APPROVED

THE COURT OF APPEAL

BARNIVILLE P.
WHELAN J.
HAUGHTON J.

Appeal number: 2021/150
Neutral Citation Number [2024] IECA 51

BETWEEN/

EOIN FANNON

PLAINTIFF/RESPONDENT

AND

TOM O'BRIEN AND PROMONTORIA (OYSTER) DAC

DEFENDANTS

AND

BY ORDER ULSTER BANK IRELAND DAC

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 6th day of March, 2024

Contents

1. Introduction

1. This is an appeal by the third named defendant/ appellant, Ulster Bank Ireland DAC ("Ulster"), from the judgment of the High Court (Keane J.) delivered on 28th April, 2021 ([2021] IEHC 301), and from the Order made by the High Court on 19th May, 2021, dismissing an application by Ulster to dismiss or strike out the claims made by the plaintiff against Ulster in the proceedings on various different jurisdictional grounds. In addition, the High Court ordered Ulster to pay the plaintiff's costs of the application.

2. The plaintiff initially commenced the proceedings against the first and second defendants only, Tom O'Brien (the "Receiver") and Promontoria (Oyster) DAC ("Promontoria"). The plaintiff subsequently joined Ulster as a further defendant to the proceedings. In an amended statement of claim delivered by the plaintiff following the joinder of Ulster, the plaintiff pleaded a number of causes of action against Ulster, in addition to those originally pleaded against the Receiver and Promontoria. The causes of action

asserted against Ulster included claims in contract (the "contract claim"), negligence and related torts (the "negligence claim") and in defamation and trespass (the "defamation and trespass claims").

3. Ulster brought an application in the High Court to dismiss or strike out all of those claims on various different jurisdictional grounds including O. 19 r. 28, O. 19 r. 27, O. 15 r. 13 of the Rules of the Superior Courts (the "RSC"), and the inherent jurisdiction of the court. Ulster's application was advanced on a particular basis which was clearly set out in its affidavits and in its written submissions. That basis was, essentially, that because Ulster had assigned the plaintiff's loan and mortgage to Promontoria, any cause of action which the plaintiff might have arising out of the matters complained of, lay against Promontoria and not against Ulster. In advancing that argument, Ulster relied heavily on the provisions of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 (the "1877 Act"). That provision reads, as far as is relevant to this appeal, as follows:

> *"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor..."*

4. In a comprehensive judgment, the High Court Judge (Keane J.) carefully considered the arguments advanced for, and against, Ulster's application. The judge set out clearly and,

in some detail, the legal principles applicable to the dismissal of a claim as well as the law governing the effect of an alleged assignment on causes of action in contract and tort. There is no dispute between the parties that the judge correctly identified the principles applicable to the dismissal of claims. Rather, the dispute concerns his application of those principles in the context of the particular alleged assignment in this case. The judge concluded that it would not be appropriate to dismiss or strike out any of the plaintiff's claims against Ulster on foot of Ulster's application to dismiss.

5. Ulster has appealed to this Court from that judgment and the consequent order made by the High Court. It is clear, however, that in advancing its appeal, Ulster has relied on points and arguments not advanced in the High Court which the judge had no opportunity to address in his judgment. While the notice of appeal and Ulster's written submissions on the appeal moved some distance from the case advanced by it in the High Court, that move was even more dramatic in the oral submissions made on behalf of Ulster at the hearing of the appeal. This dramatic shift in the arguments advanced by Ulster was most pronounced in its attempts to persuade the court that it should dismiss the plaintiff's negligence claim. In respect of that part of its appeal, Ulster made arguments and relied on case law which were not advanced or addressed before the High Court, or, indeed, developed to any material extent in its notice of appeal or in its written submissions. The plaintiff protested at this in his response to the oral submissions on the appeal.

6. In my view, there is considerable merit to the plaintiff's objections. Ulster should not be permitted to rely on substantial arguments which were not considered by the High Court. For the court to permit Ulster to do so would, in my view, be unfair and would be inconsistent with the role of the appellate court as discussed by O'Donnell J. in the Supreme Court in *Lough Swilly Shellfish Growers Cooperative Society Limited v. Bradley & Ors* [2013] IESC 16, [2013] 1 I.R. 227 (*"Lough Swilly"*) and considered on many occasions by

this Court (a recent example being, *Promontoria* (*Aran) Limited v. Mallon* [2021] IECA 130). Ulster's appeal should be considered on the basis of the case and arguments advanced by it in the High Court and not on the basis of the fundamentally new arguments advanced on its behalf in this Court.

7. In addition to this, there is, I believe, a significant difficulty in Ulster relying on the provisions of s. 28(6) of the 1877 Act in its application to dismiss the plaintiff's claim on the basis of the alleged assignment of the plaintiff's loan and mortgage to Promontoria, in circumstances where Ulster did not provide a copy of the document (or the relevant parts of the document) alleged to constitute the assignment. Ulster did not, therefore, put before the High Court or this Court, for the purpose of its application to dismiss the plaintiff's claims, evidence that the alleged assignment was an "*absolute assignment*" for the purposes of that statutory provision.

8. Having regard to these considerations and for the further reasons set out in the judgment below, I have concluded that Ulster's appeal should be dismissed, insofar as it relates to the contract claim and the negligence claim.

9. However, I am satisfied that its appeal from the refusal of the High Court to dismiss the defamation claim should be allowed. In my view, that claim is unstateable and unsustainable as pleaded, and in substance, and should be dismissed under both O. 19, r. 28 RSC and the inherent jurisdiction of the court. The plaintiff did not seek to avail of any opportunity to amend the pleas made in respect of the defamation claim so as to identify any stateable basis for it. The same goes for the plaintiff's claim in trespass. Insofar as the plaintiff has sought to advance such claims in defamation and trespass as against Ulster, I believe the High Court should have dismissed those claims and I would allow Ulster's appeal in respect of them.

2. Factual Background

10. In his judgment in the High Court, Keane J. provided a brief summary of the relevant factual background. I propose here to set out that background in a little more detail.

11. The plaintiff and his wife borrowed the sum of €501,500 from First Active Plc ("First Active") in April 2007. The purpose of the loan was to fund the purchase of an apartment in Dublin (the "property"). The loan was secured by a mortgage granted by the plaintiff and his wife to First Active in May 2007. It appears that the loan was for a term of 20 years from drawdown in April or May 2007 and was to be on an interest only basis for the first 60 months or 5 years (expiring in April or May 2012) (the "original loan agreement").

12. In 2009, Ulster Bank Ireland Limited (now Ulster Bank Ireland DAC) acquired the business, rights, liabilities and obligations of First Active under S.I. 481/2009, *Central Bank Act 1971 (Approval of Scheme of First Active Plc and Ulster Bank Ireland Ltd) Order 2009*. The plaintiff's loan and the mortgage were transferred to Ulster on foot of that instrument. It is Ulster's case that, by deed of transfer dated 19th December, 2016, Ulster transferred and assigned the plaintiff's loan and mortgage to Promontoria. The plaintiff has not admitted the transfer and has put the defendants (the Receiver, Promontoria and Ulster) on proof of it. Ulster did not exhibit a copy of the deed of transfer or even a redacted version of it as part of its application to dismiss the plaintiff's claim. The failure to do so has implications for Ulster's application. In March 2017, Promontoria was registered on the relevant folio as owner of the charge of which First Active was previously registered as owner.

13. The plaintiff claims that, in November 2014, Ulster Bank offered him a new repayment schedule which he accepted on 20th November, 2014, and which amounted to a new agreement with Ulster, under which he would pay an overall monthly sum of €958.00 for a three year period and that Ulster would suspend the contractual obligation to pay full

interest and capital repayments. The plaintiff claims that that agreement superseded any previous agreements between the parties for its duration. The judge has described that agreement as the "repayment agreement" and I will use that term in this judgment. Ulster does not agree that the repayment agreement, or any agreement, was made between it and the plaintiff in November 2014. Representatives of Ulster have sworn affidavits (both in the context of Ulster's application to dismiss the plaintiff's claim and in response to the plaintiff's previous application in 2018 for certain interlocutory relief against the Receiver and Promontoria) in which they have denied that the repayment agreement or any agreement varying the terms of the original loan agreement was made with the plaintiff.

14. That was the position maintained by Ulster when its application to dismiss the plaintiff's claim was heard and determined by the High Court. For the first time when opening its appeal at the hearing before this Court, counsel for Ulster Bank accepted that there is an arguable case that, in November 2014, a binding agreement was made between the plaintiff and Ulster varying the terms of the original loan agreement between the parties, such that, for a further period of three years, the plaintiff (and his wife) would only be liable to make interest payments on the loan. Ulster did not, however, accept that there was an arguable case that such an agreement was a separate or collateral agreement (as found by the judge).

15. The plaintiff claims that he complied with the repayment agreement although this is disputed by Ulster, which claims that the plaintiff's loan went into arrears in late May 2015.

16. Following the alleged transfer and assignment of the plaintiff's loan and mortgage to Promontoria in 2016, Promontoria appears to have called in the loan and appointed the Receiver as receiver over the property the subject of the mortgage in February 2018. The plaintiff disputed Promontoria's entitlement to appoint the Receiver and the validity of various steps taken by Promontoria and the Receiver, following that appointment. However,

the court was provided with almost no information concerning the circumstances in which the Receiver was appointed and the steps taken following his appointment. Some of those steps can be discerned from material which is before the court. For example, it appears (from the defence delivered by the Receiver and Promontoria) that the plaintiff sought injunctive relief against the Receiver and Promontoria and that the High Court made an order on 12th July, 2018, directing that Promontoria repay to the plaintiff such sums as it may have received in respect of rental income from the date of the appointment of the Receiver and that that was done (para. 10 of the defence of the Receiver and Promontoria to the original statement of claim). It must be said, however, that the hearing in the High Court and in this Court proceeded without all of the relevant facts being provided to either court.

3. Procedural History

17. The plaintiff commenced the proceedings against the Receiver and Promontoria by plenary summons issued on 26th March, 2018. In the original plenary summons, the plaintiff sought various reliefs against those defendants including declarations that they were in breach of an agreement entered into between the plaintiff and those defendants or either of them in relation to the plaintiff's loan account (i.e., the alleged repayment agreement), that the plaintiff was not in default of the terms applicable to that account and was not in arrears in relation to repayments under the account and that the purported appointment of the Receiver was in breach of that alleged agreement. An order of specific performance was sought directing the Receiver and Promontoria perform the terms of that alleged agreement. Orders were sought restraining the Receiver and Promontoria (and any other persons having notice of such an order) from interfering with the plaintiff's enjoyment of the property. An account was also sought of any monies received by the Receiver since 1st February, 2018 (the date of appointment of the Receiver). Damages were sought for breach of contract, breach of duty,

breach of statutory duty "*or otherwise*". Mesne rates and damages for trespass were also sought. Those were the essential reliefs which were sought by the plaintiff when the proceedings were originally issued against the Receiver and Promontoria only.

