THE COURT OF APPEAL - UNAPPROVED

Court of Appeal Number: 2022 141

Whelan J.
Faherty J.
Binchy J.

Neutral Citation Number [2023] IECA 119

BETWEEN/

KAREN EGERTON AND ANDREA TIGHE

PLAINTIFFS/
APPELLANTS

- AND –

EDGEFORM METALS LIMITED AND AIDAN BOYLAN

DEFENDANTS/
RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 17th day of May 2023

1. This is a judgment in an appeal from a decision of the High Court (Barr J.) of 12th May 2022, whereby the trial judge refused the application of the appellants for summary judgment in a liquidated amount, and directed that the proceedings be remitted for plenary hearing.

Background

2. The appellants are the successors in title to Mr. Brian Egerton who died on 7th April 2011. On 3rd February 2010, Mr. Egerton sold his shareholding in the first named defendant ("the Company") to a company called Waaigeest Ltd ("Waaigeest"), which it appears may be a company owned or controlled by the second named respondent, Mr. Boylan, and while

this was not clarified, it is, beyond any doubt, a company with which Mr. Boylan has a close connection. This transaction was agreed and implemented through a share sale and purchase agreement of the same date. Also on the same date, as part and parcel of the same transaction, Mr. Egerton and the Company entered into an indenture of lease (the "Lease") whereby Mr. Egerton, as landlord, demised unto the Company a commercial premises known as Unit 2, Balbriggan Business Park, Balbriggan, Co. Dublin, for the term of four years and nine months from 1st January 2010, at the yearly rent of €20,000 per annum, exclusive of VAT, but with the obligation on the Company to discharge any VAT payable arising out of the lease. On the same date, the second named defendant, Mr. Boylan, executed a guarantee in respect of the liabilities of the Company under the Lease.

3. The Lease was amended in writing on 14th July 2011, on which date, Ms. Elizabeth Egerton, widow and executrix in the Estate of Mr. Egerton, agreed to the inclusion in the Lease of the adjoining premises at no additional rent, also owned by the late Mr. Egerton, being Unit No. 1 Balbriggan Business Park. Mrs Egerton died soon afterwards, and following upon her death, the plaintiffs, being the daughters of Mr. and Mrs. Egerton, were registered as full owners of both premises, as tenants in common in equal shares. Both premises together comprise the hereditaments registered in Folio 93107L County Dublin.

4. There is no disagreement about any of the foregoing. Nor is there any dispute that upon the expiration of the Lease on 30th September 2014, the respondents continued in occupation of both premises, and that a periodic tenancy arose by implication thereafter.

5. The Company paid the rent in full up to 30th September 2012, but thereafter began to fall into arrears. It is not in dispute that no rent at all was paid for seven months, nor is it in dispute that from 1st May 2013, when the Company resumed making payments, it paid only €1,000 per month, inclusive of VAT.

6. The appellants caused these proceedings to be issued on 6th October 2015, by which it was claimed at that time that the arrears of rent owned by the Company as of that date amounted to €49,280.16. The same amount was also claimed as against the second named defendant, as guarantor, and interest at the rate of 20% on the arrears of rent due was also claimed from the date the rent fell into arrears until payment, in accordance with the terms of the Lease. The summons also claimed any further arrears accruing up to the date of judgment, and interest thereon, and also sought an order for possession of the units on the ground that the amount due was in excess of one year's rent.

7. There were some difficulties with service of the proceedings, and following upon an order of substituted service made by Baker J., in the High Court, on 18th January 2016, the proceedings were served and an appearance was entered on behalf of the defendants on 26th January 2016. No further steps in the proceedings were taken until 19th June 2018, when a notice of intention to proceed was served by the appellants. On 13th June 2019, the appellants caused the issue of a motion seeking judgment against the defendants, pursuant to O.37, r.4 of the Rules of the Superior Courts, in the sum of €147,021.71 in respect of arrears of rent, together with the VAT payable thereon and interest on the arrears of rent only at the rate of 20% per annum. This application was grounded upon the affidavit of Ms. Andrea Tighe, the second named appellant.

8. Mr. Boylan swore a replying affidavit on behalf of both respondents on 15th April 2021. He avers that in 2010, Mr. Egerton was not in the best of health and that he wished to sell the Company, and he, Mr. Boylan was eager to purchase it. However, he avers, at the time, the construction industry generally was "on its knees" and the Company had a number of significant debtors from whom payment seemed unlikely, if not entirely irrecoverable.

9. Mr. Boylan avers that a price was agreed, but at the time it was necessary for him to borrow the sum of €50,000 from Mr. Egerton on a very short term basis, and that that sum

was repaid on 19th February 2010 by means of a personal cheque from Mr. Boylan to Mr. Egerton. Although not referred to by Mr. Boylan, it is apparent from the exhibits to an affidavit sworn in reply to his affidavit by the second named appellant, that the purchaser of the Company was not Mr. Boylan himself, but was in fact Waaigeest, and the consideration for sale of the Company to Waaigeest was to be €1,187,680.

10. At paragraph 7 of his replying affidavit, Mr. Boylan avers that he made a number of other agreements with Mr. Egerton surrounding the sale of the Company. He avers that two such agreements are relevant to the within proceedings. Firstly, he says, Mr. Egerton agreed to guarantee a number of the Company's debtors in the event that they failed to make payments as agreed. Those debtors were:

- Barbary Construction Limited ("Barbary") – in the amount of €109,089.18
- Robert Copeland & Sons Limited ("Copeland") – in the amount of €129,290.65
- Edgeline Metal Roofing Limited ("Edgeline") – in the amount of €3,492.47.

11. Mr. Boylan says that this agreement was assented to personally between himself and Mr. Egerton and was not reduced to writing. He exhibits copies of the invoices relating to the debts due by the debtors mentioned above.

