THE HIGH COURT

[2026] IEHC 476

[Record No. 2020/7570P]

BETWEEN

AIDAN KELLY

PLAINTIFF

AND

KEN FENNELL, LINK ASSET SERVICES & HAVBELL DAC

DEFENDANTS

[2026] IEHC 476

[Record No. 2024/106CA]

BETWEEN

HAVBELL DAC

PLAINTIFF

AND

AIDAN KELLY

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered electronically on the 23rd day of July 2026.

Introduction.

1. This judgment deals with a preliminary issue that arises in two separate actions between Mr. Kelly, acting as a litigant-in-person, and primarily, Havbell DAC, the assignee of the original loans and underlying securities, which had been given by Mr. Kelly to the original lender Irish Permanent in 1999.

2. As the parties appear in different roles in the two actions, it will be convenient for the purposes of this judgment to refer to the original lender, which was Irish Permanent, which later changed its name to Irish Life and Permanent, and further changed its name to Permanent TSB, as "*the bank*". Mr. Kelly will be referred to as "*the borrower*". Havbell, which took an assignment of the loans and underlying securities from PTSB on 19 June 2015, will be referred to as "*Havbell*".

3. In the Circuit Court proceedings bearing title *Havbell v Kelly* (High Court Record No. 2024/106 CA), which was commenced on 31 August 2018, Havbell is seeking an order for possession against the borrower in respect of his residence at Brooklands, Kindlestown, Delgany, Co Wicklow (hereinafter "*Brooklands*").

4. The proceedings were commenced in the Circuit Court. On 24 April 2024, the application of Havbell for a summary order for possession of Brooklands was refused on the grounds that as no steps had been taken by the bank to enforce its security over Brooklands in the period 2002 to 2014, the mortgagee's title was extinguished at that date. The matter comes before this Court as a Circuit Appeal.

5. In the proceedings bearing title *Kelly v Fennell & Ors.* (Record No. 2020/7570 P), the borrower is suing the receiver who was put into possession of a commercial premises owned by the borrower known as Unit 20, Beechwood Close, Boghall Road, Bray, Co Wicklow (hereinafter "*Unit 20*"), and who sold it at auction on 12 November 2020. He is sued as the first defendant. The borrower is also suing the debt servicing agent, as second defendant; and Havbell, as third defendant.

6. He seeks damages on the following grounds: that Havbell as asignee of the mortgagee's interest, had no legal right to appoint the receiver in 2018, as the bank's title as mortgagee had been extinguished in 2014, before the bank had purported to transfer the loans and underlying securities to Havbell in 2015. It is alleged that the receiver had no lawful authority to take possession of Unit 20; nor to sell it. It is pleaded that even if the receiver had lawful authority to sell the property, he breached his duty as receiver by selling it at a gross undervalue. Finally, it is pleaded that Havbell had acted unlawfully and in breach of contract in appointing the receiver because it had reached an agreement with the borrower that it would accept the sum of €1m in full and final payment of all debts due by the borrower, but it wrongfully reneged on that agreement before it could be implemented. It is pleaded that as a result of these matters, the borrower has suffered loss and damage.

7. For the purpose of the trial of the preliminary issue, it was accepted that the borrower and his wife (since deceased) took out two loans from the bank in 1999, which were secured by mortgages over the lands at Brooklands. At the same time, they also took out two further loans with the bank, which were secured against Unit 20.

8. It was accepted that the borrower and his wife ceased making any repayment of the loans since 2002. No further payments were made by them thereafter. The borrower's wife died in October 2003.

9. It was accepted that the bank did not issue any proceedings to recover the loans or enforce the securities in the period 2002 to 2014. It was accepted that the bank purported to transfer the loans and securities to Havbell on 19 June 2015.

10. It appears that on 31 December 2025, Havbell transferred their interest in the loans and underlying securities over Brooklands to BCM Global ASI Limited (hereinafter "*BCM*"), formerly known as Link Asset Services. BCM are already a party to the plenary proceedings brought by the borrower, but they are not yet a party to the Circuit Appeal brought by Havbell.

11. In an affidavit sworn on 16 June 2026 by Ms. Elaine McNally, the solicitor acting for Havbell and the other defendants in the plenary proceedings, it was indicated that BCM intended to make an application either to be substituted as plaintiff in the Circuit Appeal, or to be joined as a co-plaintiff to that appeal, being the appeal brought by Havbell against the refusal in the Circuit Court of a summary order for possession over Brooklands.

12. At the hearing of the preliminary issue on the statute of limitations point, the receiver, BCM (under their former title Link Asset Services) and Havbell were jointly represented by the same legal team.

13. The net issue before the court on the trial of the preliminary issue is whether Havbell's proceedings against the borrower, as an assignee of the loan and underlying securities, were statute barred against the borrower as and from 2014, having regard to the provisions of ss. 36 (1)(a) and 33 of the Statute of Limitations 1957 (as amended).

<u>Background – (a) General Overview.</u>

14. There is a complicated and in many respects tragic background to the two sets of proceedings that are behind the preliminary issue that falls for determination in this judgment. I will give a brief synopsis of the general background so as to put the preliminary issue and more particularly, certain correspondence that is relied upon by Havbell, in its proper context.

15. As already noted, the borrower and his wife took out four loans with the bank pursuant to letters of loan offer in March 1999. Two of the loans taken out were secured over Brooklands and a further two loans were secured on Unit 20.

16. At that time, the borrower was engaged in his own manufacturing business. His wife had been suffering with cancer since in or about 1990. In the final two years of her life, the family moved to Mexico so that she could avail of treatment there. Unfortunately, that treatment was not successful. The borrower's wife died in October 2003.

17. The borrower returned to Ireland with his children. He accepts that he was not able to make any repayments on the loans since 2002. At some point he entered into an agreement with a Mr. & Mrs. Grumley to subdivide Unit 20 and to sell part of it to them. It appears that a contract was signed which required the borrower to carry out certain works to the subdivided unit before it was to be transferred to the purchasers.

18. The borrower appears to have requested an increase in his overdraft facility with the bank. That was refused. He then applied for a further loan from the bank to enable him to carry out the required works to Unit 20. The bank acceded to that request, but on terms that were not acceptable to the borrower.

19. It appears that proceedings for specific performance of the contract were issued by Mr. & Mrs. Grumley against the borrower. These were subsequently altered to a claim seeking rescission of contract, return of deposit and damages. The court is not aware of the outcome of these proceedings.

20. As already noted, the bank transferred its interest in the loans and in the underlying securities to Havbell in June 2015.

