Neutral Citation No. [2012] NIQB 47 | *Ref:* **McCL8550**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **29/06/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISON

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BETWEEN:

IRISH BANK RESOLUTION CORPORATION LIMITED

Plaintiff;

-and-

PETER GERARD CURISTAN

Defendant.

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McCLOSKEY J

I INTRODUCTION

[1] The Plaintiff appeals against the order of the Deputy Master, made on 18th January 2012, whereby he refused the Plaintiff's application for summary judgment against the Defendant.

[2] The Plaintiff's claim, as formulated in the Statement of Claim, is for the following amounts:

(i) £340,000 allegedly owing pursuant to a guarantee dated 25th July 2008 for the liabilities of Marian Anne Curistan (the Plaintiff's spouse) to the Plaintiff.

(ii) £160,000 owed on foot of account number X in respect of Green Road, Ardglass.

(iii) £550,000 owed on foot of account number Y in respect of Enterprise Crescent, Lisburn.

The total amount claimed is £1,050, 000 plus interest.

[3] In brief compass, it is contended that the Plaintiff has an unanswerable case against the Defendant for the repayment of three personal loans to the Defendant and his spouse. It is emphasized on the Plaintiff's behalf that each was a loan of a personal nature, unrelated to the Defendant's well known business activities involving the Sheridan Millennium Company and The Odyssey Arena Belfast. This was characterised by Mr. Hanna QC (appearing with Mr. Colmer) as "*a fundamental point*". As no Defence has been served, the Defendant's resistance to this summary judgment application must be extrapolated from his affidavits. The Plaintiff's case is that insofar as any issues can be identified in the Defendant's affidavits with any degree of clarity, these lack intrinsic merit and/or do not raise any potentially sustainable defence.

[4] Having regard to all the evidence assembled, there is no discernible issue of contention relating to the *quantification* of any of the three elements constituting the Plaintiff's claim. Equally, there is no identifiable dispute that, *on paper*, the Defendant owes the Plaintiff the amounts claimed. The fundamental issue to be determined by the court is whether the Plaintiff's application for summary judgment satisfies the governing principles. Bearing in mind that there are other, related proceedings in existence (*infra*), this appeal also raises for consideration questions bearing on the over-riding objective and issues of case management.

II THE EVIDENCE

[5] All of the evidence considered by the court is contained in affidavits and exhibits. I embark upon the unambitious task of highlighting the salient aspects thereof only.

[6] The **first** limb of the Plaintiff's claim is based on a duly executed instrument described as "Guarantee and Indemnity in Respect of Indebtedness of Marian Anne Curistan" dated 25th July 2008. By this guarantee, the Defendant covenanted unconditionally and irrevocably to pay on demand to the Plaintiff the maximum sum of £340,000, in consideration of the Plaintiff providing facilities to Mrs. Curistan. By Clause 16, all sums payable by the guarantor shall be made "*… without set off or counterclaim or any restriction, condition or deduction whatsoever*". The July 2008 guarantee is the successor to a written guarantee first made by the Defendant around May 2003, in consideration of the Plaintiff's provision of financial facilities to Mrs. Curistan. In accordance with this arrangement, the Plaintiff advanced £152,000 to Mrs. Curistan to fund the purchase of 30 Ravensdene Crescent, Belfast, a three bedroom house ("*the Ravensdene debt*"), repayable on demand. It appears uncontroversial to describe this as a "buy to let" investment by the Curistans. By a successor contractual arrangement, made between the parties in October 2007, the Ravensdene debt was augmented to the sum of £340,000. The parties to this discrete contract continued to be the Plaintiff and Mrs. Curistan only. In this discrete

facilities contract, the Defendant's personal guarantee, a separately executed instrument, was described as one of the three contractual forms of security.

[7] The **second** element of the Plaintiff's claim is made pursuant to a separate "facilities" contract initially executed on 13th January 1998, whereby the Plaintiff advanced £77,000 to both the Defendant and his spouse to facilitate the purchase of a holiday home at 2 Green Road, Ardglass ("*the Green Road debt*"). This sum was repayable on demand. The most recent incarnation of this discrete facilities contract was executed by the Defendant and his spouse on 16th October 2007, when the debt was increased to £160,000. The **third** element of the Plaintiff's claim relates to a contractual debt said to be owed by the Defendant personally to the Plaintiff, arising out of the provision of £550,000 to finance the acquisition of premises at Enterprise Crescent, Lisburn ("*the Enterprise debt*"). This is based on a further, separate "facilities" contract made between the parties in March 2007.