12. Mr. Boylan continues, at para. 8 of his affidavit, to aver that by 2014, the outstanding amounts had significantly reduced. He avers:

> *"I confirmed the up to date position to the plaintiffs' solicitor in a letter dated 17th December 2014. As can be seen therefrom, the Company still had outstanding debts as guaranteed by Mr. Egerton, against which the rental income could be offset."*

13. Mr. Boylan exhibits the letter of 17th December 2014. The information provided by Mr. Boylan is in tabular form, as follows:

Loan Note	150,000	
Rent Arrears	29,000	
Brian's part payment		
Copeland's debt		23,600
Copeland's debt remains Unpaid		30,090
Edgeline Metal Roofing		3492
Barbary Construction		15,000
Payments		125,000
Amount overpaid	18,182	

14. I pause here to mention that, in discussions with the court, counsel for Mr. Boylan agreed that the amount of the rent arrears referred to in the first column of figures reflected the amount of rent outstanding as of 17th December 2014. He also agreed that, on the basis of this table, the value of the three debts which Mr. Boylan claims had been guaranteed by Mr. Egerton then stood at €48,582. In any case, the respondents purport in this table to set off, as a credit against rent due by the Company, the balances (as the respondents claim they then stood) of the debts due to the Company by Copeland, Barbary and Edgeline, on the basis of their claim that the late Mr. Egerton guaranteed payment of those debts at the time that he sold the Company to Waaigeest.

15. It appears from the remaining content of the letter of 17th December 2014 that it was sent by Mr. Boylan to the solicitors for the appellants, in response to a notice to quit that had been served on behalf of the appellants upon the respondents.

16. Returning then to the affidavit of Mr. Boylan, at para. 9 thereof he says that he had a separate agreement with Mr. Egerton that a portion of the debt owed by Copeland would be written off against the share purchase price on the understanding that if a specific invoice

was ever discharged in full that the benefit of that specific invoice would then go to Mr. Egerton, *"by means of restoring the full purchase price".* Mr. Boylan avers that this was agreed in February 2010, but was not reduced to writing at that time. However, he avers that, in December 2010, Mr. Egerton signed a note to formalise that element of the agreement, and Mr. Boylan exhibits the loan note. In this document, which is dated 13th December 2010, it is stated:

> *Brian Egerton gave Aidan Boylan at the date of sale an understanding that, if Robert Copeland & Sons did not pay the sum of €28,556.32 for goods received on 4.11.2009 he would not expect payment of that sum, €28,556.32 less VAT as part of the share sale/purchase agreement and loan note from Waaigeest Ltd. However, if Robert Copeland & Sons Ltd. pay this sum at any time in the future then this sum becomes part of the loan note/share sale and will be paid to Brian Egerton forthwith.*

17. The reference to the "loan note" is a reference to a loan note completed between the parties at the same time as the share sale and purchase agreement was completed. This loan note was not exhibited by Mr. Boylan, but was exhibited by Ms. Tighe in an affidavit sworn by her in reply to Mr. Boylan's affidavit, and I will address the contents of the loan note in due course, when dealing with Ms. Tighe's replying affidavit.

18. Mr. Boylan avers that from the beginning of 2012, the Company was unable to maintain the rental payments in accordance with the lease. He avers that in or about May 2013 (he is unsure as to the precise date) he had a telephone conversation with Mr. Christopher Tighe, husband of the second named appellant, who was dealing with the Lease on behalf of the appellants. Mr. Boylan avers that in the course of that telephone conversation, he referred to the agreements that he allegedly had reached with Mr. Egerton. He further avers that he discussed the rental situation with Mr. Tighe, and it was agreed that the Company would pay 50% of the annual rent until such time as the outstanding debts due

from the "guaranteed debtors" had been paid or until such time as the Company was in a position to resume full rental payments. He avers that from that time onwards, the Company has maintained the payment of 50% of the originally agreed rent. Mr. Boylan avers that he had ongoing discussions with Mr. Tighe. He referred to exhibits and an email dated 9th April 2014 which he received from Mr. Tighe, in which Mr. Tighe inquired whether Barbary had made any payments to the Company and in which Mr. Tighe also alluded to the insolvency of Robert Copeland & Sons Ltd., which had gone into liquidation in January 2011.

19. So far as his guarantee of the obligations of the Company's under the Lease is concerned, Mr. Boylan avers that the guarantee does not provide that it would continue as security beyond the fixed term of the tenancy created by the Lease, and he disputes that it has any application after the expiration of that term, even if a periodic tenancy may have arisen thereafter.

Replying affidavits of appellants

20. The affidavit of Mr. Boylan gave rise to two replying affidavits, one sworn by Ms. Andrea Tighe, the second named appellant on 8th July 2021, and the other sworn by Mr. Christopher Tighe, on 15th July 2021.

21. In her affidavit, Ms. Tighe avers that of 30th June 2021, the arrears of rent, taking account of payments received, amounted to €120,050.00. This includes the VAT liability due on the rental payments.

22. Ms. Tighe exhibits a table in which are set out particulars of all rental payments due, the VAT thereon, the sums received and the interest accumulated. The interest accumulated up to 30th June 2021 is stated to be €89,653.29. The total amount due, according to Ms. Tighe, up to 30th June 2021, is €209, 703.29. Ms. Tighe provides detailed particulars as to the computation of this sum which it is unnecessary to set out here.

23. Ms. Tighe avers that it appears from the affidavit of Mr. Boylan that the only basis upon which he asserts that the Company has a *bona fide* defence to the claim of the appellants is to be found in the final sentence of para. 14 of his affidavit, where he claims that he agreed a 50% reduction in rent with Mr. Christopher Tighe. Noting that Christopher Tighe will deal with that assertion, Ms. Tighe avers, by way of submission, that if even if this is accurate, it would do no more than establish that Mr. Tighe had made a gratuitous promise to accept a reduced rent for an uncertain and ill defined period of time, and Mr. Boylan did not suggest that the Company had provided any consideration for this gratuitous promise. For that reason, Ms. Tighe avers, it is not necessary for her to address whether or not her husband had the appellants' authority to bind the appellants to any agreement, nor to consider how any such understanding could affect the arrears which had already fallen due.

24. Ms. Tighe then proceeds to address some of the background facts as averred to by Mr. Boylan. She exhibits the share sale and purchase agreement of 3rd February 2010, the loan note of the same date (referred to above) and a statement of account of 22nd February 2012. She avers that a number of facts are evident from these documents:

(1) The shares in the Company were purchased by Waaigeest rather than by Mr. Boylan. The registered office of Waaigeest is at the same address as that provided by Mr. Boylan as being his own address.

(2) The sum borrowed by Waaigeest [from Mr. Egerton] to make up the shortfall in the purchase monies was €162,680 and not €50,000 as stated by Mr. Boylan. Mr. Boylan guaranteed the repayment of these monies.