21. On 15 May 2018, Havbell sent a letter of demand to the borrower. In that letter they referred to the four loan accounts; they stated that the debt outstanding at that time was in the order of €1.4m and they referred to the mortgaged properties. The letter went on to state that as the borrower had been in default of making two or more of the repayments due under the loans, Havbell were formally demanding that the borrower should discharge the total sum outstanding within 10 days from the date of that letter. The letter went on to state that the borrower was required to deliver up possession of the property further to the security that he had provided over each property.

22. On 8 June 2018 Havbell appointed a receiver over Unit 20. By letter of the same date, Mr. Fennell, the receiver, wrote to the borrower informing him that he had been appointed receiver over that property.

23. By letter dated 12th July 2018, the solicitor acting for Havbell wrote to the borrower demanding repayment of all sums then outstanding and demanding that he deliver up possession of Brooklands.

24. On 31 August 2018, Havbell commenced summary possession proceedings in the Circuit Court against the borrower seeking an order for possession in respect of Brooklands.

25. On 15 October 2020, the receiver put Unit 20 on the market for sale. According to the borrower, it was sold at auction by the receiver on 12 November 2020.

26. On 9 November 2020, the borrower instituted his plenary proceedings against the receiver, Link Asset Services and Havbell. The nature of those proceedings has been described earlier in this judgment.

27. On 24 April 2024, the application for a summary order for possession of Brooklands as brought by Havbell, was dismissed in the Circuit Court. The order of the court merely recites that as it was appearing to the court that the plaintiff had failed to prove their claim on foot of the Civil Bill therein, the plaintiff's claim therein was dismissed. There was no order as to costs. According to the borrower, the learned Circuit Court Judge dismissed Havbell's application on the grounds that as more than 12 years had elapsed since the right to possession had first accrued, the mortgagee's title had been extinguished pursuant to s.33 of the Statute of Limitations 1957 as and from 2014.

28. On 2 May 2024, Havbell lodged a notice of appeal against the order made in the Circuit Court in the possession proceedings.

29. On 26 June 2025, the borrower obtained an order permitting him to amend his statement of claim in the plenary proceedings to plead, *inter alia*, that Havbell had reneged on an agreement reached between the parties whereby it would accept the sum of €1m in full and final settlement of all sums due by the borrower to it. The borrower pleaded that these terms had been agreed in principle, but Havbell wrongfully refused to execute or complete the agreement.

30. On 31 December 2025, Havbell transferred its interest in the loans and its securities over Brooklands to BCM, which had formerly been known as Link Asset Services.

31. When the Circuit Appeal in the possession proceedings and the borrower's plenary action came into the Non-Jury/Judicial Review list in the High Court, the list judge directed that they should be heard together. The actions were originally listed for hearing over six days. However, prior to the hearing, the parties agreed that the trial of the issue concerning the statute of limitations point should be dealt with as a preliminary issue. That issue was heard before this Court over two days in June 2026.

General Background – (b) Relevant Correspondence.

32. Havbell has submitted that the bank's entitlement to the debt created by the loans and its title to Unit 20 and Brooklands as mortgagee, were not extinguished pursuant to the provisions of the Statute of Limitations as alleged by the borrower.

33. Havbell submitted that in several pieces of correspondence during the currency of the original limitation period, which commenced in 2002, the borrower had acknowledged the debt and the title of the mortgagee within the meaning of ss. 52, 56 and 58 of the Statute of Limitations 1957. It was submitted that in these circumstances, the 12 year limitation period provided for in ss. 33 & 36(1)(a) of the Statute of Limitations, was reset; such that the proceedings instituted by Havbell are not statute barred.

34. It is necessary to give a brief summary of the correspondence relied upon by Havbell in this regard. The first letter relied upon is an open letter which was sent by the solicitors then acting for the borrower to Mr. Peter Keegan, a manager of PTSB, dated 18 December 2006. The letter refers to the mortgages over both the commercial property at Unit 20 and the residential property at Brooklands. It informs Mr. Keegan that the lands at Brooklands had been rezoned to permit the development of housing units thereon. It was indicated that this would cause a substantial increase in the value of the lands. It was estimated that Unit 20 had a current value of €1.6m and possibly as much as €2m. The letter stated that in these circumstances, it was suggested that the borrower's two properties represented the best type of collateral for the bank in a strongly performing location. It stated that the security which the bank was holding in respect of its dealings with the borrower had radically strengthened.

35. The letter went on to outline that the borrower was experiencing cash flow difficulties at that time. An increase in the overdraft facility was requested. The letter noted that the bank already had an undertaking from the firm of solicitors to repay all the arrears due to the bank on all four mortgage accounts that had been referred to earlier in the letter. It went on to state that the borrower had authorised them to give a further undertaking: that out of the expected proceeds of the sale of Unit 20A (the new sub-divided unit), to redeem in full the entire of the two commercial mortgages secured on the commercial premises; to redeem in full all other non-mortgage liabilities to PTSB, including the overdraft facility and including interest due at time of settlement; to pay off all arrears outstanding on the two residential mortgages; and in the unlikely event that planning permission was not granted for the subdivision of Unit 20 by the end of March 2007, the borrower would undertake to immediately place the entire of Unit 20 on the market with the benefit of it its existing planning permission in order to fulfil the foregoing items of undertaking.

36. The letter further stated that the borrower proposed that once the two commercial mortgages had been redeemed in full and all arrears on the residential mortgages had been paid, together with all other non-mortgage liabilities, he would revert to paying interest only on the two residential mortgages for a period of six months from the settlement date of the commercial loans, whereafter he would revert to full capital and interest repayment from them on. The letter went on to state that the borrower proposed to redeem in full the two residential mortgages from further disposals as soon as practicable, but in any event before 30 June 2008. It was stated that it was the borrower's intention to repay the monies in full well before that date. The letter went on to request a further overdraft facility from the bank.

37. The second letter relied upon by Havbell as constituting an acknowledgement of the debt and of its title as mortgagee, is a letter from the borrower's accountant dated 24 April 2008, which was addressed to Mr. Gareth Kavanagh, in the collections department of the bank. That letter referred to the illness of the borrower's wife leading to her death in 2003. It informed the bank that the borrower and his family had gone to Mexico in an effort to secure treatment for his wife. They had resided there for two years. The letter went on to indicate that in or about May 2007, the borrower had entered into a contract with a Mr. & Mrs. Grumley to subdivide Unit 20 and to sell a portion of it to them for in or about €935,000 (the exact figure being hard to decipher on the copy of the letter before the court).