18. As noted earlier, the plaintiff brought a motion seeking interlocutory relief in May 2018 which was apparently the subject of an order made by the High Court on 12th July, 2018. With the exception of one affidavit – an affidavit sworn by Sarah Mulvey, an employee of Ulster, in early July 2018, on which Ulster relied in the High Court in support of its dismissal application – none of the papers from the plaintiff's interlocutory injunction application were before the High Court or this Court.

19. The plaintiff delivered a statement of claim as against the Receiver and Promontoria in March 2018. The statement of claim set out the plaintiff's claim against those two defendants only (as Ulster had not yet been joined as a defendant to the proceedings). The plaintiff made clear, in the statement of claim, that, while Promontoria was contending that it had acquired the rights of Ulster in the loan and mortgage under a deed of transfer dated 19th December, 2016, the plaintiff was awaiting proof that that was the case and that Promontoria was the entity which had succeeded to Ulster's rights and obligations under the mortgage. The plaintiff, in the statement of claim, pleaded that the Receiver and Ulster were in breach of the alleged repayment agreement when, notwithstanding compliance by the plaintiff with the terms of that agreement, Promontoria purported to appoint the Receiver as receiver over the property. The plaintiff also pleaded as against those two defendants that they informed the tenant of the property that the plaintiff was in arrears with his mortgage, and that the Receiver had been properly and lawfully appointed and was entitled to demand that the tenant should pay rent to him rather than to the plaintiff. It was also pleaded that the Receiver contacted the management company and procured a change in the title of the ownership of the property. It was alleged that those actions amounted to the tort of defamation and trespass and certain

meanings were pleaded in the statement of claim. In addition to seeking the various declarations and other orders mentioned earlier, the plaintiff sought damages including damages for breach of contract, breach of duty, breach of statutory duty, defamation "*or otherwise*" as well as mesne rates and damages for trespass. The plaintiff did not, at that stage, include a specific claim for damages for negligence, as such.

20. The Receiver and Promontoria delivered a defence to the original statement of claim in April 2019. Of note is that Promontoria pleaded that it was a stranger to the alleged repayment agreement relied on by the plaintiff and denied that any agreement was concluded "*between the parties*" either in the terms alleged in the statement of claim or otherwise. They pleaded that *"in the absence of a concluded agreement between the parties, arrears on the loan account continued to accrue because capital and interest repayments were not being made"* (para. 9 of their defence). Those defendants also pleaded that the plaintiff knew or ought to have known that there was no such alleged repayment agreement on the basis of correspondence emanating from its predecessor in title (i.e., Ulster) and servicing agents which, it was pleaded, confirmed that the plaintiff's account had fallen into arrears by May 2015 and that arrears continued to accrue (para. 8 of their defence). Those defendants also denied the allegations of trespass and defamation. It is clear, therefore, from the defence delivered by the Receiver and Promontoria, that they were denying that there was any alleged repayment agreement which bound them, in any event.

21. Having received the defence of the Receiver and Promontoria, the plaintiff then applied to join Ulster as a co-defendant to the proceedings. That motion was issued in May 2019. Ulster was ultimately joined as a co-defendant by the High Court on 14th October, 2019. An amended plenary summons was issued in January 2020 (it appears following a

further Order of the High Court) and an amended statement of claim was delivered thereafter.[1]

22. The main amendments in the amended statement of claim were at paras. 8, 12 and 14. At para. 8, the plaintiff alleged that, in breach of contract and negligently and in breach of duty, Ulster failed or neglected to inform Promontoria of the existence of the alleged repayment agreement between it and the plaintiff as a result of which the plaintiff suffered loss and damage. At para. 12, it was pleaded that the plaintiff complied with his obligations under the alleged repayment agreement by paying the sum of €958.00 per month to Ulster and its successor in title. At para. 14, it was pleaded that, due to the breach of contract, negligence and breach of duty on the part of Ulster in failing or neglecting to inform Promontoria of the existence of the alleged repayment agreement, Promontoria wrongfully and without lawful excuse purported to appoint the Receiver as receiver causing loss and damage to the plaintiff.

23. Notably, the amended statement of claim did not contain any amendments to the pleas in the original statement of claim which set out the plaintiff's defamation and trespass claims (now paras. 16 – 18 of the amended statement of claim). There was no specific plea in the amended statement of claim following Ulster's joinder concerning the acts or omissions allegedly done or not done by Ulster which amounted to defamation and trespass. There was an amendment to para. 6 of the prayer for relief to include express reference to a claim for damages for negligence (which had been omitted from the prayer for relief in the original plenary summons and statement of claim).

24. The Receiver and Promontoria had not delivered a defence to the amended statement of claim when Ulster's dismissal application was heard and determined by the High Court.

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[1] The amended statement of claim bears the date 1st November, 2019, but it appears to have been delivered in fact after the amended plenary summons was issued in January 2020.

Nor was any such defence delivered when this appeal was heard. Those defendants did not participate in the hearing before the High Court or in the appeal. The order of the High Court of 19th May, 2021, recorded the fact that counsel for the Receiver and Promontoria was present *"on a watching brief"*. It was unclear, therefore, when Ulster's dismissal application was heard by the High Court, and when the plaintiff's appeal was heard by this Court, what position the Receiver and Promontoria were adopting in response to the amended claims set out in the amended statement of claim. There was nothing, however, to indicate that they were resiling from any of the pleas or denials contained in the defence they delivered to the original statement of claim.

25. Ulster did deliver a defence to the amended statement of claim in February 2020, in which it raised a preliminary objection to the effect that the plaintiff's claim against it did not disclose a reasonable cause of action and was bound to fail, and reserved the right to bring an application to dismiss a claim against it. It based that plea solely and exclusively on the alleged deed of transfer of 19th December, 2016. It pleaded that Promontoria, as the transferee and assignee under that deed, has the exclusive right to demand repayment of the loan and to seek to enforce the provisions of the mortgage and that Ulster no longer has any such right. It relied on s. 28(6) of the 1877 Act and pleaded that the assignee (i.e., Promontoria) is the party entitled to exercise all of the remedies previously open to the assignor. Ulster further pleaded that Promontoria took the loan and mortgage subject to any agreements or equities arising before the alleged transfer and assignment (although it denied any such alleged agreements or equities) including "*any alleged repayment agreements or rights of setoff vested in the plaintiff (which are denied*)" (para. 1(e) of Ulster's defence). Ulster pleaded, therefore, that any action by the plaintiff to restrain enforcement of the loan or the mortgage had to be brought against the Receiver and Promontoria and not against Ulster. It was on that basis that it was pleaded that the plaintiff's action for the various reliefs sought lay solely against the

Receiver and Promontoria and that his claim against Ulster did not disclose a reasonable cause of action and was bound to fail.

26. Without prejudice to that preliminary objection, in response to the amended statement of claim, Ulster denied that it reached a "*binding agreement with the plaintiff for a new payment arrangement on or about 14th November, 2014"* (para. 6 of the defence). It went on to plead that, with effect from late December 2014, the plaintiff's mortgage loan account was not in "*any active arrangement*" (para. 6(c)). Ulster further denied that there was any alleged breach of contract or negligence or breach of duty or other wrongdoing on its part (para. 7).

27. It further denied the plaintiff brought his claim in defamation within time, arguing that it was statute barred by virtue of s. 11 of the Statute of Limitations 1957 (the "1957 Act"), as amended by s. 38 of the Defamation Act 2009 (the "2009 Act").

28. Ulster did not include any specific plea that it did not owe the plaintiff any duty of care in relation to the assignment or transfer of the loan and mortgage to Promontoria, or in relation to the information conveyed, or otherwise, to Promontoria in connection with the underlying loan or mortgage and any alleged repayment agreement relevant to them.

4. Ulster's Dismissal Application

29. On 15th June, 2020, Ulster brought a motion in the High Court to dismiss or strike out the plaintiff's claim on the following jurisdictional bases:

(i) under O. 19, r. 28 RSC or the inherent jurisdiction of the court on the grounds that the plaintiff's claim against Ulster fails to disclose any reasonable cause of action and is bound to fail;

(ii) under O. 19, r. 27 RSC or the inherent jurisdiction of the court striking out the (amended) plenary summons and statement of claim (or portion of those

documents) as *"unnecessary pleadings"* or as failing to disclose any reasonable cause of action;

(iii) under O. 15, r. 13 RSC or the inherent jurisdiction of the court striking out the plaintiff's claim against Ulster on the grounds that the joinder and presence of Ulster before the court is not necessary.

30. Ulster relied, in support of its dismissal application, on two affidavits. The first was a grounding affidavit sworn by Sean Linnane, a manager with Ulster, in June 2020. The second was an affidavit which was sworn by Sarah Mulvey, another manager in Ulster, back in July 2018. The Receiver and Promontoria had procured Ms. Mulvey's affidavit as part of their response to the interlocutory injunction application brought by the plaintiff in July 2018. The plaintiff swore a replying affidavit in response to Ulster's dismissal application in October 2020.

31. It is clear from Mr. Linnane's affidavit that the entire basis on which Ulster sought to dismiss the plaintiff's claim (or, alternatively, to strike out the claim or portions of the claim), at least insofar as it related to the contract and negligence claims, was the alleged deed of transfer between Ulster and Promontoria of December 2016, and s. 28(6) of the 1877 Act. Mr. Linnane asserted that, as a result of the deed of transfer and s. 28(6) of the 1877 Act, the plaintiff was *"barking up the wrong tree"* and had pursued a *"mistaken and misguided course of action"* in joining Ulster to the proceedings.

32. Ulster denied that it had entered into any repayment agreement with the plaintiff in November 2014, and relied on Ms. Mulvey's affidavit in that respect. However, without prejudice to that position, Mr. Linnane asserted that, as a matter of law, Promontoria, as the transferee and assignee under the alleged deed of transfer, took the plaintiff's loan facility and mortgage security subject to any agreements or equities arising before the transfer was effected and that that included any alleged *"alternative repayment arrangement, what the*

judge referred to as the alleged repayment agreement, agreed between the plaintiff and Ulster prior to the transfer relied on by Ulster".

33. Ulster's case (as disclosed in the affidavits it relied on before the High Court and, as will be seen later, in the submissions made to the High Court) was that, as a matter of law, Promontoria, as assignee, had the exclusive right to demand repayment of the loan and to seek to enforce the provisions of the mortgage and that the plaintiff's claims in the proceedings, including his claim for damages for breach of contract and negligence, lay solely against the Receiver and Promontoria. With respect to the plaintiff's claim for damages in negligence, it was asserted that any such claim arising from the failure or neglect by Ulster to inform Promontoria of the existence of the alleged repayment agreement was bound to fail as a matter of law. The reason for this, as set out by Mr. Linnane, was on the same basis, namely, that Promontoria took the loan and mortgage subject to any agreements arising before the transfer was effected including the alleged repayment agreement. It was asserted that that arose by *"automatic operation of law"* and was not dependent on any actions of the bank. Mr. Linnane contended that, as a matter of law, the plaintiff's action, if any, lay solely against the Receiver and against Promontoria, as the assignee and mortgagee following the transfer.