(3) The sum borrowed was to be repaid in full after two years, and interest was to be paid at the rate of 3.75% per annum. Ms. Tighe avers that it was not repaid by a personal cheque on 19th February 2010.

(4) The sum due to the Company by Barberry was €45,000 and not €109,089.18, and the sum due by Copeland was €30,750, and not €129, 209.65. There is no suggestion in the loan note that payment of those sums was underwritten or guaranteed by Mr. Egerton. Rather, payment of those sums to Waaigeest by those parties would have triggered an obligation on the part of Waaigeest to discharge the loan a year earlier.

(5) As of 22nd February 2012, the sum outstanding on foot of the loan to Waaigeest was €64,720.

25. Ms. Tighe avers, by way of submission, that it is clear from the documents that she exhibits that even if, at the time of the sale of his shares, Mr. Egerton had made some agreement in relation to the payment of outstanding invoices by Barberry, Copeland and/or Edgeline, such an agreement would have related solely to the repayment of the monies loaned to Waaigeest Ltd. and guaranteed by Mr. Boylan: it could not possibly provide a justification for the Company withholding rent. Moreover, Ms. Tighe avers, the Company had covenanted in the lease to pay the rent "without any deductions or abatement whatsoever" and so is therefore precluded from seeking to set off other monies which it says are due to it by the landlord against the rent.

26. Ms. Tighe acknowledges that the point raised by Mr. Boylan that his guarantee does not cover the obligations of the Company after the expiration of the term of the Lease is an arguable defence to the claim against Mr. Boylan after 30th September 2014. However, the arrears up to that date amounted to €26,178.68 together with VAT at 23%, making a total of €32,199.77. Accordingly, Ms. Tighe avers, Mr. Boylan has no *bona fide* defence in relation to this part of the appellants' claim. It follows from that, that the interest accumulated on that amount up that date, which Ms. Tighe avers comes to €6,031.54 is also due by Mr. Boylan pursuant to his guarantee. This brings the total due by Mr. Boylan pursuant to his

guarantee, as at the date of Ms. Tighe's replying affidavit (8th July 2021), to €38,231.00. Accordingly, the appellants seek judgment against the respondents jointly and severally in the sum of €38,231.00, and as against the first named respondent only in the sum of €171,471.98, i.e. the total sum of €209,703.29 (see para.21 above) less the sum of €38,231.00, although that computation results in the very slightly different net sum of €171,472.29. The appellants also seek on order for possession of Units 1 and 2 of Balbriggan Business Park, and an order adjourning the balance of the appellants' claim against the second named respondent to plenary hearing

Affidavit of Christopher Tighe

27. In his replying affidavit, Mr. Christopher Tighe says that the only conversation to which Mr. Boylan could be referring is a telephone conversation which he and Mr. Boylan had on 15th November 2013. Mr. Tighe avers that during the course of this conversation, Mr. Boylan informed him that the Company was in financial difficulties and that it had been prioritising other debts, owed to suppliers, over payment of rent. Mr. Tighe avers that Mr. Boylan apologised for this, and that he stated that he was confident that the Company could return to profitability, but that it could not afford to pay rent at €20,000 per annum and that there was a similar unit (to that rented by the Company from the appellants) available to let at €6,000 per annum. Mr. Tighe says however that this was for a single unit, whereas the respondents rent two units. Mr. Tighe avers that he subsequently had a conversation with an auctioneer, a Mr. Cumisky, who he claims advised Mr. Tighe that there were no units that he was aware of on the market for €6,000. Mr. Tighe avers that he kept a note of that conversation at the time, but he does not exhibit the note and it is unclear whether he is referring to a note of his conversation with Mr. Boylan or Mr. Cumisky.

28. Mr. Tighe continues:

"Mr. Boylan indicated that his company was paying rent but accepted that it was not the full rent. I said the fact that it was paying something and had recommenced doing so without prompting was appreciated. This was a reference to the fact that since May 2013, some six months earlier, his company had started making payments of €1,000 per month inclusive of VAT."

29. Mr. Tighe avers that Mr. Boylan said during the course of this conversation that it was common for landlords to renegotiate rents with their tenants in the then prevailing economic climate, and Mr. Boylan wished to renegotiate the rent, as well as the term of repayment of an outstanding loan of €50,000, which he, Mr. Boylan, owed to Mr. Egerton. Mr. Tighe says that it was agreed they would speak again on 22nd November 2013 but they did not do so.

30. Mr. Tighe says that he did not agree to a reduced rent being paid in respect of the premises, and he further says that he would not have been able to do so on behalf of his wife and her sister. He avers that he does not believe that they would have agreed to do so to a reduction in rent unless there was some *quid pro quo* and that there was absolute clarity as to the Company's obligations in respect of existing arrears and the terms on which a reduced rent would be accepted.

Decision of the High Court

31. Barr J. conducted a careful review of the affidavit evidence of the parties. He refers to the kernel of the dispute as being whether or not there was an agreement between the parties that the Company would pay 50% of the annual rent until such time as the outstanding debts due from Copeland and Barberry had been paid or until such time as the Company was in a position to resume full rental payments. He stated that there is some evidence of such an agreement insofar as the Company, from May 2013 onwards, paid €1,000 per month, whereas the rent reserved was just over €2,000 per month, inclusive of VAT. The trial judge noted that it is the appellants' case that there is no sufficient evidence of any agreement

between the parties as regards reduction in rent, and that even if there was, there was no consideration given by the respondents for such reduction, and he noted the reliance by the appellants on *Pinnel's* case and the decision of the High Court in *The Barge Inn Ltd. v Quinn Hospitality (Ireland) Operations 3 Ltd.* [2013] IEHC 387. The trial judge noted that it was the appellants' case that no real defence had been raised by the *defendants* to what is a claim for arrears of rent~~,~~ as against the Company, and a liability on foot of the guarantee, as against Mr. Boylan. He noted that it had been accepted that there is an argument as to whether the guarantee could extend beyond the term of the Lease, and that that issue would have to go to plenary hearing.

