insurance "shall not be assigned" meant that it was non-assignable at law but did not prevent the beneficial interest being assigned by way of a declaration of trust.

(7) A clause prohibiting assignment is prima facie restricted to assignment of the benefit of the obligation and does not extend to a declaration of trust of the benefits – see HC19H to 230A, *Don King*.

(8) If one party wishes to protect himself against the other party declaring himself a trustee, and not merely against an assignment he should expressly so provide – see p321C *Don King v Warren*.

(9) "A prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action" – per Lord Browne-Wilkinson in *Linden Gardens* [1994] 1 AC 85 at 108D. Therefore, an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights.

**Was the Declaration of Trust a breach of Clause 12 of the Facility letter?**

[60] The bank assigned the fruits of the contract by way of a declaration of trust to a third party Promontoria without the consent of the Pollocks. To determine whether the bank was prohibited from creating a declaration trust in favour of the Promontoria of the fruits of the contract depends upon the nature of the contract and upon the true construction of Clause 12 of the facility letter.

[61] As appears from the jurisprudence there are certain contracts the benefit of which cannot be assigned e.g. contracts for personal services, building contracts etc. The reason for their non-assignability relates to the fact that the identity of the one party is important to the other. In this case I consider the identity of the bank was important to the Pollocks. There were a number of lenders with whom they could have entered into banking relations. They chose this bank. No doubt the choice was based on a number of considerations including the reasonableness of the bank in respect of enforcement of its facilities. The identity of the bank was therefore important to the Pollocks. Accordingly, I consider any assignment of the benefit of the contract without their consent which would have brought them into a direct contractual relationship with a third party (in particular an unauthorised lending

institution) would be prohibited due to the nature of the contract. [as well as under clause 12].

[62] A distinction however must be drawn between assignment of the benefit of the contract and a declaration of trust of the "fruits of the contract." In *Don King* Lightman J held at p 321:

> "In principle I see no objection to a party to contracts involving skill and confidence or containing non-assignment provisions from becoming trustee of the benefit of being the contracting party as well as the benefit of the rights conferred. I can see no reason why the law should limit the parties' freedom of contract to creating trusts of the fruits of such contracts received by the assignor or to creating an accounting relationship between the parties in respect of the fruits."

Part of the reasoning for this view is that a declaration of trust of the proceeds of the contract does not bring that third party into a direct contractual relationship with the other original party to the contract. In this case the bank entered into a declaration of trust with Promontoria of the fruits of the contract only. Such a declaration did not place Promontoria in a direct contractual relationship with the Pollocks. Any actions regarding enforcement of the banking facilities therefore remain between the bank and the Pollocks as legal title remains with the bank. There is therefore no prejudice to the Pollocks by the creation of the declaration of trust as it is a matter of indifference to the Pollocks how the bank deals with any funds it receives from satisfaction of its demands. I therefore consider there is nothing in the nature of the contract between a bank and its customer which in principle prohibits the creation of a declaration of trust of the fruits of the contract.

[63] Accordingly, the court must now turn to consider the second question whether upon the true construction of clause 12 it prohibits the creation of a declaration of trust of the fruits of the contract.

Clause 12 provides:

> "The Bank shall have the right to assign or transfer the benefits or obligations of the facility or any part thereof to another entity within the Ulster Bank Group and may with the borrower's prior consent, assign or transfer the benefits or obligations of the facility to any person not within the Ulster Bank Group. The borrower is not permitted to assign or transfer the benefits or obligations of the facility or any part thereof to any other party without the prior written consent of the bank."

[64] Clause 12 prohibits the assignment or transfer of the benefits or obligations of the facility without the consent of the Pollocks. No such consent was given. The question therefore is whether the assignment of the fruits of the contract to a third party by way of a declaration of trust is in breach of clause 12.

[65] In construing this clause the court takes into account the following rules of construction:

(a) The natural and ordinary meaning of the words used.

(b) The jurisprudence which states that a clause prohibiting assignment prima facie only restricts a legal assignment.

(c) A contract can prohibit the creation of a declaration of trust but such a prohibition needs to be expressly provided for in the contract.

(d) The public interest in ensuring that property is freely alienable. The court therefore will not likely infer a limitation upon the freedom of parties to assign property.