34. As I observed earlier, Mr. Linnane made it clear that Ulster was also relying on the defence it had delivered to the amended statement of claim which he said made very clear that Ulster was disputing that there was an alleged repayment agreement in place at the time of the assignment and was relying on contemporaneous correspondence between the plaintiff and Ulster to demonstrate that there was no such agreement or arrangement in existence by the end of December 2014. Mr. Linnane did not specifically address the defamation and trespass claims in his affidavit.

35. In his replying affidavit, the plaintiff sought to challenge Ulster's assertion that it had not entered into the repayment agreement with the plaintiff in November 2014. He sought to analyse and compare the approach taken by the Receiver and Promontoria with that taken by Ulster on the issue of the existence of any such alleged repayment agreement, and sought to demonstrate that Ulster had changed its position in relation to the existence or otherwise of that alleged repayment agreement. The bulk of the plaintiff's affidavit focussed on the issue of whether Ulster entered into the alleged repayment agreement with him in November 2014, and his interpretation of Ulster's position in that respect, and of the correspondence exchanged between the plaintiff's representative and Ulster officials from November to December 2014. The plaintiff further asserted that the actions of the Receiver and Promontoria were taken on foot of its understanding that the plaintiff had fallen into arrears with the mortgage which could only have been based on information provided (or not provided as the case may be) by Ulster.

36. Ulster and the plaintiff provided written submissions to the High Court in respect of the dismissal application. The entire basis of Ulster's application was encapsulated in para. 18 of those submissions where it again contended that the plaintiff was *"barking up the wrong tree"* and had pursued a *"mistaken and misguided course of action"* in joining Ulster to the proceedings. Ulster continued:

> *"Put simply, the plaintiff is claiming damages and seeking relief against Ulster Bank for alleged breaches of his mortgage loan contract, even though Ulster Bank has absolutely assigned its interests in the mortgage loan to another entity."*

37. Ulster referred to *"clear Court of Appeal authority that a borrower's claims for alleged breaches of their assigned loan contract lies solely against the assignee, and not the assignor"*. The authority relied on was *McGuinness v. Kenmare Property Company Limited* [2015] IECA 299 ("*McGuinness"*) and Ulster's submissions quoted at length from the

judgment of the Court of Appeal in that case (delivered by Kelly J. on behalf of the court). Ulster noted that the Court of Appeal in *McGuinness* drew a clear distinction between (a) contractual claims relating to the assigned loan contract which, it contended, fell solely to be dealt with by the assignee, and (b) tortious claims relating to alleged tortious activities of the assignor or its officials which might remain with the assignor, notwithstanding assignment of the relevant loan contract.

38. In respect of the plaintiff's contract and negligence claims, Ulster submitted that, on the basis of s. 28(6) of the 1877 Act and the judgment of this Court in *McGuinness*, the plaintiff had no cause of action against Ulster as the assignor or transferor of the relevant loan and mortgage (see paras. 22 – 26 of Ulster's submissions in the High Court). Ulster advanced precisely the same basis for seeking the dismissal of the negligence claim advanced by the plaintiff (paras. 27 – 31 of those submissions). Ulster also addressed the point raised in *McGuinness* to the effect that if Ulster was not a party to the proceedings and if the plaintiff wished to obtain discovery from it, it would have to seek non-party discovery. Ulster confirmed that it had offered to make non-party discovery of certain documents in the event that it was no longer a party to the proceedings.

39. Ulster set out a convenient summary of the basis on which it contended in the High Court that the plaintiff's claims against it should be dismissed (para. 12 of its submissions in the High Court). It is very clear from that summary that the entire basis on which Ulster sought to dismiss the contract claim and the tort claims made by the plaintiff against Ulster was on the basis of an absolute assignment by Ulster of all of its interests in the plaintiff's loan and mortgage to Promontoria (and therefore s. 28(6) of the 1877 Act and the judgment of this Court in *McGuinness*).

40. In his written submissions, apart from addressing the legal principles applicable to the dismissal of claims, the plaintiff noted that he had put the defendants on strict proof that his

contract with Ulster had, in fact, been assigned, and that it was for the defendants to prove that this had been done. A considerable portion of the plaintiff's submissions were directed to the issue as to whether he and Ulster did reach the alleged repayment agreement in November 2014. The plaintiff also relied on the judgment of the Court of Appeal in *McGuinness*. He advanced various other arguments which I consider unnecessary to explore further here, including that he would be at a real "*litigious disadvantage"* if Ulster were released from the proceedings.

5. The Judgment of the High Court

41. Keane J. delivered a detailed and considered judgment in the High Court refusing Ulster's application (*Fannon v. O'Brien* [2021] IEHC 301). It is clear from the judgment that the judge understood that the sole basis on which Ulster was seeking to dismiss the contract claim and the tort claim was on the basis of s. 28(6) of the 1877 Act and judgment in *McGuinness*. That can be seen, for example, from para. 34 onwards of the judgment where the judge noted that Ulster was submitting that the plaintiff's various claims against it *"all hinge on a discrete legal issue that can only be resolved against him"* and that that issue is *"whether a borrower can have any claim against the assignor of his loan for alleged breaches of the loan contract by the assignee"*.

42. In support of its contention that that issue had to be resolved against the plaintiff, Ulster relied on s. 28(6) of the 1877 Act and *McGuinness*. Having noted that Ulster was primarily invoking the inherent jurisdiction of the court to secure the dismissal of the plaintiff's claims as being bound to fail, the judge referred to some of the leading authorities in the area including the judgments of Clarke J. in the Supreme Court in *Moylist Construction Limited v. Doheny* [2016] 2 I.R. 283 (*"Moylist"*), and *Keohane v. Hynes* [2014] IESC 66 (*"Keohane"*). It is not suggested, in this appeal, that the judge did not correctly identify the

relevant legal principles applicable to a dismissal application pursuant to the court's inherent jurisdiction.

43. Having set out those legal principles, the judge then considered Ulster's arguments based on s. 28(6) of the 1877 Act and the judgment of the Court of Appeal in *McGuinness*. He said at para. 50 onwards:

> *"50. McGuinness is certainly authority for the proposition that, upon the assignment of a debt, s. 28(6) of the Judicature Act operates to give the assignee the legal right to the debt; all legal and other remedies for the debt; and the power to give a good discharge for the debt, so that, from then on, any action seeking to restrain the enforcement of the debt lies against the assignee and not the assignor.*
>
> *51. So, in McGuinness, the Court of Appeal had no difficulty in accepting that the plaintiff's claims for declarations that his loans had not been lawfully transferred and that he was entitled to register a lis pendens over the mortgaged property, and for damages for an alleged conflict of interest resulting from the employment by the assignee of a former employee of the assignor, were all claims that lay against the assignee and not the assignor. Mr Fannon makes no such claim against Ulster in this case.*
>
> *52. On the other hand, the Court of Appeal was not willing to accept that the plaintiff's claims of negligent misrepresentation, overcharging and mis-selling against the assignor were each claims that now lay solely against the assignee, nor that certain of the plaintiff's other claims in respect of events that occurred prior to the assignee's 'arrival on the scene' could properly or fairly be dealt with solely by the assignee and not the assignor.*

> *53. It seems to me that none of Mr Fannon's three heads of claim against Ulster seeks to restrain the enforcement of the loan agreement. Each is a claim for damages based on alleged acts or omissions of Ulster that are not directly referable to the loan agreement or its enforcement, but rather turn on the existence and effect of the repayment agreement and the alleged failure of Ulster to apprise Promontoria of those matters. As such, those claims concern events that occurred prior to Promontoria's arrival on the scene."*

44. The judge then considered two further arguments advanced by Ulster in the alternative. The first was that, by operation of s. 28(6) of the 1877 Act, Promontoria took the assignment of the plaintiff's debt from Ulster subject to each and every existing agreement concerning that debt, as well as subject to all equities entitled to priority over Promontoria's rights as assignee. The second, or alternative, argument was that, as a matter of fact, there was no separate or collateral repayment agreement concerning the debt as allegedly demonstrated by the contemporaneous correspondence relied on by Ulster.

45. The judge considered both of those arguments by reference to the legal principles summarised by Clarke J. in the Supreme Court in *Moylist*. The judge was not persuaded that, on the basis of either of those arguments, the plaintiff's contract and negligence claims were clearly bound to fail. As regards s. 28(6) of the 1877 Act, the judge referred to the fact that Ulster had not cited any authority for the construction of that section for which it was contending, as part of its first argument, and that, even if the section were so construed, it was not clear how it would affect the plaintiff's negligence claim against Ulster based on its failure to apprise Promontoria of the existence of the alleged repayment agreement. Ulster's second argument was one of fact and relied on the proper meaning to be attributed to the correspondence exhibited by Ms. Mulvey to her affidavit. The judge noted that the plaintiff disputed the interpretation of that correspondence put forward by Ulster and relied on further

affidavit evidence which was apparently sworn by the plaintiff's accountant in the interlocutory injunction application back in July 2018 (but which inexplicably was not put before either the High Court or this Court) and further noted that the plaintiff did not accept that the documentation exhibited by Ms. Mulvey represented the complete dealings with Ulster and was anxious to pursue that issue further in discovery.

46. In considering the submissions of the parties, the judge relied on those passages from the judgment of Clarke J. in *Moylist* and *Keohane* which set out the limitations on the court's inherent jurisdiction to dismiss claims. The judge then went on to express his conclusions the operation of s. 28(6) of the 1877, saying:

> *"59. In my view, whether s. 28(6) of the Judicature Act operates to render the assignment of a debt subject to any and every prior agreement on the legal rights and obligations associated with the debt, as well as subject to all equities entitled to priority over the assignee's rights in that debt, is not so straightforward a legal issue that it would be safe to reach a conclusion on it on the hearing of a motion to dismiss."*

He continued:

> *"Differently put, as Mr Fannon claims damages in tort for the alleged negligence of Ulster in failing to apprise Promontoria of the existence and terms of the separate repayment agreement for which he contends, I do not think that any unliquidated damages that may be awarded to him on that basis can be regarded as – in the formulation of Lord Hobhouse in the Government of Newfoundland case* [*Government of Newfoundland v. Newfoundland Railway Co.* (1887) 13 App. Cas. 199] *– so obviously 'flowing out of and inseparably connected with the dealings and transactions which gave rise to*

the subject of the assignment' that it would be safe to conclude that he must pursue that claim exclusively against Promontoria, rather than Ulster."