32. The trial judge went on to refer to the principles applicable in applications for summary judgment, and he referred to a number of authorities including *Aer Rianta v. Ryanair* [2000] IEHC 205 and *Harrisrange v. Duncan* [2002] IEHC 14. He then went on the consider whether or not the appellants had established that the respondents could have no defence to the claim. He noted that there was agreement that there had been a phone call at some time during 2013 during the course of which there had been a discussion about rent, and although, according to Mr. Tighe, there was to be a further conversation about the matter, no such further conversation took place. On the other hand, the respondents continued to pay rent at the rate of €1,000 per month after that phone call "apparently without demur" from the appellants. While the appellants had argued that there was no consideration for a reduction in rent, and relied on *Pinnel's* case and *The Barge Inn*, the trial judge concluded that it is arguable that there was consideration on the part of the respondents in staying on in the premises in circumstances where the Company could have "just walked away". The trial judge noted that had there been no agreement to a reduced rent, and had the Company left the premises in 2013, the liability at that stage would have been fairly low. In these circumstances, the trial judge concluded, a court might conclude, after a full hearing, that

the Company had provided consideration for a reduced rent by staying on the premises. Alternatively, a court might be persuaded that there was an agreement between the parties that would be sufficient to constitute an estoppel such as to prevent the appellants from reneging on any representation that they would accept an abated rent.

33. The trial judge also addressed the question of detriment, and noted that it might be argued that the Company could have rented a smaller unit as €6,000 per annum, but it forewent that opportunity on foot of the representation of the appellants regarding a reduced rent.

34. For all of the reasons summarised above, the trial judge concluded that the defendants had raised an arguable defence that there was either an enforceable agreement regarding reduction of the rent, or alternatively that the appellants were estopped from resiling on their agreement to accept a reduced rent, and he directed that the action should be referred to plenary hearing. Having regard to these conclusions, the trial judge did not consider it necessary to consider and reach any conclusion upon the claim of set off made by the respondents in relation to the debts due to the Company by Copeland, Barbary and Edgeline.

Grounds of Appeal

35. The appellants set out eight grounds in their notice of appeal. So far as is relevant to the grounds pursued at the hearing of this appeal, these may be summarised as follows:

(i) In finding that the respondents had an arguable defence based on estoppel, the trial judge erred in failing to address, firstly, the fact that the affidavit of Mr Boylan contained no assertion of either reliance upon the alleged promise to abate the rent or detriment suffered as a result of such reliance and, secondly, the

fact that, in the absence of direct evidence, the court could not infer from the circumstances of the case that there had been such reliance and/or detriment.

(ii) The trial judge erred in failing to attach sufficient weight to the fact that in her second affidavit, Ms. Tighe had drawn attention to the lack of any evidence of any consideration for the alleged rent abatement and the absence of any evidence of reliance or detriment, and the defendants had not sought to respond to supply this deficit.

(iii) The trial judge erred in law and on the facts in failing to have regard to the fact that the respondents had offered no defence at all in respect of the non-payment of rent for a period of seven months between October 2012 and April 2013, prior to the alleged discussion of an arrangement in relation to abatement of rent.

(iv) The trial judge erred in law and on the facts in determining that, on the basis of the evidence adduced and the arguments made, the second named respondent had established a bona fide or arguable defence to the appellants claim to the sum of €32,199.77 (excluding any claim as to interest).

36. I should mention that there was also a ground of appeal that the trial judge erred in holding that the respondents had established a *bona fide* or arguable defence on the grounds that the court, at the hearing of the full action might be satisfied that an enforceable contract for the abatement of rent had been concluded in 2013, having regard to the fact that the respondents did not assert that any consideration had been provided by them for such abatement, and the fact that it was acknowledged by the respondents in the course of argument that no consideration had been provided, thereby effectively admitting that the rule in *Pinnel's* case applied. However, since the respondents did not contest this issue at the hearing of this appeal, this ground fell away, and accordingly the appeal from the decision of the trial judge on this issue must be allowed.

Respondents Notice

37. The respondents say that the decision of the trial judge was not solely predicated on an argument regarding the existence of an enforceable contract for the abatement of rent, but rather this was a factor taken into account by the trial judge in the general exercise of his discretion to grant leave to the respondents to defend the proceedings**.**

38. The trial judge correctly assessed the evidence and the submissions made on behalf of the Company that it had relied on the promise made on behalf of the appellants to accept an abated rent, and the trial judge correctly concluded that this amounted to an arguable defence. In arriving at this conclusion, the trial judge was entitled to take into account the uncontroverted evidence that a promise had been made to abate the rent and that payments had been made thereafter by the Company in accordance with the promise.

39. In relation to those grounds whereby the appellants argue that the trial judge erred in giving judgment for amounts less than the total amount claimed (see paras.35(iii) and (iv) above), the respondents counter that the trial judge was correct to grant leave in respect of the entirety of the sums claimed as it was demonstrated during the course of the hearing in the High Court and by their notice of appeal that the appellants' figures were unreliable. Moreover, the appellants were unable to demonstrate their entitlement to the sums actually claimed (the reference to the notice of appeal here is taken to be a reference to the fact that the appellants elected not to claim interest on the amount claimed as against the second named respondent (see para.35(iv) above) because as originally presented, interest had also been claimed in error on the VAT portion of the amount claimed.

Submissions of appellants

40. The appellants say that the respondents assert an arguable defence on two distinct bases. The first involves an assertion, arising from an agreement made contemporaneous with Mr. Egerton's agreement to sell the Company to Mr. Boylan, whereby Mr. Egerton agreed to guarantee the payment of three outstanding debts due to the Company, giving rise to an entitlement to set-off those sums against its liability for rent. The second issue raised by the respondents is that the appellants are estopped from demanding payment of the full rent, Mr. Tighe having represented to Mr. Boylan in May 2013 that the Company would accept a reduced rent of €1,000 (including VAT) per month thereafter.

41. In relation to set-off, the appellants submit that the facts, even as asserted by the respondents, do not disclose an arguable defence. The appellants submit, *inter alia*:

(1) Mr. Egerton sold his shares in the Company not to Mr. Boylan personally, but to the company Waaigeest Ltd. If, therefore, Mr. Egerton had given any guarantees, they were given for the benefit of Waaigeest, and conferred no rights on either the Company or Mr. Boylan.

(2) Alternatively, if the guarantee had been given by Mr. Egerton to Mr. Boylan personally, it would have conferred no rights on the Company, such as to entitle it to set off its liability for rent.