38. The letter went on to state that under the contract of sale concerning the subdivision of Unit 20, the borrower had undertaken to carry out substantial works to the unit prior to delivery to the purchasers. It was stated that in order to proceed with that transaction, the borrower would require a further loan from the bank of €300,000. The letter stated that if the loan was provided, the borrower would agree, *inter alia,* to use his best efforts to secure a sale of Unit 20. He agreed to discharge the agreed amount for principal and interest for the loans outstanding on Unit 20 on completion of the sale. He agreed to clear the arrears on the loan secured on his family home in Delgany, Co Wicklow and to keep repayments up to date.

39. The two pieces of correspondence referred to above were both open correspondence. They were not marked "*without prejudice*".

40. Havbell also seeks to rely on several pieces of correspondence that were marked "*without prejudice*". The first of these, is a letter dated 12 August 2009, which was sent by the borrower to Mr. Keith Brady, in the commercial collections department of the bank. The letter referred to the premises at Unit 20 and referred to the mortgage account numbers. It stated that the borrower was very willing and had been consistent in his efforts in trying to regularise his arrears/affairs with the bank within the shortest possible timeframe. He stated that he was doing his best to achieve that result. He went on to complain that there had been delay on the part of the bank in dealing with him. He stated that notwithstanding the delay on the part of the bank and the absence of his solicitor on holidays, he was confident that if the bank showed understanding and forbearance in the matter; upon the return of his solicitor from holidays, they would be in a position to carry out a review and to update Mr. Brady as requested in relation to progress in the matter.

41. The next letter relied upon is a letter dated 11 April 2015 from the borrower to Mr. David Fassbender in the commercial division of the bank. It was headed in relation to the four mortgage accounts, being the two accounts on Unit 20 and the two accounts on Brooklands. The letter began by stating that the borrower wished to reassure the bank of his commitment to continue to engage with the bank and of his resolve to try to find a just and fair resolution to the exceptional and unique circumstances concerning the above referenced mortgage accounts and related matters. The borrower stated that his son had experienced significant mental health issues. The letter went on to assure the bank that the borrower was determined to find a way to make progress on the accounts and associated matters in the coming months. He stated that he was aware that there was correspondence from the bank that required his attention. He stated that he was doing his utmost in very challenging and vulnerable personal circumstances to deal with all outstanding correspondence as quickly as possible.

42. In the letter the borrower informed Mr. Fassbender that a date for the High Court proceedings relating to the contract of sale in relation to the subdivided portion of Unit 20 had not yet been received by him. He went on to state that he believed that there were very legitimate questions over the balances due on the mortgage accounts concerning interest and charges applied and which he alleged were being accrued inappropriately. He ended by stating that he would be grateful if the bank would take all the foregoing into consideration and afford him the necessary time to catch up on any outstanding correspondence. He stated that he would endeavour to be in contact with the bank within the next four to six weeks.

43. It is appropriate to note at this point in the chronology that the letter of demand which has been referred to earlier in the judgment was sent by Havbell to the borrower on 15 May 2018. That was followed by a formal letter in similar terms from Havbell's solicitor on 12 July 2018. On 31 August 2018, Havbell issued its Civil Bill seeking possession of Brooklands.

44. The next relevant correspondence relied upon by Havbell is a letter dated 17 July 2019 from the borrower to Mr. Keith Masterson of Link Asset Services. It was in reply to an email dated 4 July 2019, which had been sent by Mr. Masterson to Mr. Chris Van der Lee, who had taken over acting as solicitor for the borrower. In that email, Mr. Masterson stated to Mr. Van der Lee that Havbell had agreed in principle to settle the borrower's exposure to them at €1m. That was subject to the following conditions: the timeline involved; the structure of the settlement; and how the borrower proposed to deal with the outstanding judgments against him. The email stated that once they had clarification around those points, and subject to Havbell's approval, they could arrange for formal approval to be issued. The borrower's solicitor was asked to respond with a proposed timeline of action points so that he could set Havbell's expectations accordingly.

45. It was in response to that email that the borrower wrote his letter of 17 July 2019. He noted that subject to formal approval, Havbell would be willing to settle his indebtedness for €1m. The letter stated that while receipt of the email of 4 July 2019 would allow the borrower to progress matters with his investors, it would take some time to finalise matters. He stated that a proposed timeline was set out in the letter. He went on to state that in those circumstances he and his solicitors were taken aback by the terms of a further email that had been sent on 11 July 2019. The Court has not been furnished with a copy of this email.

46. The letter went on to state that the borrower had only been able to consult with his solicitor in the previous two days on 15 July 2019. In relation to the proposed timeline, the borrower stated that having discussed matters with the investors, he was satisfied that the commercial aspects, the tax structures and related legal matters could be concluded within a few weeks with the expectation that all matters would be concluded and funds would be available by the end of October 2019. In relation to the structure of the settlement, the borrower confirmed that all payments in respect of the agreed settlement sum would be structured so that they would be paid to Havbell through his solicitor who would be handling the legal title aspects of both the investment and settlement deals on his behalf.

47. Finally, the borrower stated that in relation to outstanding judgment mortgages, he was satisfied that all but one of those were in excess of twelve years old and therefore it was his opinion that any action on foot of them was statute barred. The only remaining judgment, was a judgment in favour of AIB for €23,712.67. The borrower stated that he was satisfied that that debt inclusive of costs could be settled for €24,394.67. He stated that provision was been made to settle that amount in the context of the formal completion of the deal with Havbell. He stated that if Havbell required any further information they should contact his solicitor.

48. The letter included a letter from the borrower's financial adviser, which included the advisor’s view on Havbell’s potential CGT exposure. He finished by stating that the email of 4 July 2019 had been a great help to him in enabling him to progress matters. He stated that he had been in regular contact with investors and they were currently reviewing the matter in order to progress matters as quickly as possible. He stated that the investors had indicated that both properties, being Brooklands and Unit 20, would be required to form part of the proposed deal. He stated that in order to move forward, he needed Havbell's confirmation that the above was in order. He stated that he would be grateful to hear from them by return.