47. The judge then referred to the broad similarities between the test for summary judgment and that applicable to the dismissal of a claim under the court's inherent jurisdiction and stated that, bearing in mind that there was evidence (from the plaintiff's accountant) which supported his claim of a *"separate or collateral repayment agreement"*, he could not be satisfied that the correspondence exhibited to Ms. Mulvey's affidavit amounted to *"incontrovertible evidence that no such agreement exists"*. On that basis, he held that Ulster had failed to persuade him that the plaintiff's claims against it were bound to fail. It is clear that in reaching that conclusion the judge was addressing the contract claim and the negligence claim advanced by the plaintiff in the amended statement of claim.

48. While noting that it was not strictly necessary to consider the issue as to whether the plaintiff would be placed at a "*litigious disadvantage"* were his claims against Ulster to be dismissed, the judge, nonetheless, went on to identify two reasons for concluding that it would be difficult to see how the plaintiff would not be so disadvantaged: first, the Receiver and Promontoria had not by that time delivered a defence to the amended statement of claim and it was unclear whether they intended to argue that Promontoria had no liability for the tortious conduct which the plaintiff alleges against Ulster. He did note that in their defence to the original statement of claim, the Receiver and Promontoria pleaded that they were strangers to the alleged repayment agreement, the existence of which they denied. If, therefore, Ulster were to be dismissed from the proceedings, the plaintiff would be *"on the hazard of having to face that argument"* by the Receiver and Promontoria which the judge felt *"hardly seems appropriate or fair"* (para. 63). Second, if the claim were dismissed against Ulster, the plaintiff would not be able to seek discovery against Ulster as a party to the proceedings and would have to seek non-party discovery. Notwithstanding confirmation

by counsel for Ulster at the hearing that, if the claims against it were dismissed, and, if the plaintiff went on to seek and obtain an order for non-party discovery against Ulster, Ulster would consent to a stay on any order for its costs of making that discovery, pending the determination of the plaintiff's proceedings against the Receiver and Promontoria. The judge felt that, while that would go some way towards meeting the potential unfairness of depriving the plaintiff of the entitlement to seek discovery on an *inter partes* basis from Ulster, it did not eliminate that potential unfairness because *"the test for, and procedural implications of, inter partes discovery and non-party discovery are not the same in all other respects"* (para. 64). The judge felt, therefore, that were it necessary to consider the question of "*litigious disadvantage*", he would conclude that the scales of justice would weigh significantly against the dismissal of the plaintiff's claims against Ulster.

49. The judge then considered the plaintiffs defamation claim. He noted that that claim was not flagged in the affidavits or in the written submissions provided in respect of Ulster's application although there was some argument, at the hearing of the motion, as to whether the defamation claim should be struck out as against Ulster. The judge noted that, in its defence to the amended statement of claim, Ulster pleaded that the defamation claim was statute barred under s. 11 of the 1957 Act, as amended by s. 38 of the 2009 Act, under which a defamation action had to be commenced within one year from the date on which the cause of action accrued (or within such longer period as the court might direct, not exceeding two years). Ulster's argument on the limitation issue was that (relying on O. 15 r. 13 RSC) the plaintiff's claim was only commenced against it when Ulster was joined as a defendant on 14th October, 2019, whereas Ulster had allegedly transferred the mortgage and loan to Promontoria in December 2016, and Promontoria was registered as the owner of the charge on the property in March 2017. The judge understood this to mean that the words allegedly attributed to Ulster could not have been published by it after 9th March, 2017, so that any

claim in respect of any such publication would have been statute barred when the proceedings commenced on 14th October, 2019. The judge concluded, referring to some case law in this area, that although the Supreme Court confirmed the existence of a discretion to dismiss a claim that is manifestly statute barred (in *O'Connell v. Building & Allied Trades Union* [2012] 2 I.R. 371), he was of the view that that did not extend to the dismissal of a claim that was *"quite possibly, or even probably, statute barred"* (para. 69).

50. It can be seen, therefore, that as regards the contract and negligence claims, the judge rejected the bases advanced by Ulster for the dismissal of those claims which were the alleged deed of transfer, the effect of s. 28(6) of the 1877 Act, and the judgment of the Court of Appeal in *McGuinness* (which in turn approved certain of the principles set out by Lord Hobhouse in the *Government of Newfoundland* case). The judge was not satisfied, for the reasons summarised above, on the basis of Ulster's submissions, that the plaintiff's contract and negligence claims against Ulster were bound to fail. He then added his conclusion that the plaintiff would be at a "*litigious disadvantage"* if his claims against Ulster were dismissed. Finally, with respect to the plaintiff's defamation claim against Ulster, the judge was not prepared to dismiss that claim as being clearly statute barred or on any other ground. While not expressly addressing the plaintiff's trespass claim in his judgment, he did not dismiss that claim.

6. Ulster's Appeal and Submissions on the Appeal

51. I took some time earlier in this judgment to outline the case made by Ulster in support of its application to dismiss the various claims made by the plaintiff and the bases and arguments advanced in support of that application. It is clear from a review of Ulster's notice of appeal, from its written submissions in the appeal and, most clearly, from the oral submissions made by its counsel at the hearing of the appeal that the arguments ultimately relied upon by the Ulster in the appeal were very significantly different to those it made in the

High Court. At each stage of this appeal, from its notice of appeal to its written submissions and, ultimately, to the oral submissions made at the hearing, Ulster moved very far from the case it made, and from the arguments it advanced, in the High Court. It sought to rely on arguments which the judge of the High Court never had the opportunity to consider and, for that reason, were not determined as part of his judgment.

(1) Ulster's Notice of Appeal and Plaintiff's Response

52. The evolution in Ulster's case started with its notice of appeal. Ulster relied, at the outset of that notice, on the ground that the judge failed properly to apply the judgment of the Court of Appeal in *McGuinness*. It went on to consider separately the grounds of appeal in respect of the contract claim, the negligence claim and the defamation and trespass claims. It then separately addressed the question of the alleged "*litigious disadvantage"* which the plaintiff maintained he would suffer should Ulster be released from proceedings.

53. As regards the grounds of appeal in respect of the contract claim, Ulster unequivocally relied on the alleged "*absolute*" assignment of its interests in the plaintiff's loan and mortgage to Promontoria and the consequences of that alleged assignment having regard to the terms of s. 28(6) of the 1877 Act. It contended that the judge erred in failing to have regard to the fact that Promontoria, as alleged assignee, took the loan and mortgage subject to agreements or equities arising before the assignment including the alleged repayment agreement or any rights of set-off vested in the plaintiff. These grounds raised points which were before and considered by the High Court.

54. The notice then set out the grounds of appeal in respect of the negligence claim. Again, the bulk of the grounds with respect to the negligence claim were directed to the alleged absolute assignment to Promontoria and the effects of that assignment having regard to s. 28(6) of the 1877 Act. Ulster then added certain grounds which did not reflect the case it made before the High Court, including the contention that the judge ought to have held that

it was not arguable that Ulster owed the plaintiff a duty of care in relation to the assignment of the plaintiff's loan and mortgage to Promontoria, that the judge erred in law in *"impliedly"* concluding that it was arguable that Ulster's liability to the plaintiff could have exceeded or extended beyond any liability which Ulster might have to the plaintiff in contract, that the judge erred in law in concluding that any cause of action in negligence arising out of the loan agreement and mortgage was not co-terminus with any cause of action for breach of contract arising out of that agreement. For the most part, however, the notice of appeal did reflect the case made by Ulster in the High Court in reliance on the alleged absolute assignment to Promontoria and the effects of s. 28(6) of the 1877 Act.

55. Ulster's notice of appeal then set out the grounds of appeal in respect of the plaintiff's defamation and trespass claims. It stated that, following the alleged assignment to Promontoria and Promontoria's appointment of the Receiver (in February 2018), the plaintiff's claim in defamation arose from statements allegedly made to the tenant of the property. Ulster was joined as a co-defendant to the proceedings in October 2019. Ulster contended, in the notice of appeal, that the judge erred in finding that the plaintiff's defamation claim against Ulster was not barred by s. 11 of the 1957 Act, as amended by s. 38 of the 2009 Act. It also claimed that the judge erred in finding that the plaintiff could have a cause of action against Ulster in defamation for alleged defamatory statements made by, or on behalf of, the Receiver or Promontoria. The notice then asserted that the judge erred in finding that the plaintiff could have a cause of action against Ulster for the alleged trespass or other acts of the Receiver or Promontoria.

56. Finally, the notice addressed Ulster's appeal against the findings of the judge in relation to the alleged "*litigious disadvantage*" to which the plaintiff would be subject in pursuing his claim if Ulster were not a defendant in the proceedings. The particulars provided, in respect of this ground, were all directed to the judge's conclusion that the

plaintiff would be at a disadvantage if he had to seek non-party discovery from Ulster rather than seeking discovery on an *inter partes* basis.

57. It is notable that Ulster did not raise in its notice of appeal any ground of appeal directed to the judge's finding that he could not be satisfied that the plaintiff's case that the plaintiff and Ulster entered into the alleged repayment agreement, which was separate from, or collateral to, the original loan agreement, was unarguable. That point, which featured prominently when it came to Ulster's oral submissions at the hearing of the appeal did not feature at all in the notice of appeal.

58. It is unnecessary to dwell on the Respondent's notice which essentially consisted of a traverse of the grounds of appeal set out in Ulster's notice of appeal.

(2) Ulster's Written Submissions

59. Ulster's written submissions for the appeal did focus for the main part on its reliance on the alleged assignment of the plaintiff's loan and mortgage to Promontoria on foot of the deed of transfer of December 2016 on which Ulster relies, the effect of s. 28(6) of the 1877 Act, and the judgment of the Court of Appeal in *McGuinness* on causes of action in contract and tort consequent upon an absolute assignment. The issue on the appeal was identified in Ulster's submissions as being a *"discrete one"* and was put as follows: *"does Mr. Fannon have any stateable claims against Ulster Bank that survived the assignment of the loan contract to Promontoria?"*. The submissions then considered, extensively, the provisions of s. 28(6) of the 1877 Act and case law which considered that provision (including *SPV Osus v. HSBC Institutional Trust Services (Ireland) Limited* [2018] IESC 44, [2019] I.R. 1). While the part of the written submissions which addresses s. 28(6) was much more developed and contained reference to more authorities than the submissions in the High Court, it could not be said that they departed dramatically from the case made by Ulster in that court. The

submissions did, however, depart to a significant extent from those made in the High Court when it came to consider the plaintiff's negligence claim.

60. Ulster advanced submissions in support of the dismissal of the contract and negligence claims based on the judgment in *McGuinness* and reproduced a significant portion of the judgment of Kelly J. in that case. Having done so, Ulster noted that the issue in the present case was whether the plaintiff's claims could be said to be *"flowing out of and inseparably connected with the dealings and transactions which gave rise to the subject of the assignment",* in the words of Lord Hobhouse in the *Government of Newfoundland* case which were quoted with approval and applied by Kelly J. in *McGuinness*. Ulster noted that the excluded claims in tort, which it said were *"mis-selling claims"* did not fall into that category. I observe here that, as a matter of fact, the claims in tort which the plaintiff in *McGuinness* was entitled to maintain against the assignor, notwithstanding the assignment was not confined to claims for mis-selling or misleading the plaintiff in the case in relation to the nature and effect of the transactions he was entering into. While they did include mis-selling claims, they also included a claim that IBRC had grossly mismanaged a particular fund.