[8] The Defendant has sworn three affidavits. In the first, he describes himself as the Chairman of the Sheridan Group, which has been financed by the Plaintiff and its predecessor since 1998 in the development of the Odyssey Arena and Pavilion. He suggests that the Plaintiff provided finance of some £17,000,000. He accuses the Plaintiff of deceit and bad faith, which he appears to date from approximately December 2008 in the context of the sale of the two "Odyssey" leases, designed to address the company's indebtedness of some £65,000,000 to the Plaintiff. The gist of these averments seems to be that a more attractive bidder offering a superior financial package was lost, with the result that he, his wife and the Sheridan Group have suffered (unquantified) losses. This complaint features prominently in the Defendant's case. It is convenient to describe it as "the PBN grievance". The Defendant's averments link this grievance to a proliferation of legal actions involving the Plaintiff, the Defendant, the Sheridan Group and linked companies. The PBN grievance emerges clearly in the following passage:

> "*The above* [proliferation of] *litigation is a direct consequence of* [the Plaintiff's] *wrongs in and around the PBN litigation. I have been prevented from moving on from the Odyssey Pavilion to other matters. This has caused me substantial financial loss because I have been unable to pursue other opportunities such as development of the Coca Cola site in Lisburn, office development in the Cathedral Quarter and the Parnell Centre in Dublin. Furthermore I was unable to develop units within the Odyssey occupied by my companies …*".

The Defendant also complains of restrictions in his ability to deal with these units.

[9] Most of the Defendant's first affidavit is occupied by the matters summarised in paragraph [7] above. Eventually, in rather lean terms, he makes the following assertions:

(a) The Plaintiff has failed to provide sufficient details of his wife's alleged indebtedness and he puts the Plaintiff on proof of when and to whom the monies were paid. (As noted in paragraph [4] above, this was not pursued with any vigour at the hearing).

(b) "*I was in any event advised and assured by Pat Whelan, director of Anglo, that Anglo would not call in personal guarantees from me or my wife. This was in the context of the sale of the* [Odyssey] *and I relied upon these assurances …*

Furthermore I was assured that there would be no demand for repayment whilst interest was serviced on the loans".

With regard to the Green Road facility, the Defendant highlights clause 12 which provides:

> "*The Facility will be fully repaid from the refinance funds received by the Bank in respect of associated borrower, Sheridan Millennium Limited*".

The Defendant appears to make the case that this clause operated to relieve him from his liability under the guarantee. The Plaintiff retorts that this was simply a mechanism to ring fence this prospective source of income in advance and adds that no repayment of any kind has been made in the event. Finally, the Defendant disputes his alleged liability to the Plaintiff in respect of the Enterprise Crescent facility on the ground that the Plaintiff appointed a fixed charge receiver to this property on 14th April 2011. (This contention also was not pursued with any energy at the hearing).

[10] In his second affidavit, the Defendant disputes, without elaboration or particulars, his wife's alleged indebtedness to the Plaintiff, pointing out that this is the subject of separate proceedings against her in the Chancery Division. Secondly, he contends that the alleged misdemeanours of the Plaintiff giving rise to the Defendant's PBN grievance constitute bad faith, sufficient to relieve him of any liability under the guarantee. He attempts to forge a nexus between the transfer of the Odyssey asset from the Sheridan Group to a special purchase vehicle and his inability to discharge the Ravensdene Crescent liability. Elaborating on his first affidavit, he alleges that the "assurance" [singular] provided by Mr. Whelan on behalf of the Plaintiff was (a) given to the Defendant *and his wife* and (b) was repeated on several unparticularised occasions, dating from a lunch in Dublin on 14th April 2005. The date of this alleged promise cannot be reconciled with the date to which the Defendant's earlier averments relate viz. the sale of the Odyssey asset, an exercise which belonged broadly to the period 2007/2009. Furthermore, the Defendant re-executed the guarantee in July 2008 and the forbearance, or promise, which he attributes to the Plaintiff's representative does not feature in this or any of

the other contractual debt documentation and is *prima facie* confounded. One adds to this discrete jigsaw the undisputed fact that Mr. Whelan was the Plaintiff's former managing director of lending and he began working for the Defendant circa January 2010. Finally, the Defendant's second affidavit puts in issue the legality of the "no set off" clause.