49. The next letter is not relied upon as constituting an acknowledgement of the debt or title of the mortgagee, as it is a letter from Link Asset Services to the borrowers then solicitor Mr. Van der Lee dated 6 August 2019. In that letter, it was indicated that in order to consider the borrower's application for an alternative repayment arrangement (ARA) and the proposed settlement of €1m being financed by Mespil Equity; the lender would need to be informed of the structure of the proposal; the timeline for implementation of the proposal; and details on the proposal, in particular as to how it was intended to overcome the judgment mortgages. To that end the borrower was asked to provide information on or before 30 August 2019 in relation to written confirmation from Mespil Equity that they were agreeable to provide the funds by 31 October 2019; the confirmed structure of the settlement; and written confirmation from AIB that they were agreeable to settle their judgment for circa €24,000 and that the payment would be made on or before 30 October 2019.

50. That letter was replied to by a letter from the borrower's solicitor dated 30 August 2019. He informed the lender that notwithstanding that there had been talks between the borrower and Mespil Equity, the investors would not provide the confirmation in writing that had been requested by the lender. It stated that Mespil Equity remained interested in the project. In addition, the borrower had been continuing negotiations with a "*very experienced and long established investor*", which negotiations were apparently at an advanced stage. It went on to state that the borrower would be seeking to agree a timeline and structure for a deal with the investor and would request proof of funds to allow the deal to be concluded at the €1m price that the lender had confirmed that it would accept in full payment of the borrower's indebtedness. The letter concluded by stating that the borrower had a determination to bring the matter to a satisfactory conclusion in the shortest possible timeframe. He assumed that the lender was like-minded in that regard. It was stated that the borrower was to have further engagement with the alternate investor in the following weeks.

51. Havbell seeks to rely on an email from the borrower's solicitor dated 6 March 2020 in which the solicitor stated that the initial structure of the alleged compromise was to be a bridging loan to meet the agreed settlement, which without prejudice to the borrower's legal position, he had agreed to be paid to Havbell and to discharge any enforceable judgment mortgage secured on the property at Brooklands. In return a first legal charge was to be granted over the two properties. The bridging loan was stated to be the fastest way of securing funds. The email went on to state as follows:

> "*I also want to be clear that it is our understanding and which has been communicated to the investor/borrower, that your client will accept the*

settlement sum of €1m as you indicated in previous correspondence. This formed the basis of all of Aidan's negotiations with the investor/lender. I also want to be clear that my client's formal position is that he does not accept or concede that any sum is due to your client, but will agree to discharge the settlement sum to fully conclude all claims made by your client. If the matter proceeds through litigation without agreement, then any agreement by my client to discharge the settlement sum will be deemed to have been withdrawn and he will require a forensic examination of all sums that your client claims are due to it by my client. Your client will be put on full proof of same."

52. The email concluded with a request on behalf of the borrower to have the possession proceedings adjourned to enable him to consult with a personal insolvency practitioner to explore options available to him to include, but not limited to, a personal insolvency arrangement.

53. That concludes the summary of the correspondence on which Havbell relies as establishing an acknowledgement of the debt and/or title so as to restart the limitation period provided for under the Statute of Limitations 1957.

Submissions of the Parties.

54. The borrower rested his case on the wording of ss. 33 and 36(1)(a) of the 1957 Act. It was submitted that having regard to the provisions of these sections, the debt that had been secured by the mortgages and the title of the mortgagee to the land comprised in the mortgages had been extinguished twelve years after the mortgagee's right of action first accrued. As the borrower had not made any repayments on the loans since 2002, this meant that the debt and the title of the mortgagee was extinguished as and from 2014.

55. It was submitted by the borrower that in these circumstances any title held by the bank as original mortgagee, or by Havbell or BCM as assignees of its interest, had been extinguished as and from 2014, being twelve years after default in payment of the loans by the borrower in 2002.

56. The borrower denied that there had been any acknowledgement of the debt sufficient to restart the running of the twelve year limitation period provided for in the Statute of Limitations.

57. On behalf of Havbell and the other defendants to the plenary proceedings, it was submitted by Mr. Handy SC that even taking 2002 as the start of the limitation period, there were acknowledgements by or on behalf of the borrower of both the debt and the title of the mortgagee in the correspondence summarised above on numerous occasions, both within the initial limitation period and thereafter. It was submitted that these acknowledgements reset the clock in terms of the commencement of the limitation period, such that Havbell's proceedings, which issued in 2018, were not statute barred under the provisions of the 1957 Act.

58. Insofar as some of the acknowledgements were contained in correspondence headed "*without prejudice*", it was submitted that in the borrower's amended statement of claim he had pleaded that there had been a concluded agreement whereby Havbell had agreed to accept €1m in repayment of all monies owing by the borrower to them. It was further pleaded that the bank had wrongfully reneged on that agreement.

59. It was submitted that where the borrower had implicitly deployed the without prejudice correspondence to establish his claim in this regard, he had thereby waived any privilege attaching to it. Therefore, Havbell could rely on the correspondence as evidence of acknowledgement of the debt and of their title as mortgagee, which was sufficient to restart the running of the twelve year limitation period.

60. It was submitted that in these circumstances, the court should find that neither the appointment of the receiver by Havbell in 2018, or the commencement of the possession proceedings by it in the Circuit Court in 2018, were outside the relevant limitation period provided for in the 1957 Act.

Relevant Provisions of the Statute of Limitations 1957.

61. The relevant provisions of the 1957 Act can be summarised as follows: s. 13(2)(a) provides that for an action to recover land brought by a person other than a State authority, no such action shall be brought after the expiration of 12 years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person. Section 24 deals with the extinction of title to land after the expiration of the period limited for actions to recover land. It provides that subject to s.25 of the 1957 Act and to s.49 of the Registration of Title Act 1964, at the expiration of the period fixed by the 1957 Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished.

62. Section 33 is of particular relevance in this case, it provides as follows:

> "*At the expiration of the period fixed by this Act for a mortgagee to bring an action claiming sale of the mortgaged land, the title of the mortgagee to the land shall be extinguished.*"

63. Section 36 deals with the limitation of actions to recover principal money secured by a charge on land or personal property. It provides that no action shall be brought to recover any principal sum of money secured by a mortgage or charge on land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

64. Section 38 provides that at the expiration of the period fixed by the Act for a mortgagee of land to bring an action to recover the land or for a person claiming as mortgagee or chargeant to bring an action claiming sale of the land, the right of the mortgagee or such person to the principal sum and interest secured by the mortgage or charge shall be extinguished.

65. The provisions in relation to acknowledgement of a debt or of title to land are contained in Chapter 3 of the Act. Section 50 provides that the term "*acknowledgement*" means an acknowledgement made pursuant to the provisions of the Act that is made in accordance with s.58.