61. Ulster submitted that the plaintiff's claims (being his contract and negligence claims) related entirely to the assignment and flow out of, and are inseparably connected to, the dealings giving rise to the assignment. It was submitted that any claims which the plaintiff had about the terms of the original loan facility and whether they were revised were entirely a matter for Promontoria, as the assignee of the loan. Thus far, the submissions did not depart fundamentally from the case advanced by Ulster in the High Court. However, thereafter (from para. 34 onwards) they did so depart, to a very significant extent. Ulster submitted that the law of assignment does not recognise any tort of failure to inform the assignee, at the time of the assignment, and that there is no authority to support the existence of a duty of care in

tort owed by the assignor to the relevant debtor at the time of the assignment. That was not a case that appears to have been made in the High Court. Ulster submitted that the plaintiff was asking the High Court to *"to create new law and to find a novel duty of care when none hitherto existed"*.

62. In support of that argument, Ulster relied on the judgment of Hogan J. in *Healy v. Stepstone Mortgage Funding Limited* [2014] IEHC 134 (*"Healy"*) in which the High Court dismissed a claim for damages for *"reckless lending procedures"* by the defendant. It is, however, notable that Hogan J. did so having relied on two recently decided judgments of the High Court which had already reached the same conclusion: *ICS Building Society v. Grant* [2010] IEHC 17 and *McConnon v. President of Ireland* [2012] IEHC 184, [2012] 1 I.R. 449. This was not an argument advanced by Ulster in the High Court insofar as can be ascertained from Ulster's submissions to that court and from the judgment of the High Court. Nor are there previous decisions of the High Court which confirmed that the negligence claim relied on by the plaintiff was not one recognised in law. Ulster sought to develop its argument that it owed no duty of care to the plaintiff in connection with the alleged assignment to Promontoria and as to the information provided, or not provided, as the case may be, by Ulster, as assignor, to Promontoria, as assignee, in relation to the terms of its agreement with the plaintiff. The argument along those lines advanced at para. 36 of Ulster's submissions go way beyond the case made by Ulster in the High Court.

63. As regards the defamation and trespass claims, Ulster submitted that Promontoria appointed the Receiver over the plaintiff's property the subject of the mortgage after Ulster had allegedly *"absolutely assigned"* its interests in the plaintiff's loan and mortgage to Promontoria and that the claim and defamation concerned statements allegedly made to the tenant of the property following the Receiver's appointment. Similarly, it was submitted that the trespass claim concerns alleged acts of the Receiver, who had been appointed by

Promontoria. It was argued that the plaintiff could have no cause of action against Ulster in defamation and trespass in those circumstances. Alternatively, Ulster submitted that the judge was wrong to find that the defamation claim against Ulster was not statute barred by s. 11 of the 1957 Act, as amended by s. 38 of the 2009 Act by the time Ulster was joined to the proceedings in October 2019.

64. Finally, in its submissions, Ulster rejected the suggestion that the plaintiff would be at any "*litigious disadvantage*" were the plaintiff's claims against it to be dismissed. It noted that the plaintiff could seek non-party discovery from Ulster, that Ulster had pointed that out in correspondence in April 2020, making proposals to the plaintiff to which there was no reply. It was submitted that the plaintiff's entitlement to seek non-party discovery would cure any alleged litigious disadvantage to the plaintiff.

65. There is, again, a convenient summary of Ulster's submissions at the end of the document which confirms Ulster's reliance on the alleged absolute assignment of its interest to Promontoria and its contention that as a result the plaintiff's recourse in respect of his contract claim and his negligence claim must be against Promontoria and not against Ulster. The summary also highlights an argument on which Ulster relies on the appeal, which was not made in the High Court, to the effect that the alleged tort relied on by the plaintiff of failing to inform Promontoria of the alleged repayment agreement is not recognised in law (para. 45(f)). As noted earlier, this is a new argument which was not raised in the High Court.

66. Ulster's submissions do not advance an argument to the effect that the judge was wrong in concluding that the plaintiff's reliance on the alleged repayment agreement has a separate or collateral agreement to the original loan agreement was not unarguable. That was, however, a point on which Ulster's counsel sought to place great emphasis in his oral submissions on the appeal.

(3) The Plaintiff's Written Submissions

67. In his written submissions on the appeal, the plaintiff submitted that the court should decline to interfere with the exercise of discretion by the trial judge in refusing to dismiss his claim and that there would be no serious injustice to Ulster were the court to decline to interfere with that discretion. The plaintiff submitted that the judge applied the correct legal principles in determining Ulster's dismissal application and that insofar as he exercised a discretion, that discretion ought not to be interfered with. The plaintiff relied on various authorities including *Moylist* and *Keohane* to demonstrate the appropriate limitations on the court's inherent jurisdiction to dismiss claims. Those were among the cases referred to by the judge in his judgment and there is no dispute between the parties that the legal principles to be applied in determining an application to dismiss a claim under the court's inherent jurisdiction were correctly identified by the judge.

68. In his submissions, the plaintiff addressed separately his contract claim and his negligence claim. With respect to the negligence claim, he relied on the judgment of Kelly J. in *McGuinness*, in support of his submission that the assignment of a debt does not *"immunise the assignor from a claim for damages for tort where there had previously been a direct contractual relationship between the parties"* (para. 12 of plaintiff's written submissions). The plaintiff submitted that the same situation as applied in *McGuinness* applies in this case. He submitted that he was entitled to pursue his negligence claim (as well as his other tort claims) against Ulster. He disputed, what he called, the *"false analogy"* drawn between his negligence claim and the unsuccessful attempts to rely on an alleged tort of *"reckless lending"* (in the cases relied on by Ulster). With respect to the defamation claim, the plaintiff submitted that his case was that Ulster's actions caused the further actions on the part of Promontoria or the Receiver or their agents to occur and that Ulster *"therefore bears responsibility as a matter of law"*. The plaintiff disputed the entitlement of Ulster to

have his defamation claim dismissed as being statute barred and referred to two judgments of Collins J. in the Court of Appeal in *Smith v. Cunningham* [2021] IECA 268, and *Noble v. Barr* [2021] IECA 269, (where Collins J. identified the correct procedure for having a limitation issue determined on the basis of agreed or established facts). The plaintiff submitted that there were *"a number of matters"* that could be said by him in response to the limitation arguments and that those could not be *"summarily disposed of"* in the context of the appeal where the relevant facts have not been agreed or established.

69. With respect to his contract claim, the plaintiff stressed that the defendants (including Ulster) were on strict proof that his loan agreement and mortgage were, in fact, assigned by Ulster to Promontoria and that it is for the defendants to prove that assignment. He noted that Ulster had not placed any affidavit evidence before the court from Promontoria or from the Receiver. As with earlier submissions and with his replying affidavit in the High Court, the plaintiff sought to demonstrate inconsistencies in the approach taken by Ulster and by Promontoria and the Receiver in relation to the existence or otherwise of the alleged repayment agreement. These points were presumably made in order to support the plaintiff's contention that there is, at least, an arguable case that such a repayment agreement was made with Ulster in November 2014. While the plaintiff did not engage with Ulster's submission based on *McGuinness*, he supported the approach taken by the judge not to dismiss any of his claims.

70. Finally, the plaintiff addressed the issue of the alleged *"litigious disadvantage"* to which he would be subject if his claims against Ulster were dismissed. He noted that that was a factor relied on by Kelly J. in *McGuinness*. The reasons for which he claims that he would suffer a *"litigious disadvantage"* if Ulster were to succeed in having the claims against it dismissed are (a) the difficulty that the plaintiff would have in establishing contested facts if Ulster were released from the proceedings, particularly in circumstances where the

Receiver and Promontoria have not put in a defence to the amended statement of claim setting out its position in relation to the alleged repayment agreement following the joinder of Ulster and did not participate in Ulster's dismissal application in the High Court, and (b) the burden that would be on the plaintiff in having to seek non-party discovery from Ulster.

(4) The Case Made by Ulster at the Hearing

71. The most fundamental departure from the case made by Ulster in the High Court came at the hearing of the appeal in the oral submissions of Ulster's counsel. At the very outset of the hearing, counsel stated that Ulster accepted that there was an arguable case that the original loan agreement was varied by means of a binding agreement entered into between the plaintiff and Ulster in November 2014, under which the plaintiff would only have to make interest payments for a further period of three years. That was a sensible concession in light of the evidence and the limitations on the court's inherent jurisdiction to dismiss a claim. It was made clear on behalf of Ulster that the existence or otherwise of such a variation to the original agreement is and remains an issue in the case but Ulster was prepared to proceed with its appeal on the basis that there was an arguable case that there was a binding variation of the original agreement in November 2014. However, it maintained that notwithstanding same, the plaintiff did not have any freestanding claim against Ulster as the assignor of the plaintiff's loan and mortgage to Promontoria.

72. Despite that concession, Ulster maintained that there was still one agreement (as varied) and that any rights or obligations arising out of that agreement was a matter as between the plaintiff and Promontoria and the Receiver. Ulster submitted that any such varied agreement was not a separate or collateral agreement for which the judge held there was an arguable case. Ulster submitted that the judge was *"definitely wrong"* in so holding. It argued that there could be no consideration for a separate or collateral agreement (relying on the rule in *Pinnel's* case ((1602) 5 Co. Rep. 117a)). It maintained that the agreement as

varied continued as one agreement and that Ulster's rights, entitlements and obligations under that agreement were assigned to Promontoria thereby giving rise to the consequences and effects provided for in s. 28(6) of the 1877 Act. Insofar as the plaintiff's contract claim was concerned, therefore, Ulster maintained that it was a matter for the plaintiff to the pursue that claim against Promontoria and not against Ulster.

73. It can readily be seen, therefore, that there was a significant shift in Ulster's position at the outset of the appeal insofar as the plaintiff's contract claim was concerned. The first such shift was the concession of an arguable case in relation to a binding variation of the original loan agreement. The second was its contention that any such binding variation could not give rise to a separate or collateral agreement and that the judge was incorrect in holding that there was an arguable case that it did. That was not a point which featured at all before the High Court. Nor was it raised in Ulster's notice of appeal or in its written submissions for the appeal. It was an entirely new argument raised for the first time in Ulster's submissions to this Court.

74. With respect to the plaintiff's negligence claim, Ulster contended that the plaintiff had no freestanding claim in negligence or negligent misstatement against Ulster following the assignment. Ulster submitted that the essential requirements for a claim in negligent misstatement have not been demonstrated by the plaintiff even to the point of arguability in circumstances where the plaintiff had not referred to any statement or representation made by Ulster on which he relied. I observe here, however, that the plaintiff has not, in fact, expressly pleaded any claim in negligent misstatement or negligent misrepresentation.