(3) In the further alternative, even if Mr. Egerton had entered into the guarantee agreement with the Company, there was not a sufficient connection between that and the obligations of the Company as lessee under the Lease to give rise to an equitable right of set off.

(4) Mr. Egerton died on 7th April 2011, and therefore any claim against his estate on foot of the alleged guarantee agreement became statute barred on 7th April 2013 by act and operation of law, long before these proceedings were instituted on 6th October 2015.

(5) The rent claimed in these proceedings is payable to the plaintiffs in respect of the period after they became entitled to the premises. The Company cannot therefore claim set-off of any sums allegedly due by Mr. Egerton against rent payable to the plaintiffs.

(6) The alleged agreement to reduce the share purchase price payable under the share purchase and sale agreement cannot give rise to a defence to the claim for rent.

42. In relation to the respondents' defence based on estoppel, the appellants point out that in his replying affidavit, Mr. Boylan does not assert either reliance or detriment, nor does he set out any circumstances in which reliance and detriment might be inferred. Accordingly, it is submitted that the conclusion of the court that there is sufficient evidence of reliance and detriment such as to ground a defence by way of estoppel is not supported by the evidence.

43. Furthermore, it is submitted that there are no other circumstances from which the Court might infer reliance and detriment, and that even if there is any degree of reliance and detriment, it could not entitle the Company to anything more than reasonable notice that it was required to resume paying the full rent, and the commencement of these proceedings constituted unequivocal notice that this was so.

44. It is further submitted that, for an estoppel to arise, it must be established that it is arguable that:

(a) There was an unambiguous promise or representation by the appellants that a rent of €1,000 (inclusive of VAT) per month would be accepted;

(b) That the Company acted in reliance on that promise or representation which would prove to be to its detriment should the appellants be permitted to resile from the same; and

(c) As a result, it would be unfair or unconscionable to allow the appellants to resile from that promise or representation.

45. It is submitted that there is ample authority for the proposition that detriment is an essential element of estoppel, and the appellants rely upon, *inter alia*, the decision of this Court (Whelan J.) in *Tyrrell v. Wright* [2018] IECA 295 wherein, at para. 33, Whelan J. cited the following passage from the decision of the Supreme Court (Griffin J.) in *Doran v. Thompson & Sons Limited* [1978] IR 223:

> *"Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has acted on it, altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and may be restrained in equity from acting inconsistently with such promise or assurance".*

46. In any case, it is submitted, that in order to establish reliance there must be evidence of the promisee acting on foot of the promise and this, coupled with the requirement of an element of unfairness or unconscionability, would seem to encompass the concept of detriment in most if not all cases. Here, there is no direct evidence of reliance, detriment or unfairness and the potential detriment relied upon by the trial judge cannot withstand scrutiny. Mr. Boylan did not claim that the Company might have vacated the demised premises and taken a lease of another unit if a reduced rent had not been accepted. Moreover, the uncontroverted evidence is that the Company would not have been entitled to vacate the premises until 30th September 2014, and it would not have been open to it (at the time of the conversation between Mr. Boylan and Mr. Tighe) to surrender its tenancy and lease in order to take up the lease of an alternative premises at a lower rent. So therefore, even if the

alleged representation was made, and the Company paid rent at €1,000 per month on the basis of the same, it suffered no detriment by doing so.

Submissions of respondents

47. The respondents submit that Mr. Boylan has deposed as to an agreement that he entered into with Mr. Egerton in 2010 whereby the Company could off-set rental payments as against bad debts. While that agreement was never reduced to writing, Mr. Boylan exhibited another agreement which was reduced to writing some months after the alleged agreement regarding off-set. This was an agreement, recorded in the form of a letter from Mr. Egerton, dated 13th December 2010, which, as noted above, states:

> *"Brian Egerton gave Aidan Boylan at the date of sale an understanding that, if Robert Copeland & Sons did not pay the sum of €28,556.32 for goods received on 4.11.2009 he would not expect payment of that sum, €28,556.32 less VAT as part of the share sale/purchase agreement and loan note with Waaigeest Ltd. However, if Robert Copeland & Sons Ltd. pay this sum at any time in the future, then this sum becomes part of the loan note/share sale and will be paid to Brian Egerton forthwith*."

48. It is submitted that this agreement demonstrates that, in addition to their formal agreements entered into in February of 2010, there were also a number of personal oral agreements whereby, it was asserted, the outstanding debts owed to the Company were used to offset certain other liabilities between the parties. While recognising that the evidence is not conclusive, it is submitted that it is nonetheless supporting evidence of the manner in which Mr. Egerton and Mr. Boylan dealt with each other, and provides the basis of an arguable defence. This limb of the defence addresses any shortfall which may have arisen on rental payments prior to the alleged abatement agreement of May 2013. The respondents

contend that during this period the Company was entitled to set off rental monies against outstanding debts due to the Company.

49. The respondents also contend that the evidence indicates that the appellants were aware of the set-off agreement, and in this regard rely upon an email sent by Mr. Christopher Tighe to Mr. Boylan on 9th April 2014 wherein he makes enquiries as to whether or not debts outstanding by Copeland and Barberry had been paid.

50. The respondents submit that the appellants have made no comment on Mr. Boylan's reliance on his email of 9th April 2014 to Mr. Christopher Tighe as being evidence of the set off arrangement. The respondents submit that while Ms. Tighe in her affidavit opines that the documents surrounding the sale and purchase of the Company by Mr. Egerton to Waaigeest could not provide a justification for the Company withholding rent, it is inappropriate to ask the court, on a summary judgment application, to arrive at any conclusion in this regard in circumstances where the appellants have not invoked the procedures for cross examination. The respondents rely upon the decision of the Supreme Court in *RAS Medical Limited v. RSCI* [2019] IESC 4 [2019] 1 IR 63 in which Clarke C.J. stated:

> *"… It is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting*

affidavit evidence and where it is considered that a resolution of that dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.

A similar principle applies where it is suggested that there is documentary evidence, properly before the court, which might cast doubt on the reliability of sworn testimony. It is not possible to invite a court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross examination, to explain, if that be possible, any matters which might go to credibility or reliability."