66. Section 52 provides that where the right of a mortgagee of land to bring an action to recover the land has accrued, and either (1) the person in possession of the land acknowledges the mortgagee's title to the land, or (2) the person in possession of the land or the person liable for the mortgage debt acknowledges the debt, the right of action shall be deemed to have accrued on and not before the date of the acknowledgement.

67. Section 56 deals with acknowledgement of a debt. It provides that where any right of action has accrued to recover any debt, and the person liable therefor acknowledges the debt, the right of action shall be deemed to have accrued on and not before the date of the acknowledgement. The section further provides that where the right of action of a mortgagee of land to recover the mortgage debt has accrued, and the person in possession of the land acknowledges the mortgagee's title to the land, the right of action shall be deemed to have accrued on and not before the date of the acknowledgement.

68. Finally, the requirements for a valid acknowledgement under the Act are set out in s.58. It provides that every acknowledgement shall be in writing and be signed by the person making the acknowledgement. The section further provides that the acknowledgement may be made by the agent of the person by whom it is required to be made and shall be made to the person or the agent of the person whose title, right, equity of redemption or claim (as the case may be) is being acknowledged.

69. Section 59 provides that an acknowledgement of title to any land by any person in possession thereof shall bind all other persons in possession during the ensuing period of limitation.

Discussion and Conclusions.

70. Insofar as the borrower submitted that upon the expiry of the original twelve-year limitation period in 2014, the mortgagee's title was automatically extinguished pursuant to s.33 of the 1957 Act; that is an incorrect interpretation of the legal effect of that section.

71. In *Mars Capital Finance Ireland DAC v Walsh* [2025] IESC 45, the Supreme Court held that where a mortgagee's title is extinguished under s.33 of the 1957 Act, that is still a matter to be pleaded as a defence by the mortgagor, or person in possession. The court further held that title is only extinguished between the dispossessor and the owner of the land. Murray J., delivering the judgment of the court, stated that it is only if the claim of the mortgagee against the mortgagor is barred that extinguishment occurs, and the claim is only barred if the necessary conditions are met and if the mortgagor is in a position to invoke the limitation period under s.13 of the 1957 Act.

72. Murray J. went on to state that in order for the period to have expired, it is necessary for the mortgagor to have enjoyed "*ordinary*" and uninterrupted possession for a period of twelve years; that the twelve years had run from a point defined by the mortgage as conferring a right to possession on the mortgagee; and that the mortgagor has not paid principal, or interest, or otherwise acknowledge the mortgagee's title during that period. It also means that the mortgagor has invoked the statute and that they had not disabled themselves from so doing. He stated that without all of these, the claim is not statute barred under s.13 of the Act, and if it is not statute barred under s.13, the mortgagee's title is not extinguished vis-à-vis the mortgagor under s.24 of the Act (see para. 69).

73. Thus, the defence provided for in s.33 of the Act has to be raised by the mortgagor and there must not be any countervailing reason why the defence should not be relied upon by the mortgagor or other person in possession of the land.

74. In the *Walsh* case, the Supreme Court held that because the mortgagor had entered into a written settlement agreement, with the benefit of legal advice, wherein he had acknowledged the debt and the underlying security and had specifically agreed that he had no claims and/or was waiving any claims he had against the plaintiff arising from the facilities, he had thereby given up the affirmative defence that the plaintiff's title had become extinguished by lapse of time. The court went on to hold that by virtue of the concluded settlement agreement the defendant was estopped from asserting a defence pursuant to s.33 of the 1957 Act.

75. In the *Walsh* case it was recognised that the making of a valid acknowledgement to pay the debt or an acknowledgement of the title of the mortgagee pursuant to the provisions of s.58 of the 1957 Act, within the original limitation period, would cause the limitation period to recommence from the date of the acknowledgement.

76. The key issue that arises for determination on this preliminary hearing is whether the borrower acknowledged the debt created by the loans and/or the title of the mortgagee during the original limitation period, so as to restart the running of time for the purposes of the 1957 Act.

77. Before looking at the correspondence relied upon by Havbell, it will be helpful to give a brief summary of the legal requirements of a valid acknowledgement for the purposes of the 1957 Act.

78. The relevant provisions of the 1957 Act, being ss. 52, 56 and 58 thereof have been summarised above.

79. The case law has established that no specific form of wording is necessary as long as there is a clear acknowledgement of the debt. In *AIB v Costello* [2019] IEHC 286 Barrett J. held that the words "*Here's why I can't pay you the money*" was sufficient to constitute an acknowledgment of a debt due by the defendant to the bank. He also held that the typed name of the defendant on the letter was sufficient to constitute his signature for the purposes of the acknowledgement.

80. Nor is it necessary for the acknowledgement to specify the exact amount of the debt being acknowledged, as long there is a clear acknowledgement of the debt and its content can be established by extrinsic evidence: *Read v Price* [1909] 2 KB 724. In *Jones v Bellgrove Properties* [1949] 2 KB 700, a statement contained in the company's accounts, which had been prepared for presentation at an AGM, stated "*To sundry creditors 7,638l , 6s, 10d.*" The plaintiff claimed that he was owed 1807l by the company. Evidence was given by the company's accountant that the plaintiff's debt was included in the sum stated in the balance sheet, which had been signed by the directors of the company and which had been presented at the AGM. It was held that the balance sheet constituted a sufficient acknowledgement of the debt for the purposes of the Statute of Limitations.

81. In *Dungate v Dungate* [1965] 1WLR 1477, which concerned a series of loans from one brother to another, it was held that a letter sent by the defendant which stated, "*Keep a check on totals and amounts I owe you and we will have account now and then... Sorry I cannot do you a cheque yet - terribly short at the moment.*" Diplock LJ. stated that "*an acknowledgement under this Act need not identify the amount of the debt and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extraneous evidence.*"

82. It is not necessary that the acknowledgement be given by the debtor; an acknowledgement by his agent will suffice. Similarly, the acknowledgement can be made to an agent of the creditor or title holder.

83. In relation to an acknowledgment of title to land, the acknowledgment need only acknowledge that the paper owner has a better title than the acknowledger's title. It need not acknowledge that he has a particular interest in the land.

84. In both *Edgington v Clark* [1964] 1 QB 367 and *Ofulue v Bossert* [2009] 1 AC 990 it was held that an offer to purchase property was capable of being a sufficient acknowledgement of title for the purposes of the Statute of Limitations.

85. In *Allen v Matthews* [2007] EWCA Civ 216 it was held that while the person acknowledging title does not have to know who the owner is, the acknowledgment must be by or on behalf of the person actually in possession of the land.