75. While Ulster continued to rely on the effects of the alleged assignment to Promontoria and the consequences and effects of such assignment having regard to the provisions of s. 28(6) of the 1877 Act and on the judgment in *McGuinness* (all of which were argued before the High Court and are properly before the court on this appeal), it elaborated very

significantly on the argument touched on in the written submissions for the appeal that Ulster, as assignor, owed no duty of care to the plaintiff in terms of what Promontoria, as assignee, was or was not told about the terms of its loan agreement with the plaintiff and any variation or separate or collateral agreement affecting the loan agreement. Counsel sought to make the argument that this was an economic loss case for which no authority had been provided by the plaintiff and that relying on cases such as *Glencar Exploration plc v. Mayo County Council (No. 2)* [2001] IESC 64, [2002] 1 I.R. 84 and *University College Cork v. Electricity Supply Board* [2020] IESC 38, the court should only extend the categories of cases in which a duty of care arose in the case of economic loss in very clear circumstances. The difficulty with that line of argument is that it was not made in the High Court. Nor was it signposted in the notice of appeal or in Ulster's written submissions for the appeal. Nor were any of those authorities relied on included by Ulster in the book of authorities for the appeal.

76. In support of its submissions that no duty of care was owed by Ulster to the plaintiff in relation to the alleged assignment to Promontoria, Ulster referred to the judgment of Hogan J. in *Healy* (which was referred to in Ulster's written submissions to the Court of Appeal but not in Ulster's submissions before the High Court) and the judgment of Baker J. in the High Court in *Wilkinson v. Ardbrook Homes Limited* [2016] IEHC 434 (*"Wilkinson"*) (which was not referred to in its written submissions in the High Court or in this Court but was included in the book of authorities for the appeal and it was referred to in the Plaintiff's submissions to illustrate the high bar which a defendant has to surmount to secure a dismissal of a case under the court's inherent jurisdiction). Ulster's counsel relied on *Healy* as demonstrating that the argument that a duty of care arose in that case was disposed of in less than a page (that does, however, somewhat underplay the significance of the fact that there were two written decisions on the issue prior to *Healy* on which Hogan J. relied in his judgment). Reliance was placed on *Wilkinson* as showing that the obligations of the one of

the defendants, HomeBond, in tort, could not be greater than that found expressly in contract. Baker J. applied the decision in *Pat O'Donnell & Company Limited v. Truck and Machinery Sales Limited* [1998] 4 I.R. 191, in holding that the claim in negligence in *Wilkinson* was bound to fail *"because the claim is one founded wholly in contract and the contract itself expressly excludes liability for such negligence"* (per Baker J. at para. 33). It is notable that, in that case, the contract between HomeBond and certain of the plaintiffs contained an express provision excluding liability in negligence. It was not suggested by Ulster that any of the agreements it may have had with the plaintiff contained an equivalent provision. Ulster's counsel did also rely on *McGuinness* in submitting that the judge ought to have concluded that any claims in contract and in tort which the plaintiff might have had did not survive against Ulster as a result of the assignment to Promontoria and, consequently, had to be pursued by the plaintiff against Promontoria and, where appropriate, the Receiver. In support of his submission that any potential liability which Ulster might have in contract to the plaintiff passed to Promontoria, Ulster relied on its submission that the judge was wrong in concluding that there was an arguable case that the repayment agreement amounted to a separate or collateral contract (an argument which was not advanced in the High Court or in the notice of appeal or Ulster's written submissions for the appeal).

77. With respect to the plaintiff's trespass claim, Ulster submitted that such a claim (if any) would have to be maintained against the party who allegedly trespassed on the plaintiff's property, namely, the Receiver. With respect to the plaintiff's defamation claim, Ulster submitted that a plaintiff was not alleging that Ulster did anything to defame that plaintiff. The actions relied on in the amended statement of claim were those of the Receiver and Promontoria and not of Ulster or any of its agents. It was noted that the amended statement of claim did not contain any amendment to the original statement of claim insofar as the defamation claim was concerned. Ulster, therefore, submitted that the plaintiff's defamation

claim against Ulster was unstateable as well as being statute barred, for the reasons set out in its written submissions.

78. In his replying submissions, counsel for the plaintiff relied, at the very outset, on the fact that most of the arguments advanced by Ulster were not made in the High Court or included in Ulster's notice of appeal or written submissions for the appeal. Counsel objected to Ulster's reliance on those arguments and referred in that context to the judgment of O'Donnell J. in the Supreme Court in *Lough Swilly*. The plaintiff submitted that the submissions advanced by Ulster in relation to the existence or otherwise of a duty of care and the absence of such a duty based on the case law referred to by Ulster's counsel, were not made in the High Court or in the notice of appeal or written submissions. The plaintiff objected to Ulster's reliance on those arguments.

79. The plaintiff also relied on the case law referred to in his written submission to the effect that the court should be slow to interfere with the exercise of a discretion by the High Court where there would be no injustice to the appellant. In addition, the plaintiff emphasised the limitations on the court's inherent jurisdiction to dismiss claims and referred, in that respect, to the judgment of Clarke J. in the Supreme Court in *Moylist* (which was referred to extensively by the judge in his judgment and relied on by the plaintiff in his written submissions).

80. Insofar as Ulster was relying on an alleged *"absolute"* assignment of the plaintiff's loan and mortgage to Promontoria and s. 28(6) of the 1877 Act, as having the effect that the plaintiff's remedy in contract and tort lay against Promontoria (and the Receiver), it was submitted that the plaintiff was unaware as to the position of Promontoria and the Receiver in circumstances where they had not yet delivered a defence to the amended statement of claim and had, in their defence to the original statement of claim, pleaded that they were strangers to the alleged repayment agreement. The plaintiff also relied on the fact that Ulster had not

exhibited a copy of the deed of transfer which it was alleging constituted an *"absolute"* assignment to Ulster and had, instead, relied on an averment on affidavit to the effect that such a transfer and assignment had occurred as well as on an entry in the folio for the property. However, neither the High Court nor this Court could assess whether the alleged assignment referred to was an *"absolute"* assignment or otherwise (for the purpose of s. 28(6) of the 1877 Act) without sight of the relevant deed.

81. The plaintiff objected to Ulster's attempt to raise an issue as to the judge's finding of an arguable case that the alleged repayment agreement constituted a separate or collateral agreement on the basis that that was not an issue raised in the notice of appeal or in Ulster's submissions.

82. The plaintiff supported the judge's approach to the exercise of the court's inherent jurisdiction to dismiss a claim and relied very much on the principles which the judge derived from cases such as *Moylist*. The plaintiff sought to distinguish *Wilkinson*, primarily on the grounds that the relevant contract in that case (the HomeBond guarantee) expressly excluded any claim in tort, which was not the case here. The plaintiff also sought to distinguish *Healy* where Hogan J. dismissed a claim which relied on the alleged tort of reckless lending in circumstances where there were already two judgments holding that such a tort did not exist. The plaintiff does not rely on that alleged tort in this case but rather a breach by Ulster of a duty of care owed to the plaintiff in failing to inform Promontoria of the existence of the alleged repayment agreement. The plaintiff submitted that it would be inappropriate to dismiss his negligence claim against Ulster on a motion to dismiss under the court's inherent jurisdiction in light of the considerations discuss by Clarke J. in *Moylist* and in the absence of the plaintiff obtaining discovery from Ulster and from the other defendants.

83. The plaintiff relied on the judgment in *McGuinness* and the conclusions drawn by the court in that case that certain tort claims remained against the assignor notwithstanding the

assignment of the relevant agreement. While it was accepted that this is not a "*mis-selling*" case, it was submitted that the principles applied by this Court in *McGuinness* was not confined to such a case. In principle, therefore, it was the plaintiff's submission that negligence claim could arguably remain as against Ulster rather than passing to Promontoria. The plaintiff therefore relied on the judge's analysis of *McGuinness* in the High Court, and s. 28(6) of the 1877 Act insofar as his contract and negligence claims are concerned.

84. With respect to the plaintiff's defamation claim, it was accepted that the defamation claim arose from the conduct and interactions of the Receiver and Promontoria with the tenant of the property and that no conduct or action on the part of Ulster or its agents was being relied upon. The essence of the plaintiff's case is that, were it not for Ulster's failure to inform Promontoria about the alleged repayment agreement, none of the further acts by the Receiver and Promontoria would have occurred. The plaintiff's counsel acknowledged that the pleading in the amended statement of claim in relation to the negligence claim was not, in any way, amended following the joinder of Ulster as a defendant to the proceedings. When it was suggested by members of the court that, in order to maintain a claim in defamation, it would be necessary to plead precisely what Ulster allegedly did to the tenant or in relation to the property, the plaintiff's counsel did not demur. When asked whether there were any amendments, the plaintiff would wish to make to the amended statement of claim to flesh out his claim in defamation against Ulster, counsel confirmed that the plaintiff had no amendments to suggest and did not wish to rely on any additional facts in support of his defamation claim against Ulster. Counsel acknowledged that the plaintiff's defamation claim was very much subsidiary to his other claims and that the plaintiff might be in difficulty if it was the only claim the plaintiff was advancing against Ulster.

85. While the plaintiff's counsel did not specifically address the trespass claim against Ulster in the statement of claim, I infer that the plaintiff was adopting a similar position in relation to that claim as with his defamation claim.

7. Decision on Appeal

(1) Decision on Dismissal of Contract and Negligence Claims

86. I am satisfied that Ulster's appeal from the decision of the High Court not to dismiss the plaintiff's contract or negligence claim under the court's inherent jurisdiction (being the primary basis ultimately relied on by Ulster in the High Court and in this Court) should be dismissed for a number of reasons which I explain further below.

(a) Arguments and issues raised for the first time on appeal

87. Ulster's arguments on the appeal in support of the dismissal of the plaintiff's negligence claim were significantly different to those made in the High Court, in the notice of appeal and in Ulster's written submissions on the appeal. This is particularly so in the case of the arguments advanced at the hearing of the appeal, to the effect, that Ulster did not owe any duty of care to the plaintiff in terms of what was or was not communicated to Promontoria at the time of the alleged assignment as to the existence and terms of any alleged repayment agreement made between the plaintiff and Ulster. Another important part of the case made by Ulster on the appeal in support of its application to dismiss the plaintiff's contract claim was that the judge ought not to have found that there was an arguable case that the alleged repayment agreement amounted to a separate or collateral agreement and was not merely a variation of the original agreement between the plaintiff and Ulster. That argument was made for the first at the hearing of the appeal.

88. As has been consistently held, the Court of Appeal is an appellate court and, save in the most exceptional circumstances, should not hear and determine an issue which was not argued and decided in the High Court. This is clear from several recent judgments of the

Court of Appeal, including, *Promontoria* (*Aran) Limited v. Mallon* [2021] IECA 130, which considered and applied the principles identified by the Supreme Court in *Lough Swilly* (O'Donnell J., as he then was) and in *Allied Irish Banks plc v. Ennis* [2021] 3 I.R. 733 (MacMenamin J.) (*"Ennis"*). I am quite satisfied that no exceptional circumstances arise in this case and Ulster should not be permitted to advance those arguments in support of its appeal.