[66] Applying the rules of construction clause 12 prima facie only prohibits a legal assignment and therefore does not prohibit the creation of a declaration of trust. Secondly, there is nothing in Clause 12 which expressly states that the limitation on assignment prohibits the creation of a declaration of trust. Thirdly, I consider that there is no commercial reason to construe Clause 12 as prohibiting the creation of a declaration of trust. This is a case involving an acknowledged debt. Acknowledged debts are frequently traded and are also a species of property. In such circumstances the court would be slow to contemplate that an acknowledged debt would ever be intended to be part of a prohibition on assignment as this would be a restriction of the alienability of a property right and therefore contrary to public policy.

[67] In *Barbados Trust Company Ltd v Bank of Zambia* [2007] EWCA Civ 148 the court had to determine whether a clause known as Article 12 contained in a contract prohibited the creation of a declaration of trust which assigned the benefits of the contract to a third party. Article 12 of the contract stated as follows:

> "Each bank may … assign all or any part of its rights and benefits in respect of the facility to any one or more banks or other financial institutions, provided that any such assignment may only be effected … with the prior written consent thereto of the borrower shall have been obtained."

[68] In deciding whether the bank could assign the debt without consent by way of a declaration of trust to a third party, Waller LJ at para. 33 stated:

> "The most important and thus the first question to consider is the true construction of Article 12. It seems to me that if an embargo was to be placed on a participating bank declaring a trust in relation to sums due or creating a charge over sums due, words could have been used so as to make that clear. … The language of Article 12 does not in terms include within the prohibition a declaration of trust, and it seems to me that since one is concerned with the question whether restrictions should be placed on the transfer of a piece of property, an acknowledged debt, the court should be slow to contemplate that the parties ever intended such to be within the prohibition."

The court held that Article 12 did not prohibit the creation of a declaration of trust.

[69] Whilst *Barbados Trust* is not binding upon this court I consider that it is highly persuasive in respect of the construction to be placed upon Clause 12 of the facility letter for the following reasons. Firstly, I consider that the wording of Article 12 of the facility letter in *Barbados Trust* is almost identical to the wording in Clause 12 of the facility letter issued by the bank. Secondly, each clause is contained within a facility letter and thirdly each clause concerns the rights of a bank to assign the fruits of a contract. For all these reasons and for the reasons set out above I consider that Clause 12 does not when properly construed prevent the creation of a declaration of trust. Accordingly, I consider that the creation of a declaration of trust is not a breach of the contract and therefore the bank has not acted in breach of contract by assigning the fruits of the contract to a third party by way of a declaration of trust.

[70] If I am wrong in this finding, and in fact the declaration of trust is a breach of Clause 12 I am nonetheless satisfied that the creation of the declaration of trust would not be provide a defence to the Pollocks of the bank's claim.

[71] Lord Browne Wilkinson in *Linden Gardens* held at 108F:

> "the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights."

Therefore, if the declaration of trust by the bank is ineffective all the rights and obligations under the facility letters remain vested in the bank. Accordingly, the bank was and is entitled to demand payment from the Pollocks and they are obliged under the terms of the facility letters to satisfy the demands. As it is the bank which has made the demands in this case, any argument that the declaration of trust is in breach of the contract does not provide a defence to the claim. Similarly, in *Barbados* Waller LJ after reviewing the authorities concluded at para 44 that the fact the bank

declared a trust of the right to the proceeds of a debt in favour of a third party would not be an answer to a claim by the bank for recovery of its debt.

[72] I therefore consider that the fact the bank created a declaration of trust would not, to use the words of Waller LJ be an answer by the Pollocks to the banks' claim as even if the creation of the declaration of trust was in breach of Clause 12, it would be ineffective and the bank would therefore remain the party holding the benefit and burden of the facility letters and would retain legal title to sue on them.

[73] Accordingly, I am satisfied that the bank is entitled to claim on foot of the original facility letters notwithstanding any alleged breach of contract caused by the creation of a declaration of trust of the fruits of the contract.