[11] During the course of the appeal hearing, the Defendant swore a third affidavit, putting in evidence certain further documents, all of which are internal bank records. These, on the Defendant's case, are designed to establish a nexus between the personal indebtedness of the Defendant and his spouse (on the one hand) and the activities, affairs and debts of the Sheridan Group (on the other). This, it is contended, is exemplified in the consistent description of both Curistans as "*associated borrowers*" of Sheridan. These documents also link personal repayments with the corporate Sheridan repayments and the sale of the Odyssey asset. Another of these records documents the repayment of personal Curistan debts from "*the net refinance proceeds received by the Bank in respect of the Odyssey*". In two separate "Credit Committee Applications", the approval of enlargements of the Ravensdene and Green Road debts was expressly stated to be "*subject to satisfactory confirmation that the …* [contract] *… has been entered into by both parties in respect of the* [Odyssey asset sale]" and, further, specified that "*facilities are to be fully repaid from the refinance funds in respect of associated borrower* [SML]", with "*ultimate repayment from sale of Odyssey (anticipated 11/07)*". Finally, a sample statement of Mrs. Curistan's bank account suggests that interest payments on her personal debt were being financed from an external source, said to be Sheridan.

III CONSIDERATION AND CONCLUSIONS

[12] The principles to be applied by the court in the determination of any application for summary judgment are well established. In ***Maginn –v- Crossey*** [2008] NICH 13, this court stated:

> *"[17] As appears from the commentary in the Supreme Court Practice 1999, Volume 1 (pages 1567-1568), there is a close association between applications under Order 86 and those made under Order 14 of the Rules of the Supreme Court. In an application for summary judgment of this nature, various well established tests and principles, all of them inter-related, have been devised. The onus rests on the Plaintiff to establish that there is no defence to his claim for specific performance. Summary judgment is appropriate where the court '. . . is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the Defendant', per Jessel MR in* ***Anglo Italian Bank v.Wells*** *[1878] 38 LT 197, at page 201. Similarly it has been stated that summary judgment is inappropriate where the court concludes that there is a triable issue between the parties. Another of the established tests is whether there is 'a*

> *fair probability of a defence': **Ward v. Plumbley** [1890] 6 TLR 198. Further, it has been suggested that unconditional leave to defend should be granted where there are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and disreputable business dealings and questionable conduct. In such circumstances, the court should not attempt to make tentative assessments of the parties' respective prospects of success or the relative strengths of their respective cases: see the decision in **Oskar** [1984] 128 SJ 417."*

The judgment continues:

> *"[18] A convenient summary of the correct approach is found in Civil Proceedings, The Supreme Court (Valentine), paragraph 11.49:*
>
> > *'The Defendant need only raise a reasonable doubt about the Plaintiff's entitlement to judgment, assuming all facts in his favour, or that serious questions of fact or law are involved. Obviously an Order 14 hearing is rarely an appropriate forum for resolving issues of fact, but if the result of the action depends on an issue of pure law, even if complex or highly debateable, it should be fully investigated and determined under Order 14'.*
>
> *I accept the submission on behalf of the Defendant that judgment under Order 86 should be refused where the Defendant raises a defence to which the court will pay some heed."*

In ***Landaug –v- Saunders*** [unreported, 3rd April 2006], the English Court of Appeal stated [p. 3, transcript]:

> *"There is here a goldmine for cross-examination … when one looks at the totality of that evidence, one is not left in a situation where one has the feeling that this defence has no prospect of success, nor indeed is so shadowy that conditions should be imposed upon the Defendant requiring the payment of monies as a condition of being allowed to defend".*