89. The circumstances in which the Court of Appeal will permit an issue to be argued or submissions to be advanced on a point which was not argued or addressed in the High Court and, therefore, not addressed in the judgment under appeal, have been considered in a large number of cases by the Court of Appeal. Those cases have applied the principles outlined by O'Donnell J. for the Supreme Court in *Lough Swilly*. The further discussion of those circumstances by the Supreme Court in the judgment of MacMenamin J. in *Ennis* has also been considered by this Court.

90. In *Lough Swilly,* O'Donnell J. observed that the appellate court should apply a *"certain sensible flexibility"* in deciding whether to allow a point to be considered on the appeal which was not argued in the High Court although it may have been *"closely connected"* to points which were argued in that court and which would not have had any implication for the evidence adduced in the High Court. In a passage which has been quoted in many of the subsequent cases, O'Donnell J. observed that there was a *"spectrum of cases"* where a new issue was sought to be argued on appeal. At one extreme was where the point would necessarily involve new evidence and, consequently, have an effect on the evidence already given in the High Court or where the argument was abandoned in the High Court. In those types of cases, the appellant would not be permitted to argue a new point on appeal. At the other end of the spectrum, are cases involving a *"new formulation of argument"* in relation to appoint advanced in the High Court or where new materials were submitted or

where a new legal argument was sought to be made which was *"closely related"* to arguments made in the High Court or was a refinement of them and was not dependent on the evidence adduced. In those circumstances, the court retained the power or had a discretion in appropriate cases to permit the new argument to be made. (See para. 28 of the judgment). Those principles were considered by the Court of Appeal in *Gibb v. Promontoria (Aran) Limited & Ors* [2018] IECA 95. In that case, the Court of Appeal refused to permit a new point to be argued in an appeal from a decision of the High Court refusing to grant an interlocutory injunction. In his judgment, Peart J. considered that the circumstances of the case lay at the extreme of the spectrum to which O'Donnell J. referred in *Lough Swilly,* where the court would refuse leave. He felt that the court should not permit the point to be argued where it was not argued in the High Court and that there was *"no good reason provided"* for the point not having been so argued. He said that the court should be *"slow to permit a new issue to be argued in such unexceptional circumstances"*. The refusal to permit the point to be argued did not give rise to a manifest injustice to the appellant. Whelan J. also delivered a judgment in that appeal. She carefully reviewed the authorities (including *Lough Swilly* and *Ambrose v. Shevlin* [2015] IESC 10) and identified a number of reasons why the appellant should not be permitted to raise the new point at the appeal. Foremost among those reasons was that the appellant had been legally represented in the High Court and had given no reason or explanation for why the point was not raised in that court. Whelan J. was satisfied that no ground not relied on by the appellant in the High Court should be entertained in the appeal.

91. The Supreme Court looked at this question again in *Ennis*. In his judgment for the Supreme Court, MacMenamin J. reviewed the authorities and considered the principles to be applied where new issues were sought to be raised on an appeal in plenary proceedings as well as those which arose in appeals in interlocutory matters. With respect to the latter types

of appeals, he said that the courts would adopt a *"somewhat more flexible approach, dependent upon the justice of the case"* (at para. 22).

92. The Court of Appeal considered *Ennis* in *Mallon*. In a judgment delivered by Noonan J. for the court, the appellant was not permitted to add new grounds of appeal or new arguments in support of his appeal. The appeal was from an order granting summary judgment against the appellant.

93. Noonan J. considered the authorities (including *Lough Swilly* and *Ennis*). He noted that in *Ennis*, MacMenamin J. had explained why it is essential that all points available to be argued are put before the court at first instance (at paras. 18 – 19 of the judgment of MacMenamin J. in *Ennis*). Noonan J. concluded that, although those comments were made by MacMenamin J. in the context of plenary trials, they applied, *"albeit to a less strict degree"*, in summary proceedings. Noonan J. continued (at para. 31):

> *"However, lest it be thought that the Ennis decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although MacMenamin J. allowed for greater flexibility in non-plenary cases, he said (at paragraph 15 of his judgment) that the K.D. principle remained 'the general principle' i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must be 'clearly required in the interests of justice'. MacMenamin J. viewed the Ennis case as falling within the category of 'truly exceptional'."*

94. Noonan J. held that there was nothing exceptional about the facts of the case before the court or the circumstances giving rise to the application and there was no valid reason why the new arguments sought to be made could have been made in the High Court. In my view, that is also the position in this case with respect to the new points and arguments which

Ulster has sought to rely on in this appeal. A similar approach was taken by the Court of Appeal in *Haughton v. Quinns of Baltinglass Limited* [2021] IECA 249 (at paras. 49 – 54) and *Allied Irish Banks plc v. Fitzgerald* [2022] IECA 286 (at paras. 46 – 48).

95. I have identified earlier the new arguments sought to be raised by Ulster in support of its submission that the judge ought to have dismissed the plaintiff's contract and negligence claims under its inherent jurisdiction. In my view, it would be fundamentally inconsistent with the proper role and function of an appeal court to permit Ulster to rely on these arguments with a view to having these claims made by the plaintiff's dismissed by this Court when those arguments were not advanced in the High Court and, therefore, not considered by the judge in his judgment. To allow Ulster to make these points on the appeal would, in my view, be *"wholly inconsistent with the fair and efficient administration of justice and with the proper discharge of this Court's functions as an appellate court"* if I could be permitted to adopt the words used by Collins J. in his judgment for the Court of Appeal in *Three Ireland (Hutchison) Limited v. Commission for Communications Regulations* [2022] IECA 300.

96. This is not an exceptional case which the court should permit these points to be argued. There was no reason why they could not have been argued in the High Court. Ulster should not be permitted to rely on them in this Court.

(b) No evidence of *"absolute"* assignment

97. Another fundamental difficulty with Ulster's appeal concerns the argument advanced by Ulster in the High Court and, in turn, on appeal to this Court in reliance on the alleged assignment by Ulster to Promontoria of the plaintiff's loan and mortgage under the terms of a deed of transfer apparently made in December 2016 and the provisions of s. 28(6) of the 1877 Act. This argument is undermined to a fatal extent by the failure by Ulster to put in evidence a copy of the deed of transfer itself (even in redacted form) either before the High Court or this Court. This gives rise to fundamental difficulties for Ulster's dismissal application as the

authorities demonstrate that in order for the provisions of s. 28(6) of the 1877 Act to apply, a number of conditions must be satisfied. One of those is that the relevant assignment was *"absolute"*. The plaintiff did not admit the assignment and put Ulster (and the other defendants) on proof of the assignment and its terms.

98. In a number of cases in which reliance was placed on s. 28(6), the courts have found it necessary to consider the precise terms of the document alleged to constitute the assignment in order to assess whether it was an *"absolute"* assignment or not. Neither the High Court nor this Court was afforded that opportunity by reason of the failure by Ulster to provide a copy of the relevant deed to the court. In my view, that amounts to an insurmountable barrier to Ulster succeeding on this appeal insofar as it relies on the alleged *"absolute"* assignment and the provisions of s. 28(6) of the 1877 Act, to found its application to dismiss the plaintiff's contract and negligence claims.

99. The High Court was not provided with a copy of the deed of transfer of December 2016 even in redacted form. There was no reason set out in the affidavits Ulster relied on in support of its dismissal application in the High Court as to why the document was not exhibited. Ulster's deponent, Mr. Linnane, referred to the deed of transfer but did not exhibit it. He referred to the relevant folio and did exhibit a copy of the folio which did show that on 9th March, 2017, Promontoria was registered as the owner of the charge over the property of which First Active was previously registered as the owner. Ulster relied in its submissions on s. 31 of the Registration of Title Act 1964. However, s. 31(1) provides that the register shall be *"conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon"*, it is not evidence, still less conclusive evidence, of the terms of any transfer or assignment under which the owner may have become entitled to the benefit of any charge registered on the folio. The provisions of s. 31 of the Registration of Title Act 1964, do not cure this evidential deficit as that section

does not provide that the entry on the register is conclusive evidence of the terms of the alleged assignment and of whether it is "*absolute*" or not.

100. The main focus of Ulster's case in the High Court was based on s. 28(6) of the 1877 Act. That was also an important part of its case on the appeal. The relevant provisions of s. 28(6) are as follows:

> *"Any absolute assignment, by writing under the hand of the … of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law … to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…"*

101. Section 28(6) was crucial to Ulster's argument that if the plaintiff had any claim in contract or in negligence, the effect of the assignment under the deed of transfer of the plaintiff's loan and mortgage to Promontoria was that any such claims could only be enforced against Promontoria and not against Ulster. Essential to that case was that there was an assignment which complied with the requirements of s. 28(6). It is well established in the case law that four conditions must be satisfied in order for the assignment to comply with the requirements of s. 28(6). One of those conditions is that the assignments must be *"absolute"*: see, for example, *O'Rourke v. Considine* [2011] IEHC 191 (Finlay Geoghegan J.) (para. 18); *Waldron v. Herring* [2013] IEHC 294 (Edwards J.) (para. 16); *AIB Mortgage Bank v. Thompson* [2017] IEHC 515, [2018] 3 I.R. 172 (Baker J.) (paras. 18 – 19). The point is not an academic one and the court in those cases examined the document said to constitute an assignment complying with the provisions of s. 28(6) in order to determine whether it did, in

fact, comply with those conditions including the requirement that the assignment be *"absolute"*. In order to carry out that assessment, however, the court had to have sight of the document alleged to constitute the assignment. An example of a case where the court considered the document and concluded that the assignment was not *"absolute"* is *McCool v. Honeywell Control Systems Limited* [2022] IECA 56. The decision of the Court of Appeal was very recently overturned by the Supreme Court on a different point (judgment delivered on 28th February, 2024 ([2024] IESC 5)). The particular document constituting the assignment was before the High Court, Court of Appeal and Supreme Court, and was considered by all of those courts to assess its compliance with the requirements to s. 28(6). Not so the deed of transfer in this case.

102. The plaintiff did not admit the assignment and put Ulster and the other defendants on proof of the deed of transfer which was said to give rise to an assignment which complied with the provisions of s. 28(6). One might have imagined that in those circumstances, Ulster would have exhibited a copy of the deed of transfer even in redacted form. However, that was not done. In those circumstances, neither the High Court nor this Court could be satisfied that the deed of transfer did, in fact, give rise to an *"absolute assignment"* as required by s. 28(6). I would, therefore, dismiss Ulster's appeal, insofar as it relies on s. 28(6) based on its failure to put before the High Court and this Court a copy of the deed of transfer.