51. The respondents submit that in this case there was a heightened onus on the appellants to seek cross examination of Mr. Boylan in circumstances where it is not possible to adduce any other first hand evidence of the guarantee he claims was given to him by the late Mr. Egerton, and which Mr. Boylan relies upon to claim an entitlement to set off against rent payable. In those circumstances, it is submitted, the court cannot safely adjudicate on the defence raised by Mr. Boylan without the benefit of his oral testimony and in particular without the benefit of seeing his evidence properly tested by counsel for the appellants. It is submitted that in circumstances where there is, effectively, uncontroverted evidence from Mr. Boylan as to the existence of the set off arrangement, which, if established, would constitute a defence to a portion of the appellants' claim, it would be inappropriate for the court to draw any conclusions on the issue without the oral testimony of Mr. Boylan.

Estoppel defence

52. The respondents disagree that there is no evidence relating to a defence of estoppel to be found in the affidavits of Mr. Boylan and Mr. Tighe. They point out that there is no dispute that there was a telephone conversation between both men, and the Company thereafter commenced and continued to make payments at what the respondents claim was the agreed rate of €1000 per month. Moreover, in his affidavit, Mr. Tighe confirms that Mr. Boylan informed him of the cash flow problems of the Company, and that the Company was unable to meet its monthly rental repayments. Mr. Tighe avers that Mr. Boylan informed him that he had an alternative premises available at a lower rent, albeit that that premises was a single unit. While Mr. Tighe avers that he spoke with an auctioneer to verify whether such a unit was available (the implication being that the unit was available within the same development as the demised premises) and had been told that the auctioneer was unaware of any such premises being available, Mr. Tighe did not exhibit the note that he claimed to have kept of this conversation.

53. It is submitted that there is evidence before the court that the Company remained in the demised premises on the basis of the reduced rent – which is evidenced by its payment by the Company – which rent was greater than an alternative premises available to the Company. This, it is submitted, is evidence of reliance and detriment which, if accepted by a court, would be sufficient to resist the claim on grounds of promissory estoppel.

54. As to the argument that the appellants would be entitled to terminate the agreed reduced rent on reasonable notice, no notice was in fact served, and it cannot be the case, as the appellants contend, that the proceedings themselves constitute notice. This could not be so as it would mean that, while no cause of action had accrued prior to the issue of the proceedings, the fact of the issue of the proceedings triggered the cause of action. That, it is submitted, puts the cart before the horse.

55. The respondents also argue that while it is their case that they did act to their detriment in reliance on the rent abatement agreement, it is unnecessary to establish detriment to establish a promissory estoppel. They submit that it is only necessary to demonstrate that the promisee altered his or her position such that it would be inequitable to permit the promiser to withdraw from the promise. In this regard the respondents rely on *NALM v. McMahon* [2014] IEHC 71 wherein Charleton J. said:

> *"Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his[or]her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it."*

56. The respondents also rely upon the judgment of Laffoy J. in *The Barge Inn Limited v. Quinn Hospitality (Ireland) Operations 3 Limited* wherein, at para. 68, Laffoy J. adopted the six ingredients of promissory estoppel as set out in *McDermott and McDermott on Contract* [2nd Ed.] as follows:

(i) A pre-existing legal relationship between the parties;

(ii) an unambiguous representation;

(iii) reliance by the representee (and, possibly, detriment);

(iv) some element of unfairness and unconscionability;

(v) the estoppel is being used not as a cause of action, but either as a defence to stop the other party raising a defence;

(vi) the remedy is a matter for the Court.

57. In the same text, the authors opine that "*while detriment is an essential feature of proprietary estoppel, the better view is that it is not required in order to raise a promissory estoppel*."

58. In this case, it is submitted that the Company found itself in similar circumstances to those that arose in the case of *The Barge Inn* i.e. it was a tenant in financial difficulty whose rent was abated by its landlord. Indeed it was this very kind of reliance that gave rise to the famous pronouncement of the law on this subject by Denning J. in *Central London Property Trust v. High Trees* [1947] KB 130, where he said; *"Where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even though the promise may not be supported by consideration in the strict sense and the effect of the arrangement is to vary the terms of a contract under seal by one of less value*". In this case, as in *The Barge Inn* and *High Trees,* the respondent submits that the Company as tenant relied upon a promise made by the landlords, and it would be inequitable and unconscionable that, having made the promise, the appellants should be entitled to deny it in circumstances where the respondents have met the agreed commitment and conducted their basis of this agreement.

59. It is submitted that no issue arises for determination under the rule in *Pinnel's* case. Rather the only issue that arises for consideration by this Court is whether a *bona fide* argument has been made out that the respondents have a defence to the proceedings by way of estoppel. Therefore the respondents should be granted leave to defend the proceedings, as it is not possible on the basis of the evidence before the Court now, to resolve the factual and legal issues between the parties.

Discussion and decision

60. The respondents advance two arguments in opposition to this appeal, the first being that Mr. Boylan reached an agreement with Mr. Egerton that the Company would be entitled to set off against the rent payable by it under the lease any sums due by Mr. Egerton to Waaigeest pursuant to a guarantee which Mr. Boylan claims was given by Mr. Egerton in relation to three commercial debts owing to the Company (by Copeland, Barberry and Edgeline) at the time of completion of the sale and purchase of the company. The second ground upon which the respondents resist the appellants' claim is that the appellants are estopped from pursuing arrears of rent on the basis of their agreement to a rent reduction made between Mr. Christopher Tighe on behalf of the appellants and Mr. Boylan, in the course of 2013. As has already been mentioned, the respondents did not purport to argue that the appellants had entered into a binding agreement to accept an abated rent, but they did rely on the discussions around that issue in May 2013, and their own subsequent actions in paying a reduced sum of €1000 per month, in support of their estoppel argument.

Set off

61. While it is argued on behalf on the respondents that the proceedings should be referred to plenary hearing so that Mr. Boylan's evidence as regards the set off arrangement can be heard and assessed by the Court, this is in my view unnecessary having regard to the key salient undisputed facts. Those facts are:

(1) Mr. Egerton entered into an agreement for the sale of the shares in the Company to Waaigeest on 3rd February 2010. That transaction was concluded, as a result of which Waaigeest became the owner of all of the shares in the Company.