86. An offer to take a lease will ordinarily be an acknowledgement of title unless it is found instead to be an offer to compromise potential litigation: see *Dublin Corporation Lessee v Judge* [1847] 11 IR Law Rep 8.

87. Applying these principles to the first piece of correspondence relied upon by Havbell, being the open letter dated 18 December 2006, which was a letter from the plaintiff's former solicitor to a manager in the bank; I am satisfied that this letter constitutes a sufficient acknowledgement of the debt and of the mortgagee's title to the lands, to constitute an acknowledgement for the purposes of the 1957 Act. The content of that letter has been set out *in extenso* earlier in the judgment.

88. I am satisfied that given the heading of the letter which referred to the mortgages over both the commercial and residential properties; together with the statement that the bank's interest under the mortgage had been strengthened due to the rezoning of the lands for residential purposes; together with the references made to the offer of a new undertaking if a further facility was made available to the borrower and in particular in relation to the proposals for repayment of the arrears due on the loans after the proposed subdivision and sale of part of Unit 20; these are sufficient to constitute an acknowledgement of the debt and of the mortgagee's title for the purposes of the Statute of Limitations 1957.

89. This letter was an open letter. It was not written when litigation was either extant or threatened. Accordingly, there is no reason why this letter cannot be admitted in evidence for the purpose of proving an acknowledgement for the purposes of the Statute of Limitations 1957.

90. I hold that the limitation period both for recovery of the debt and for bringing an action seeking possession on foot of the mortgage, was restarted as and from the date of the letter, meaning that the limitation period was extended until 18 December 2018.

91. I am further satisfied that the second letter relied upon by Havbell, being the letter from the borrower's accountant dated 24 April 2008 to Mr. Garreth Kavanagh in the bank's collection office, the contents of which have been described in detail earlier in the judgment, also constitutes an acknowledgement of the debt and an acknowledgement of the bank's title as mortgagee to the secured properties.

92. It is not necessary to repeat the content of that letter, suffice to note that in requesting a further loan from the bank, the borrower proposed giving further undertakings to discharge the arrears due on foot of the existing loans with the bank upon the sale of Unit 20, which it was hoped would be achieved if the further loan was forthcoming. I am satisfied that this constitutes a sufficient acknowledgement for the purposes of the 1957 Act. Accordingly, the limitation period provided for under that Act was restarted for a further period of 12 years as from 24 April 2008. This letter was also an open letter. It was not written under threat of litigation, or when litigation was proceeding. Accordingly, it is admissible in evidence.

93. Having regard to these findings, the court holds that the appointment of the receiver by Havbell over Unit 20 and the institution by it of possession proceedings on 31 August 2018, were not out of time having regard to the provisions of the Statute of Limitations 1957.

94. That effectively disposes of the preliminary issue; however, for completeness I will deal with the remaining correspondence relied upon by Havbell. This correspondence differs from the correspondence outlined above, because this correspondence was all headed "*without prejudice*" or was part of a chain of without prejudice correspondence.

95. Before dealing with this correspondence, it is necessary to say something about the general privilege against production of documents in evidence. Such a privilege can arise in a variety of circumstances. If the privilege against production of a document in evidence is for the benefit of only one party; such as legal professional privilege, which inures for the benefit of the client who received the legal advice, that party may choose to waive privilege over the legal advice so received.

96. Waiver can also occur where it is required in the interests of justice. For example, if a client sues his solicitor or barrister for giving allegedly negligent advice in an action or transaction; he is deemed to waive privilege over any advices he had received from his lawyers. The rationale being that if a person is sued for giving allegedly negligent advice, they must have access to that advice for the purpose of properly conducting their defence.

97. This is an example of the principle that where a party deploys privileged material for the purpose of securing a litigious advantage, they are deemed to have waived any privilege in the relevant documentation.

98. This principle was applied in *Hannigan v DPP* [2001] 1 IR 378, where a superintendent in An Garda Síochána had summarised the content of a document that had issued by the DPP in relation to the form of trial that should take place. In considering whether the respondent had thereby deployed the document for the purposes of the interlocutory application, Hardiman J. stated that the general rule was that where privileged material is deployed in court in an interlocutory application, privilege in that and any associated material is waived. He held that because the document in question had been referred to and its contents had been summarised for litigious purposes by the party entitled to claim privilege over it; that deployment was inconsistent with an assertion either of irrelevance, or of harmful effects following from its disclosure. He stated that it seemed just and equitable that the first respondent having deployed the letter for the purposes of the application, the appellant should be entitled to have access to it to see whether it supported the proposition in support of which his opponent had deployed it. Accordingly, the appellant was granted access to the document.

99. The dicta in the *Hannigan* case was applied by Fennelly J. in *Fyffes plc v DCC plc & Ors.* [2009] 2 IR 417. That judgment concerned an appeal in relation to access to documents that had been referred to in discovery. The court affirmed the general proposition that where a privileged document had been deployed by a party as part of the litigation process, privilege in that document had thereby been waived (see paras 41 and 42).

100. In *Elsharkawy v Minister for Transport* [2024] IECA 258, the Court of Appeal endorsed the principle that where a privileged document is deployed for litigious advantage, privilege in the document is thereby waived. Butler J., delivering the judgment of the court, stated that deployment for a litigious advantage refers to the fact that the privileged material must have been deployed in relation to a matter that is in issue between the parties in the proceedings, and not merely for some coincidental or purely procedural purpose. She held that in the circumstances of that case, it was necessary for the applicant to have sight of the advice that would otherwise be covered by legal professional privilege which had been referred to by the respondent in order for the trial court to be able to fairly dispose of the proceedings.

101. I turn now to the type of privilege that arises for consideration in this case. It is the privilege attaching to "*without prejudice*" communications that are made in the course of negotiations which are held in an attempt to reach a settlement of extant or threatened litigation.

102. It has been recognised that there is a strong public interest in protecting the privileged nature of these communications. The rationale for this principle was stated by Oliver LJ. in the *Cutts v Head* [1984] CH 290 at 306:

"*That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the enquiry is the nature of the underlying policy. It is that parties should be encouraged insofar as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations, (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott Paper Company v Drayton Paper Works Limited [1927] 44 RPC 151, 156, to be encouraged fully and frankly to put their cards on the table… The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability*."

103. Similar statements for the rationale behind this privilege are to be found in the Irish authorities. In *Ryan v Connolly* [2001] 1 IR 627, Keane CJ. observed that if parties were in the position that anything they said or wrote in the course of negotiations, even when expressly stated to be "*without prejudice*" could subsequently be used against them, they would undoubtedly be seriously inhibited in pursuing such negotiations.