103. There is, of course, nothing to prevent Ulster from proving the deed of transfer at any trial which might ultimately take place in this case. Nothing in this judgment is intended to restrict or limit its ability to do so at any such trial. This judgment is addressing the consequence of Ulster's failure to put the document before the court for the purpose of its application to dismiss the plaintiff's contract and negligence claims under the court's inherent jurisdiction. For that reason, therefore, no injustice is done to Ulster by dismissing that part of its appeal which relies on the alleged assignment and effects of s. 28(6) of the 1877 Act.

(c) Issues not appropriate for dismissal under inherent jurisdiction

104. In my view, the limitations on the court's inherent jurisdiction to dismiss a claim as being bound to fail are such that, insofar as the plaintiff's contract and negligence claims are concerned, that jurisdiction was appropriately exercised by Keane J. in the High Court in exercising his discretion to refuse to dismiss those claims on that basis. His decision was, in my view, justified by reason of the limitations on that jurisdiction very fully set out by Clarke J. in his judgments for the Supreme Court in *Moylist* and in *Keohane*, from which the judge quoted extensively in his judgment.

105. In *Moylist*, Clarke J. made clear that, by analogy with an application for summary judgment in which the court may resolve questions of law or issues concerning the interpretation of documents, the court's entitlement to dismiss a claim should only be exercised where it is possible and appropriate to do so on a motion for summary judgment *"without running the risk of injustice"*. Similar considerations apply in determining whether it is appropriate to get into complex issues of law or construction on an application to dismiss a claim as being bound to fail. The court has to be satisfied that it is *"very clear"* that the plaintiff has no case and that his claim is bound to fail. He accepted that there were limitations on the extent to which cases involving issues of law or construction could properly be the subject of an application to dismiss under the court's inherent jurisdiction and should not do so where the legal issues or questions of construction are complex and would require careful analysis which could only be carried out safely at a full trial where the facts can be fully explored.

106. Where there are complex issues of law or concerning the proper interpretation of documents, that very fact makes it difficult safely to determine that the plaintiff's case is bound to fail. In my view, leaving aside the fundamental problems for Ulster's appeal summarised at (1) and (2) above, this is another reason why the judge was entitled to

conclude that this was not an appropriate case to dismiss the plaintiff's claims in contract and negligence under the court's inherent jurisdiction. I do not believe that this Court should interfere with that decision.

(d) The judge applied correct principles in exercise of discretion

107. The judge identified and applied the correct legal principles applicable to the dismissal of claims under the court's inherent jurisdiction as well as those applicable to the application and effect of s. 28(6) of the 1877 Act. The judge considered and applied the leading Irish judgment on that issue, that of Kelly J. for the Court of Appeal in *McGuinness*. That was a judgment on which both Ulster and the plaintiff relied in the High Court and in this Court.

108. In my view, the judge made no error of principle in identifying and applying the relevant legal principles. It was, in my view, open to the judge to conclude that *McGuinness* was authority for the proposition that a tort claim, which a debtor had and which predated an assignment by the assignor to the assignee, can continue to be maintained against the assignor notwithstanding the assignment. I do not accept that this can only apply to a claim for the alleged tort of mis-selling or reckless lending (as appeared to be suggested by Ulster). That suggestion is not consistent with the tort claims which the Court of Appeal held survived against IBRC in *McGuinness*. Moreover, it was, in my view, open to the judge to conclude that any damages which might be awarded to the plaintiff arising from the alleged negligence of Ulster in failing to apprise Promontoria of the existence and terms of the alleged separate repayment agreement might not be regarded as *"flowing out of and inseparably connected with the dealings and transactions which also gave rise to the subject of the assignment"* being the principle stated by Lord Hobhouse in *Government of Newfoundland* as approved and applied by Kelly J. in *McGuinness*.

109. Having said that, all that is being decided at this stage is that it is not *"very clear"* that the plaintiff must lose on that issue and that Ulster must succeed. The appropriate stage at which that point should be finally determined between the parties to this case is the trial itself and not on an application to dismiss the plaintiff's negligence claim under the court's inherent jurisdiction. I completely agree, therefore, with the judge that the plaintiff's contract and negligence claims against Ulster should not be dismissed as being bound to fail.

110. Insofar as the judge exercised a discretion to refuse to dismiss the plaintiff's contract and negligence claims, it is clear on the authorities that the views of the judge are entitled to considerable weight and his conclusion must not be lightly interfered with (see, for example, *Sweeney v. Keating* [2019] IECA 43, *Betty Martin Financial Services Limited v. EBS DAC* [2019] IECA 327 (at para. 39), *Clare County Council v. McDonagh* [2020] IECA 307 (at para. 32), *Word Perfect Translation Services Limited v. Minister for Public Expenditure and Reform* [2021] IECA 305 (at paras. 98 – 103) and *Mackin & Anor v. O'Brien & Anor* [2024] IECA 43 (at para. 56)).

111. In my view, not only has no error of principle been identified insofar as the judge refused to dismiss the plaintiff's contract and negligence claims, no injustice was done to Ulster in the decision reached by the judge in relation to those claims. Ulster will have the opportunity of defending them fully at any trial which may take place in the future. There is no basis to interfere with the judge's decision and, accordingly, I refuse Ulster's application to dismiss the plaintiff's contract and negligence claims.

(2) Decision on Dismissal of Defamation and Trespass Claims

112. I have reached a different conclusion in relation to Ulster's appeal from the judge's refusal to dismiss the plaintiff's defamation and trespass claims. In light of the conclusion, I have reached as to the stateability of those claims, I have not found it necessary to reach a decision as to whether the judge ought to have concluded, as Ulster asked him to do, that the

plaintiff's defamation claim against it was clearly statute barred under s. 11 of the 1957 Act as amended by s. 38 of the 2009 Act.

113. I am satisfied that the plaintiff's defamation claim against Ulster is completely unstateable and bound to fail and that the judge ought to have so concluded. No defamatory words or actions are pleaded in the amended statement of claim against Ulster. The original statement of claim set out the plaintiff's defamation claim against the Receiver and Promontoria. The words and actions pleaded in the original statement of claim were clearly directed to those of the Receiver and his servants or agents. The amended statement of claim delivered after Ulster had been joined as a defendant to the proceedings did not contain any further plea in support of a defamation claim against Ulster. No words or actions by Ulster or any of its servants or agents are pleaded in the amended statement of claim. It is not suggested nor could it be suggested (having regard to the terms of the mortgage agreement between the plaintiff and Ulster) that the Receiver was acting as agent for Ulster in relation to the alleged words and actions of the Receiver (who was appointed by Promontoria) on which the plaintiff relies. The plaintiff expressly declined the opportunity of amending or providing further particulars of his defamation claim against Ulster or of supplementing the facts on which he wished to rely in support of that claim, when asked during the course of the appeal.

114. It is fair to say that in his judgment in the High Court, the judge focused on Ulster's reliance on the argument that the plaintiff's claim in defamation against it was statute barred and either was not asked to, or simply did not, consider the stateability or otherwise of the plaintiff's claim in defamation against Ulster. In my view, it would be unjust to require Ulster to go to trial to defend the plaintiff's defamation claim against it in circumstances where, as pleaded, it is clearly unstateable and where there is no desire on the part of the plaintiff to seek to amend or supplement his claim in any way.

115. As regards the plaintiff's trespass claim against Ulster, while that was not specifically addressed by the judge in the High Court and very little attention was paid to it in the course of the appeal, it does seem to me that that claim suffers from a similarly irremediable weakness as the defamation claim. I would also, therefore, allow Ulster's appeal from the decision refusing to dismiss the plaintiff's trespass claim against it.

(3) Litigious Disadvantage

116. In light of the conclusion I have expressed in relation to Ulster's appeal from the decision by the judge not to dismiss the plaintiff's contract and negligence claims, it is, I believe, unnecessary to consider further the issue of *"litigious disadvantage"* raised by the plaintiff. As I outlined earlier, the judge did address this issue, albeit that he acknowledged that it was not strictly speaking necessary to do so. It will be recalled that in his judgment in *McGuinness*, Kelly J. adverted to the fact that the appellant in that case would be at a *"considerable litigious disadvantage"* were IBRC to be excluded from the proceedings. However, Kelly J. observed that the matters described as giving rise to a *"litigious disadvantage"* to the appellant in that case *"would not of themselves be determinative"* of the appeal although they did *"add weight"* to the case in favour of the joinder of IBRC (para. 39 of Kelly J.'s judgment).

117. The matters relied on as giving rise to *"litigious disadvantage"* in this case were the plaintiff's claims against Ulster to be dismissed were (i) the lack of clarity as to the approach which Promontoria (and the Receiver) might take in respect to any alleged liability they might have for the tortious conduct which the plaintiff alleges against Ulster in light of the fact that they have not yet delivered a defence to the amended statement of claim, and (ii) the fact that the plaintiff would have to seek non-party discovery from Ulster if it were no longer in the case.

118. I do not believe that it is necessary to consider these issues further in light of my conclusion that the plaintiff's contract and negligence claims against Ulster should not be dismissed pursuant to the court's inherent jurisdiction. While I have my doubts that either of the two matters relied on as giving rise to a *"litigious disadvantage"* for the plaintiff could provide a valid reason for retaining a party as a defendant in a case where the claims against that party should otherwise be dismissed, I agree with the judge that it is not necessary to reach a decision on this issue on this appeal. The making of such a decision should await a case which requires its resolution. This is not such a case.

8. Conclusion

119. In summary, therefore, for the reasons set out earlier in this judgment, I would dismiss Ulster's appeal from the judge's refusal to dismiss the plaintiff's contract and negligence claims against Ulster. I would, however, allow Ulster's appeal from the judge's refusal to dismiss the plaintiff's defamation and trespass claims against Ulster on the grounds that those claims are clearly unstateable and bound to fail.

120. It will be necessary for the plaintiff to deliver a further amended statement of claim to take account of the fact that his claims in defamation and trespass now only subsist as against the Receiver and Promontoria and not as against Ulster. That should be done within seven days of the delivery of this judgment.

9. Costs

121. In light of the fact that Ulster has failed in its appeal from the decision of the judge not to dismiss the plaintiff's contract and negligence claims and because of the various reasons which I have set out earlier for dismissing that substantial part of Ulster's appeal (including the fact that it sought to raise entirely new issues on the appeal and failed to put an essential document before the High Court or this Court), and also recognising the fact that Ulster has succeeded on its appeal from the judge's decision not to dismiss the plaintiff's

defamation and trespass claims, it is my provisional view that, as he was largely successful in the appeal, the plaintiff should be entitled to 75% of the costs of the appeal, such costs to be adjudicated on in default of agreement. If the parties wish to contend otherwise and to seek an alternative order for costs, that must be indicated to the registrar within seven working days of the delivery of this judgment. Arrangements will then be made for an immediate listing of this appeal in order to finalise the orders and to deal with costs.

122. Whelan J. and Haughton J. have indicated that they agree with this judgment and with the orders proposed.