(2) On the same date, Mr. Egerton entered into a short term letting agreement of the premises occupied by the Company (*i.e.* the Lease) with effect from 1st January 2010, for the term of four years and nine months. The rent payable under the lease was €20,000 per annum, exclusive of VAT. The lease provided for payment of VAT in addition to rent.

(3) Mr. Boylan executed a deed of guarantee of the rent payable by the Company to Mr. Egerton, also on 3rd February 2010.

(4) On the same date as entering into the share sale and purchase agreement, Mr. Egerton and Waaigeest entered into a loan note whereby Waaigeest acknowledged that there was a shortfall of the purchase price payable by it to Mr. Egerton. This shortfall amounted to €162,680. Mr. Egerton agreed to loan that sum to Waaigeest, and Mr. Boylan agreed to guarantee that loan. The loan agreement provided that the entire sum was to be repaid by 3rd February 2012, and that interest was to be payable at the rate of 3.75% per annum. The loan note referred to two debts then outstanding to the Company, one by Barberry and the other by Copeland, in the sums of €45,000 and €30,750 respectively. It provided that in the event that those sums were discharged by 3rd February 2011, then the balance outstanding (by Waaigeest to Mr. Egerton), together with accrued interest thereon, was to be repaid in full prior to 3rd February 2011. Mr. Boylan guaranteed the liabilities of Waaigeest pursuant to the loan note.

(5) On 13th December 2010, Mr. Egerton signed a letter recording an understanding with Mr. Boylan at the date of the sale and purchase of the company, that if Copeland did not pay the sum of €28,556.32 for goods it had received (presumably from the Company) on 4th November 2009, then he would not expect payment of that sum (less VAT) as part of the share sale/purchase

agreement and loan note with Waaigeest. This was subject to the proviso that if Copeland did pay that sum at any time in the future, then the monies would form part of the sums due under the loan note, and would be paid by Waaigeest to Mr. Egerton.

62. These agreed facts demonstrate that, at the time of the sale of the Company to Waaigeest, the parties did indeed consider and address debts due to the Company by third parties, specifically Copeland and Barbary. The duration of the period for repayment of the loan advanced by Mr. Egerton to Waaigeest at the conclusion of the sale of the Company was linked, by the loan agreement, to the payment of these debts, and was extended by 12 months in the event of their non payment. Mr Boylan guaranteed the liabilities of Waaigeest to repay this loan. Later in the same year, Mr. Egerton acknowledged that he had agreed that in the event that Copeland failed to pay the Company the sum of €28,556.32 in respect of goods supplied, he would not expect payment of that sum, presumably in the context of repayment of the loan, i.e.in such circumstances, the loan would be reduced by that amount.

63. The very fact that Mr. Egerton signed this acknowledgment 10 months after completion of the sale of the Company completely undermines the respondents' claim that there was another, undocumented, agreement between Mr. Egerton and the respondents as regards the same debts. In fact the set off claim now advanced by the respondents, based as it is on an alleged guarantee provided by Mr. Egerton in respect of those debts, would be inconsistent with the both the loan note and the acknowledgment of December 2010. The latter would not have been necessary at all if Mr. Egerton had provided the alleged guarantee, and it would hardly have been necessary to refer to the debts at all in the loan note, if their payment was being guaranteed by Mr. Egerton.

64. I am very mindful that it is no function of the Court in an application for summary judgment to determine disputes as to facts arising out of the affidavits exchanged.

Nonetheless the Court is obliged to consider if the defence offered (or, in this context, an element of the defence offered) is credible. This is clear from several authorities, as summed up by McKechnie J. in *Harrisrange v Duncan*, at para.[9] (vii) , where he said:

"*… the test to be applied, as now formulated, is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result."*

65. In my view the set-off defence offered by the respondents is not credible, having regard to the documents that were completed at the time of the sale and purchase of the Company in February 2010, and the later acknowledgement signed by Mr. Egerton in December 2010. Moreover, apart altogether from its inconsistency with those documents, it amounts to no more than a mere assertion advanced by Mr. Boylan. In general terms, a mere assertion without more, is an insufficient basis upon which to resist an application for summary judgment. See, for example, the decision of the Clarke J. in *McGrath v O'Driscoll* & ors [2006] IEHC 195, [2007] 1 ILRM 203, wherein he stated, at para [3.4]:

> *"So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved."* ……..]

66. Likewise in *Harrisrange v Duncan*, McKechnie J. at para [9] (xi) stated; "*leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence…"*

67. In this case, the entitlement to set off rent otherwise payable by the Company is based upon an oral guarantee allegedly provided by Mr. Egerton , the existence of which is unsupported by and inconsistent with the carefully drawn documents completed by the

parties for the purpose of giving effect to the agreement for the sale and purchase of the Company by Mr. Egerton to Waaigeest. Moreover, those documents included two guarantees given by Mr. Boylan, one in respect of the rent, and the other in respect of the loan, and it is highly implausible that Mr. Egerton would have given a verbal guarantee in circumstances where Mr. Boylan gave two written guarantees, without even considering the inconsistency of the guarantee Mr. Egerton is alleged to have given with the other documented arrangements.

68. For the foregoing reasons, I have concluded that the set off defence contended for by the appellant is based upon nothing more than an assertion of the kind referred to by Clarke J. and McKechnie J in the authorities referred to above , and in any case it is not a credible defence for the reasons I have already stated. There are, however, two other reasons why this defence could not succeed.

69. Firstly, the rent payable under the Lease was payable by the Company, as tenant, to Mr. Egerton, as landlord. Set off as against the rent could only arise in respect of debts due by Mr. Egerton to the Company. Mr. Boylan, in his affidavit, does not claim that the guarantee in respect of debts owing to the Company was given by Mr. Egerton to the Company. Indeed, he does not identify for whose benefit the guarantee is alleged to have been given. Although he does say that: *"This was agreed between Brian Egerton and I personally and was not reduced to writing".* This suggests that any such guarantee was given for the benefit of Mr. Boylan personally. The only other alternative is that it was given (if it was given at all) to Waaigeest, being the other party to the share purchase and sale agreement. In either case, such a guarantee could not possibly give rise to any set off of rent due and owing by the Company to Mr. Egerton.