In ***National Westminster Bank –v- Daniel*** [1994] 1 All ER 156, the test formulated by the English Court of Appeal was whether there was a "*fair or reasonable probability of the Defendant having a real or bond fide defence*" (at p. 160). Some of the decided cases belonging to this field also highlight, unsurprisingly, factors such as the timing of any defence raised by the Defendants, the circumstances in which it is first raised, the terms in which it is formulated and the contents of the Defendants' affidavits. In the application of these factors to any given litigation equation, they may be decisive, as in ***Greenstein –v- Broome and Wellington LP*** [2009] EWCA Civ 589 (see paragraphs [18] – [21] especially. In other litigation contexts, they will not. It is trite to observe that every case is fact sensitive and all cases call for an evaluative judgment on the part of the court formed on the basis of untested affidavits and (as here) documentary evidence and in the absence of sworn testimony elicited by the mechanisms of examination-in-chief, cross-examination and appropriate judicial questioning.

[13] The Plaintiff's analysis of the Defendant's affidavits gives rise to a submission that the Defendant appears to be canvassing three separate lines of defence:

(a) Breach of contract based on the Plaintiff's "without prejudice – subject to contract" letter dated 14th September 2009 to the Defendant.

(b) Losses (unquantified) suffered by the Defendant by reason of being embroiled in so much litigation with the Plaintiff.

(c) Losses (also unquantified) suffered by the Defendant arising out of the sale of the Odyssey asset and his associated PBN grievance.

In common with Deeny J in ***Ward –v- Anglo Irish Bank Corporation*** [2011] NICH 7, paragraph [9], I find the first of these claims to be unarguable. As regards the second, I concur with Mr. Colmer's submission that there is no recognisable cause of action in law. I would add that the court's jurisdiction under Order 18, Rule 19 to strike out proceedings which misuse its process in any way is the recognised vehicle for pursuing a claim or complaint of this kind. Left standing, therefore, are the following:

(i) The ventilation of the Defendant's "PBN grievance".

(ii) The Defendant's assertions of waiver, or estoppel, vis-à-vis the guarantee (only).

[14] The profusion of litigation involving the Defendant and/or corporate entities in which he has, or had, an interest and/or his spouse includes ***Sheridan Millennium Limited (and others), the Anglo Irish Bank Corporation*** [2010 No. 080666]. In this action, there are four corporate Plaintiffs and two personal Plaintiffs, the Curistans. The four corporate Plaintiffs are presently either in liquidation or administration.

The Writ was issued on 23rd June 2010 and the Defence was served on 13th May 2011. (I shall describe this as "*the related Queen's Bench action*"). As the frank submissions of Mr. Orr QC (appearing with Mr Shields of counsel) made clear, the centrepiece of this separate action is the Defendant's "PBN grievance". The causes of action invoked are wide ranging - breach of fiduciary duty, negligence, breach of contract and misrepresentation. In response to the court, Mr. Orr QC candidly acknowledged that, in its present constitution, the only defence/counterclaim raised by the Defendant **exclusively** in the current proceedings and not replicated in the related Queen's Bench action is the alleged estoppel bearing on the guarantee element of the Plaintiff's claim. As noted above, this is based on Mr. Whelan's alleged representations/promises. The proliferation of litigation generated by the Odyssey development and subsequent events and involving the Plaintiff, the Defendant and others is illustrated in the recent procession of decisions of the High Court: I refer to ***Odyssey Cinemas –v- Village Theatres and Sheridan Millennium*** [2008] NICH 8, ***Ward –v- Anglo Irish Bank Corporation*** [2011] NICH 7, ***Odyssey Pavilion and Sheridan –v- Ward and Anglo Irish Bank Corporation*** [2011] NICH 10 and ***Curistan –v- Keenan*** [2011] NICH 23. Amongst this quartet of decisions, the main focus in the present context is on the judgment of Deeny J in ***Ward***, which concerned an application by the company, Ward (a member of the Sheridan Group), for an order restraining the Plaintiff from presenting a winding up petition. This judgment focussed particularly on the aborted sale of the Odyssey asset to "PBN". The judge held:

> "[11] … *I find that there is at least an arguable case that the bank was under a fiduciary duty or other duty of care to SML* [Sheridan Millennium Limited] *thereafter as agent or quasi agent*".