**Issue 4 – Is there a breach of the Consumer Credit legislation?**

[74] Article 1 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 provides that for a contract to be a "regulated mortgage contract" at least 40% of that land must be used, or be intended to be used, as or in connection with a dwelling by the borrower. As appears from the various charges and the Land Registry maps this was not the case.

[75] I further consider that the Consumer Credit Act does not apply to the present proceedings. Section 16B of the Consumer Credit Act provides an exemption for agreements for more than £25,000 entered into wholly or predominantly for business purposes. I consider the agreements in the present case concerned business loans and therefore come within the exemption. Further, Section 16C of the Consumer Credit Act provides an exemption for agreements secured by a "land mortgage." Under Section 189 land mortgage includes any security charged on land, where less than 40% of the land is occupied as a dwelling. Again, that applies in the present case. I therefore consider that the facility letters were exempt agreements under Section 16B and/or 16C of the Consumer Credit Act and are therefore not regulated agreements under the Consumer Credit Act.

**Counterclaim**

[76] The defendants' counterclaim that private trusts were expressed on 20 October 2021 and that payment of all debts were made by way of an equitable asset which was transferred to the trustees on 22 October 2021. The counterclaim further states that the trustees have failed to perform their duties and the defendants seek a hearing in private. The relief sought is an order for specific performance to "compel the trustees to fulfil their specific duty of obligation as ordered in the private trust."

[77] The bank submits that the documents purporting to be a counterclaim and the supporting affidavits are "strange documents" as discussed by Barrett J in *Start Mortgages DAC v Cussen* [2021] 1 IEHC 531 at pp 5-7. The bank further submits that

the court does not need to wrestle with the arguments contained in these strange documents because the court has already considered them in the case of *Greg Foster v John McPeake & Ors* [2015] NI Master 14 and *The man known as Anthony Parker v The man known as Master Ellison & The man known as Donnell Justin Patrick Deeny* (Unreported) 16 April 2014 when Master McCorry held that the arguments contained in the papers consisted of "a kaleidoscope of pseudo legalistic jargon, alien to law, practice and the administration of justice in any modern common law jurisdiction and in short is largely nonsense."

[78] In support of the counterclaim Thomas Pollock gave evidence in which he largely restated what was set out in the counterclaim and the accompanying affidavits. In addition, he made a closing statement to the court and in summary it is stated as follows:

> "(1) The Pollock connection has lawfully expressed several private trusts.
>
> (2) Negotiable instruments have been created, payable to the trustees at the trust.
>
> (3) The trustees have been instructed to settle the debt."

[79] I have considered the voluminous correspondence and the documentation submitted by the Pollocks to the court in which they claim that their debts have been settled by reason of the creation of private trusts and by payment on the basis of promissory notes.

[80] The various arguments advanced in these documents have been previously advanced to this court on a number of occasions and have never been held to constitute a defence to a claim for a debt claim or claim for a possession order. Indeed such claims have been the subject of much adverse judicial comment to the effect that such claims constitute legal nonsense.

[81] I have carefully considered all of the submissions made by the Pollocks. They are set out in almost identical terms to those made in a number of cases including *Child Maintenance & Enforcement Commission v Wilson* [2013] CSIH 95, *Start Mortgages DAC v Cussen* [2021] 1 IEHC 531, *Greg Foster v John McPeake & Ors* [2015] NI Master 14 and *The man known as Anthony Parker v The man known as Master Ellison & The man known as Donnell Justin Patrick Deeny* (Unreported) 16 April 2014. In line with all these authorities I consider that the submissions made by the Pollocks constitute legal nonsense and none of them has any merit in fact or law. In particular the Pollocks have sought to argue that they have made payment by way of promissory notes. There was no agreement to this by the bank. In *Wilson* the court held that:

> "…a creditor in the absence of any agreement to the contrary is entitled to insist on payment in legal tender."

Accordingly, I consider that payment has not been tendered and I am satisfied that the debts due by the Pollocks remain unpaid. I therefore dismiss the counterclaim.

**Conclusion**

[82] I find for the bank in respect of the three debt actions and enter judgment for the amounts set out by Mr McCrissican in his affidavit sworn on 16 November 2021.

[83] I further make possession orders in respect of all of the Order 88 applications.

**Costs**

[84] I will hear the parties in respect of costs.