70. Secondly, Mr. Egerton died on 7th April 2011. Any liability he had under the alleged guarantee was personal to Mr. Egerton, and , since the respondents did not issue proceedings

for recovery on foot of the same , any such claim became statute barred against his estate on 7th April 2013, two years and six months before these proceedings were instituted.

71. In so far as the respondents have argued that the appellants were aware that there was a set off arrangement, because Mr. Tighe referred to the debts due by Copeland and |Barbary in his e mail of 9th April 2014 to Mr. Boylan, this was an obvious inquiry for Mr. Tighe to raise having regard to the loan note which expressly referred to those debts, and fixes the time for repayment of the loan by reference to whenever these debts are paid.

72. None of the above involves any issues of law that are in any doubt. No evidence that Mr. Boylan may give can have any impact upon any of these conclusions, which are based, as I have said, upon facts which are not in dispute, and so there can be no need for cross-examination of Mr. Boylan as suggested. It follows therefore that there is no basis upon which to send these proceedings forward for plenary hearing for the purpose of enabling the respondents advance a defence of set off, in whatever amount.

Promissory estoppel argument.

73. While Mr. Boylan claims in his replying affidavit that in May 2013 he agreed with Mr. Christopher Tighe that the Company would pay 50% of the annual rent until such time as the outstanding debts due from the guaranteed debtors have been paid or until such time as the Company was in a position to resume full rental payments, Mr. Boylan says nothing at all about reliance on this agreement, and nor does he claim that he altered his position or suffered any detriment as a result thereof. I agree with the submission of counsel for the appellants that in order to raise a defence of promissory estoppel, it is necessary for the defendant to claim reliance. It cannot do so by way of submission of counsel as to the interpretation to be placed upon an affidavit sworn in reply on behalf of a claimant – in this case the appellants – to an affidavit sworn on behalf of a defendant – in this case the affidavit of Mr. Boylan, sworn on behalf of the defendants/respondents. What the defendants are

seeking to do here is to fill in a gap in the evidence of the defendants by way of submission, and that is not permissible.

74. This is so, *a fortiori*, in circumstances where the point raised is so fundamental to the defence of the proceedings. It is not a trivial detail, or something that could readily be overlooked. Simply put, on their own evidence, the respondents have not claimed that they acted in reliance on the alleged agreed reduction in rent, and they have offered no evidence that they did so, or that they altered their position in any way as a result of the agreement, not to mention that they did so to their detriment. So, therefore, they cannot possibly meet an indispensable ingredient in the defence; without reliance, there can be no estoppel, and it is unnecessary to consider the question of detriment at all.

75. While the respondents do claim that there is evidence as to the agreement in respect of the reduction of rent in the very fact, from May 2013 onwards, that they paid rent at the rate of €1,000 per month (including VAT) without objection, until the institution of these proceedings, that is not evidence of reliance for the purpose of estoppel, but rather, taken at its height, is evidence of acquiescence on the part of the appellants to payment of a reduced rent, and this line of defence has not been pursued, very correctly, in the absence of consideration for any such reduction.

76. While the respondents have placed reliance on *The Barge Inn Ltd.*, the facts of that case are very different to the facts here, because in *The Barge Inn Ltd.* the tenant was the plaintiff who issued proceedings in reliance on what was an undisputed agreement to reduce rent, and one of the key issues for determination was whether or not that agreement was of a temporary nature, and if so for how long.

77. For these reasons I consider that the trial judge fell into error in concluding that the respondents had established a basis upon which it could be argued successfully that there was an agreement between the parties sufficient (in the words of the trial judge) to

"constitute an estoppel such that it would prevent the plaintiffs from reneging on any representation that an abated rent would be taken or would be accepted". The trial judge also erred in taking into account the claim made by Mr. Boylan to Mr. Tighe on the telephone (but not made by Mr. Boylan on affidavit) that he could secure an alternative premises at the rent of €6,000 per annum, for the very simple reason that Mr. Boylan did not make this claim on affidavit.

78. For all of the foregoing reasons, I am of the view that the arguments of the respondents that they could successfully defend these proceedings either on the basis of a claim as to set off of rent or on the basis of a promissory estoppel are nothing more than a mirage. They are entirely without credibility, and should be rejected. That being so, the respondents have failed to demonstrate that they have any defence to the claim of the appellants, and it follows that the appeal should be allowed, and judgment entered for the appellants.

79. The amount claimed in the summary summons was €49,280.16. By the time Ms. Tighe swore her second affidavit on 8th July 2021, the amount due had obviously increased very significantly, and Ms. Tighe deposed that the balance due in arrears of rent, including VAT (allowing credit for all sums received) was €120,050, and that there was accumulated interest of €89,653.29, making a total due by the Company, in respect of rent, VAT and interest up to 8th July 2021 of €209,703.29. A clear breakdown in respect of each element of the claim was provided, and while at the hearing of this appeal the respondents purported to argue that there was some lack of clarity, I do not agree, and in any case it formed no part of the respondents' case that there had been a failure to provide adequate particulars of the amount claimed, and nor did the respondents dispute the accuracy of the amounts claimed, on affidavit or otherwise.

80. As to the second named respondent, the appellants very correctly accepted that an argument can be made that the guarantee of the rent provided by the appellant in respect of

rent payable by the Company may not continue beyond the term of the Lease, which expired on 30th September 2014. As of that date, there were arrears of €26,178.68 on which sum VAT in the sum of €6021.09 is payable, making a total due of €32,199.77. Owing to an error in computation of interest on this sum, the appellants are waiving interest in respect of this element of the claim as against the second named respondent.

81. I will therefore give judgment against the respondents jointly in the sum of €32,199.77, and, separately, judgment against the Company only in the sum of €177,503.52, i.e. €209.703.29 less €32,199.77. The appellants' claim for the balance of the claimed as against the second named respondent, Mr. Boylan, shall be sent forward for plenary hearing.

82. Finally, the appellants also seek an order for possession of the demised premises, in view of the fact that more than one year's rent has fallen due. It will be necessary to hear counsel as to the appropriate course to take in relation to this element of the claim, which was not the subject of any order of the High Court in light of the trial judge's conclusion on the application for summary judgment. Since therefore it will be necessary for the Court to sit again to address this issue, the Court will hear any submission the parties may wish to make as regards costs on that occasion.

83. As this judgment is being delivered electronically, Whelan J. and Faherty J. have authorised me to confirm their agreement with it.