The judge further held that there was a "*clearly arguable case*" that the real reason for the aborted sale to PBN was the discovery that one Mr. Kearney was one of ten clients of the Plaintiff who had been given non-recourse loans totalling €451 million to finance the purchase of shares in the Plaintiff. This judgment was given on 15th April 2011. On behalf of the Plaintiff, it is submitted that, over one year later, the prima facie arguable case reflected in paragraphs [11] and [14] of the judgment of Deeny J has not developed into any particularised claim by the Defendant. Furthermore, it is pointed out that the Ward Company is now in liquidation. However, as I have already recorded, this claim is clearly being pursued in the related Queen's Bench action by the Curistans and four other corporate entities, including Ward.

[15] The arguments of Mr. Hanna QC and Mr. Colmer on behalf of the Plaintiff draw attention to the consideration that, as regards all three elements of the Plaintiff's claim, the Defendant is sued in his personal capacity. This, it is argued, is to be contrasted with the counterclaim and set off ventilated in the Defendant's affidavits, which relate exclusively to relationships and arrangements between the Plaintiff and certain corporate entities in which the Defendant had a substantial

interest. In ***Esso Petroleum –v- Milton*** [1997] 1 WLR 938, Simon Brown LJ formulated the governing principle in these terms:

> *"For equitable set off to apply it must therefore be established first, that the counterclaim is at least closely connected with the same transaction as that giving rise to the claim and, second, that the relationship between the respective claims is such that it would be manifestly unjust to allow one to be enforced without regard to the other".*

The governing principles are rehearsed clearly and eloquently in ***Halsbury's Laws of England, Civil Procedure*** [Volume 12, 5th Edition 2009] paragraph 653:

> *"The right conferred by the Statutes of Set-off was a right to set off mutual debts arising from transactions of a different nature which were due and payable and could be ascertained with certainty at the time of pleading. Thus no legal set-off could exist against a claim which sounded in unliquidated or uncertain damages, nor could a claim which sounded in such damages be set off at law against a claimant's claim[7]. The fact that a claim was framed in damages precluded the raising of a set-off at law, notwithstanding that the claim might have been differently framed in a way which would have permitted such a set-off. Where a claim for a liquidated debt was joined by a claimant with a claim for damages, set-off at law might only be pleaded in defence to the former claim. Set-off at law operates as a defence.".*

I refer also to paragraph 662:

> *"Where a cross-claim for a sum of money is so closely connected with the claim that it goes to impeach the claimant's title to be paid and raises an equity in the defendant, making it unfair that he should pay the claimant without deduction, the general rule is that the defendant may deduct with impunity the amount of the cross-claim, or raise it by way of equitable defence when sued[1]. The element of impeachment requires, in the absence of an independent equitable ground, a sufficiently close connection between the claims. This is not necessarily to be equated with a requirement that the claims arose out of the same transactions, though there is some support for such a proposition. If the cross-claims arise out of separate transactions, they may not be sufficiently connected. It is not enough that the claims arise out of the same contract.*

> *Nor is it necessarily enough that the cross-claim is related to the transaction on which the claim is based. It has been said that the cross-claim must go to the root of the claimant's claim or that it must question, impugn or disparage the title to the claim or that the claims must be interdependent. There is some support for the proposition that equitable set-off is available whenever the cross-claim arises out of the same transaction as the claim or out of a transaction that is closely related to the claim. But the impeachment test was subsequently confirmed at the highest level, though it has been linked subsequently to the notion that the cross-claim will impeach the claimant's claim if the cross-claim is so closely connected with the claim that it would be unfair not to allow a set-off. Because the impeachment test is unfamiliar to modern lawyers, the House of Lords has re-stated the test so that an equitable set-off may arise if there is a cross-claim flowing out of and inseparably connected with the dealings and transactions which also give rise to the claim.*
>
> *The cross-claim must be for a sum of money, whether liquidated or unliquidated. As to the claim, it is probable that set-off can only be raised in defence to a money claim, and uncertain whether it may be raised only in defence to a liquidated money claim.".*

[16] From these passages and the decided cases upon which they were based, one distils three main principles. The first is that an equitable set off must be a claim for a liquidated amount. The second is that it must satisfy the test of sufficient nexus with the Plaintiff's claim. The third principle, closely related to the second, is that the cross claim must be so closely connected with the Plaintiff's claim that it would be unfair to disallow the pursuance of a set off. In ***Bank of Boston –v- European Grain and Shipping Limited*** [1989] AC 1056, the House of Lords approved the test formulated by Hobhouse J at [1987] 1 Lloyds Reports 239 (pp. 254 – 257), which couched the counterclaim as flowing out of and inseparably connected with the contract between the parties, thereby operating as a defence by way of equitable set off to the Plaintiff's claim.