104. In *Purcell v Central Bank of Ireland* [2016] IECA 50, Hogan J. delivering the judgment of the Court of Appeal adopted the dicta of Rix LJ. in *Savings & Investment Bank Ltd v Finken* [2003] EWCA Civ. 1630, where he stated that if statements made in the course of without prejudice negotiations were admitted in evidence, that would be a recipe for legalism which had the danger of turning the without prejudice meeting into a potential trap and one which may be exploited by litigants who do not enter into such discussions in good faith. He also endorsed the statement by Rix LJ. that the purpose of the without prejudice rule was to encourage parties to speak frankly to one another in aid of reaching a settlement and the public interest in that rule was very great and was not to be sacrificed save in truly exceptional circumstances.

105. The privilege attaching to without prejudice communications that are made in the course of settlement discussions is not absolute. It can be waived in the following circumstances: in order to establish whether or not a concluded settlement agreement was reached between the parties; it has been held that the phrase cannot be used to exclude an act of bankruptcy: nor to suppress a threat that if an offer is not accepted certain actions would be taken; and it has been held that such communications can be looked at after the conclusion of a case to determine the question of costs. In this regard, there is provision in the Legal Services Regulation Act 2015, for the court to have regard when deciding the issue of costs as to whether any offer was made by either of the parties in advance of or during the litigation which would have constituted a reasonable offer to settle the proceedings. This would require the disclosure of without prejudice correspondence in order to determine the issue of costs.

106. Finally, it has been held that regard can be had to without prejudice negotiations to establish an estoppel and prevent a party pleading a defence under the Statute of Limitations. In *Ryan v Connolly* the plaintiff sought to establish that the defendant should not be permitted to plead the statute because it had stated that liability would not be in issue and had invited the plaintiff's solicitor on several occasions to enter into settlement discussions. The Supreme Court held that in order to determine whether the defendant was estopped from raising a plea under the Statute of Limitations, regard could be had to the without prejudice communications between the parties. However, on the facts of the case, it was held that the defendant was not estopped from making the plea.

107. There is a further consideration to the issue of waiver of privilege over without prejudice communications. It is possible for the without prejudice documents to be admitted in evidence to establish a specific fact, rather than the truth of the content of the without prejudice communications themselves. In *Briggs v Clay* [2019] EWHC 102, the moving party was seeking to rely on without prejudice negotiations that had taken place between the lawyers acting for the relevant parties. However, it was submitted that they were not seeking to rely on the without prejudice communications for the truth or falsity of anything said in them, or for any admission or implied admission therein, but only so that the trial judge could see the extent, if any, to which the insurer's lawyers had been involved in the negotiations and to see whether, as was contended by the applicant, that the insurers were in as good a position as the defendant solicitor and counsel, to have raised a particular issue, being the participating employer argument, if it was a good one that should have been raised. Having carried out a detailed examination of the law in relation to disclosure of without prejudice communications, the learned judge declined to lift the privilege attaching to the without prejudice communications that had passed between the lawyers in the course of the settlement negotiations.

108. The issue of the admissibility of without prejudice communications in evidence was considered in *Moorview Developments v First Active PLC* [2009] 2 IR 788, where Clarke J. (then sitting as a judge of the High Court) looked at the admissibility of without prejudice communications in the context of a discovery application. Having reviewed the relevant English case law at paras 95 et seq, he endorsed the statement of the law in this area as set out in McGrath on *Evidence* (2005 edition) at para 10 -128. He went on to set out his conclusions in the following way at para 98:

"I agree that that passage from McGrath on Evidence represents the law in this jurisdiction. The overriding principle is that a very heavy weight indeed needs to be attached to without prejudice privilege. The only circumstances where, therefore, evidence of without prejudice negotiations can be admitted is where, in the words of McGrath on Evidence, "it can be clearly shown that greater damage to the interests of justice would be affected by non-admission than by disclosure". The exceptions to the general rule can be seen as deriving from that principle. For example, the whole purpose behind the privilege is to encourage negotiation and settlement of litigation. That purpose would hardly be achieved if parties were precluded from leading evidence as to, at least, aspects of the negotiations, in circumstances where it was contended that the negotiations had achieved the desired end of settling the litigation."

109. The precise question as to whether a concession or admission in without prejudice correspondence that is made in the course of settlement negotiations can constitute an acknowledgement for the purpose of the Statute of Limitations 1957, does not appear to have been decided in this jurisdiction.

110. It has been considered in the courts of the United Kingdom. In *Ofulue v Bossert* [2009] 1 AC 990, the House of Lords held that while an offer to purchase property simpliciter could constitute an acknowledgement of debt for the purpose of the relevant Statute of Limitations provisions in that jurisdiction; such an offer when made in the course of settlement negotiations was protected by the privilege attaching to without prejudice communications in settlement negotiations and could not be led in evidence to establish an acknowledgment for the purposes of the relevant Statute of Limitations.

111. Hope LJ. summarised the rationale for the privilege by referring to the dicta of Romilly MR. in *Jones v Foxall* [1850] 51 ER 588, that if converting offers of compromise into admissions of facts prejudicial to the person making them were to be permitted, no attempt to compromise a dispute could ever be made.

112. Having noted that the rationale for the privilege attaching to without prejudice negotiations had been explained in *Cutts v Head* [1984] CH 20; *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280; and in *Unilever plc v Proctor & Gamble Company* [2000] WLR 2436; he stated that the explanation for the privilege could be restated as being that when a letter is written without prejudice during negotiations with a view to compromise, the protection that these words claim would be given to them, unless the other party could show that there is a good reason for not doing so.

113. In the lead judgment delivered by Neuburger LJ., he cited what he described as the "*invaluable*" judgment of Walker LJ. in the *Unilever* case, where it was stated that the cases which he had been considering:

> "*….make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties … to speak freely about all issues in the litigation … Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers … sitting at their shoulders as minders.*"

114. The conclusion reached by the Law Lords in that case was summarised in the following terms in the headnote:

> "*Dismissing the appeal (Lord Scott of Foscote dissenting), that the without prejudice rule, which was based on both the public policy of encouraging the negotiated settlement of actions and the express or implied agreement of the parties that communications in the course of such negotiations should not be admissible in evidence, extended to negotiations concerning earlier proceedings involving an issue which was still unresolved; that, although there were exceptions to the rule where justice required it, as where it was necessary to prevent the rule being used to further impropriety, reasons of legal and practical certainty made it inappropriate to create a further exception to limit the protection to identifiable admissions; that although the acknowledgement implicit in the offer to purchase had, when made, been an agreed fact, the offer had been made with the intention of settling the earlier proceedings and the issue which had given rise to those proceedings remained; and that, accordingly, in the absence of any impropriety on the part of the defendant, the without prejudice rule applied and the letter containing the offer could not be relied on as an acknowledgement of title*."