[17] In its recent judgment in ***Ulster Bank –v- Taggart*** (MCCL 8540, 22/06/12), this court formulated the principles governing the determination of Order 14 applications in the following terms:

> *"[33] I consider that Order 14 proceedings may properly be viewed as an exception to the general practice in this jurisdiction whereby, as a reflection of the principles of adversarial litigation and oral inter-partes hearings, faithful to the common law tradition, characterised by the*

> *examination-in-chief and cross-examination of witnesses, duly supplemented by appropriate judicial questioning, a full blown trial is the well established norm. I consider that one of the tools to be applied in the determination of Order 14 applications is that of* ***confidence****. The court, having considered the totality of the available evidence and the parties' competing arguments, must be sufficiently confident that the Defendants' resistance to the Plaintiffs' claim can be fairly and properly dismissed on paper, without a trial characterised by the elements, procedures and safeguards of conventional adversarial litigation. Summary judgment is appropriate only where the court is satisfied that, fairly and realistically, the Plaintiffs' case is unanswerable.*"

The court concluded:

> "[35] *The degree of confidence which is a pre-requisite to any summary judgment order is lacking. Similarly lacking are the ingredients of irresistible potency (vis-à-vis the Plaintiffs) and impotent resistance (vis-à-vis the Defendants). In circumstances where there are obvious doubts, questions, uncertainties and obscurities, I am clearly of the view that the evidential matrix in the present case will remain incomplete, uncertain and obscure until all of the conventional adversial trial processes have been exhausted. Given this analysis and conclusions, I decline to explore the legal principles bearing on the defences ventilated: this exercise simply does not arise.*"

The thrust of the Plaintiff's case is that, on any showing, the defences which the Defendant wishes to ventilate are unsustainable to the point of intrinsic, incurable and irredeemable unviability. They are met, and destroyed, it is contended, by a series of knock out blows from the Plaintiff's quiver.

[18] As the hearing progressed, both parties' counsel concurred with the suggestion that the options open to the court are the following:

(i) To allow the appeal, thereby acceding to the application for summary judgment, with a conventional short stay of execution.

(ii) As per (i), but granting a lengthy stay, to enable the related Queen's Bench action to be completed.

(iii) To refuse the appeal, granting the Defendant unconditional leave to defend.

(iv) To refuse the appeal, granting the Defendant conditional leave to defend.

(v) To stay the appeal at this stage, pending completion of the related Queen's Bench action.

It is clear from The Supreme Court Practice 1999, Volume 1, pp. 179-180 (especially), that in determining summary judgment applications the court exercises a broad discretion. It seems to me that the breadth of this discretion is augmented, informed and influenced by the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature. I consider that there is, as a minimum, a clear association between these summary judgment proceedings and the related Queen's Bench action. I am also mindful of the currently adjourned Order 88 repossession proceedings brought by the Plaintiff against the Curistans. When one views this broader canvas, the current appeal assumes something of a satellite character. Moreover, and fundamentally, I consider that it raises issues in a summary judgment forum which will, to a large extent, inevitably be explored and ventilated in full in the *inter-partes* context of the related Queen's Bench action. The evidential matrix before this court is undeniably incomplete. It amounts to a snapshot only of the broader picture. At this juncture, I prefer to guard against unnecessary fragmentation and possible resulting injustice. I conclude that the related Queen's Bench action should proceed, while the court's final determination of this appeal is deferred. Both parties will be able to consider whether – and, if so, in what manner and to what extent – the central elements of the dispute being litigated *on both sides* in the present action can be incorporated in the other action.

[19] I shall proceed to fix a trial date and give all necessary pre-trial directions in the associated Queen's Bench action. This appeal stands adjourned to the trial of the latter.

[20] I emphasize that this judgment does not purport to make concluded findings of fact or otherwise.