115. The principles set down in the *Ofulue* case were applied by Fancourt J. in *Briggs v Clay*. Although in that case the purpose of the application to admit the without prejudice correspondence in evidence was not to establish an acknowledgement for the purposes of the Statute of Limitations; applying the principles in the *Ofulue* case, the application to admit the without prejudice correspondence in evidence was refused.

116. I am satisfied that when considering whether the court should permit a party to admit in evidence the content of without prejudice communications, the court must have regard to the strong public policy interest that exists in encouraging parties to enter into settlement negotiations in relation to extant or threatened litigation.

117. It is in the public interest that settlement negotiations should take place.. The law encourages parties to negotiate freely in an effort to resolve their differences without going to court.

118. When negotiations are held between the parties or their representatives, it is accepted that parties may make admissions, concessions or acknowledgements, which are accepted by the parties as being made only for the purposes of the settlement negotiations. It is accepted by lawyers that if the negotiations are not successful in producing a settlement of the proceedings, the parties are entitled to revert to their original position as disclosed on the pleadings.

119. It is drilled into trainee barristers and solicitors that where settlement negotiations are not successful, they may not refer to the content of those negotiations at the hearing of the action.

120. The extensive nature of this privilege is also recognised in relation to negotiations that are held as part of a mediation. The Mediation Act 2017 provides that the court can issue a formal invitation to the parties to consider mediation, or they may elect to proceed to mediation themselves. When this is done, the mediation proceedings, including any documentation produced in the course of the mediation, are privileged. They must not be referred to by either party in the event that the mediation is not successful and the litigation proceeds to a hearing.

121. I hold that having regard to the public interest in facilitating parties conducting settlement negotiations in a full and frank manner, an acknowledgement of a debt or title made by a party in the course of settlement negotiations does not constitute an acknowledgement for the purposes of the Statute of Limitations 1957. I hold that it is merely an acknowledgement made for the purposes of the settlement negotiations.

122. Were it to be held that an acknowledgement made in the course of settlement negotiations could constitute an acknowledgement for the purposes of the 1957 Act, this would have a seriously inhibitory effect on the ability of a party to conduct settlement negotiations.

123. Parties would not be able to negotiate frankly. They would have to couch any admissions, concessions or acknowledgements with extensive caveats that such statements were not to be construed as admissions, concessions or acknowledgements for any purposes other than the settlement negotiations then being undertaken. Such formalism would be contrary to the proper and efficient conduct of settlement negotiations. It would be contrary to the public interest in promoting settlement negotiations between parties to litigation.

124. In these circumstances, I hold that even if it were held that the borrower had deployed the without prejudice communications for litigious advantage in his amended statement of claim and accepting that that involved a waiver of privilege over those communications; they will only be admissible to establish whether or not there was a concluded agreement between the parties of the nature pleaded by the borrower in his amended statement of claim.

125. I hold that the without prejudice letters relied upon by Havbell do not establish any acknowledgement by the borrower for the purposes of the Statute of Limitations 1957.

126. While this court and the House of Lords in the *Ofulue* case have reached the same result, it has been arrived at arrived at by slightly different means in each case. In *Ofulue*, the House of Lords found that the offer to purchase, which had been made in without prejudice communications in the original proceedings, constituted an acknowledgement for the purposes of their Statute of Limitations; they went on to hold that as it was made in the course of without prejudice negotiations in relation to a previous action, it was privileged from production in evidence in the subsequent action between the same parties on the same subject matter.

127. I have reached the same conclusion in this case but by a different route. I have held that as the alleged statements were made in without prejudice correspondence that was generated as part of an attempt to settle threatened or extant litigation, the relevant statements were made solely for the purposes of advancing the negotiations towards a compromise of the threatened or extant proceedings; therefore, they did not constitute acknowledgements for the purpose of the Statute of Limitations 1957.

128. In these circumstances, it is unnecessary to examine the question as to whether the privilege that attaches to such correspondence was waived because the borrower pleaded a concluded agreement in his amended statement of claim. As previously noted, the without prejudice correspondence would be admissible as evidence on the issue as to whether there was a concluded agreement of the nature pleaded by the borrower.

129. Even if I am wrong in holding that the statements made in the without prejudice correspondence did not constitute acknowledgements for the purposes of the Statute of Limitations 1957; I would hold that the without prejudice correspondence referred to, while containing an acknowledgement for the purposes of the 1957 Act; is not admissible in evidence as it is protected by the privilege attaching to without prejudice communications made in the course of settlement negotiations. Insofar as it may be held that the borrower has implicitly deployed without prejudice correspondence for the purpose of establishing the plea of a concluded agreement as contained in his amended statement of claim; I hold that the without prejudice correspondence would be admissible in evidence, but only on the issue as to whether there was in fact a concluded agreement between the parties.

Proposed Final Order.

130. Having regard to the findings of the court concerning the acknowledgements contained in the open correspondence referred to above, being the letters dated 18 December 2006 and 24 April 2008; I hold that Havbell's right of action on the debt and its title as mortgagee of Unit 20 and Brooklands, were not extinguished prior to the appointment of the receiver or the institution of the possession proceedings, both of which occurred in 2018. I hold that Havbell's possession proceedings are not statute barred. I hold that Havbell were not statute barred when they appointed the receiver over Unit 20 in 2018. That is the ruling of the court on the preliminary issue.

131. By way of indicative order as to costs, the court proposes to rule that as Havbell and the other defendants in the plenary action have been successful on the point raised in the preliminary issue, there should be an order for costs in their favour against the borrower.

132. Accordingly, the court proposes to order that the cost of the preliminary issue be awarded to Havbell and the other defendants in the plenary proceedings against the borrower; such costs to be adjudicated upon in default of agreement; the court proposes to place a stay on the execution of the costs order pending the final determination of both actions.

133. As this judgment has been delivered electronically, and given that it is almost the start of the long vacation, the parties shall have until 15 September 2026 to furnish brief written submissions of not more than 1000 words on the terms of the final order and on costs and on any other matters that may arise.

134. The matter will be listed for mention at 10.30 hours on 8 October 2026 for the purpose of making final orders.