Neutral Citation Number: [2008] IEHC 141

THE HIGH COURT

Record Number 2006 857P
[2006 No. 32 COM]

BETWEEN

THOMAS J. ROCHE

PLAINTIFF

AND
MICHAEL WYMES

DEFENDANT

Judgment of Mr Justice John MacMenamin dated 8th day of May, 2008.

1. The Tara Bula litigation, and the subsequent dispute between the main Bula promoters have now been before the courts for more than a quarter century. No recital of the facts, so redolent in length and complexity of *Jarndyce v. Jarndyce* in Dickens' Bleak House, can do justice to the personal cost, stress and anxiety which the events now to be summarised have had upon all those involved. In this, the latest chapter of this unfortunate saga, the parties were encouraged at the outset to resolve their differences, but to no avail. In the course of this lengthy hearing it has been impossible to avoid the sense that, while the sums of money involved are indeed substantial, they are now almost symbolic; the entrenched stance of the parties based on traumatic past events; predetermined by the respective roles played at critical points in the course of negotiations in the litigation, when the promoters at times must have stood on the brink of financial disaster. The plaintiff, Thomas J. Roche, has since enjoyed a success in business which can only be described as spectacular. The defendant has remained entangled in a morass of litigation. There is now apparently yet further litigation in being between the defendant's son and son-in-law relating to certain dispositions which may have some connection with the consequences of the earlier litigation. For now I turn to the events which give rise to this claim based on the equitable right of contribution.

2. The plaintiff, Thomas J. Roche, seeks a declaration that the defendant, Michael Wymes, is obliged to pay to him such sum as the Court may determine as representing a 'rateable contribution' stated to be due by Mr. Wymes to Mr. Roche on foot of payments of €9 million to National Irish Bank Ltd. (the successor in title to National Irish Investment Bank Ltd. formerly known as Northern Bank Finance Corporation Ltd.), (N.B.F.C.) and €1.4 million to Ulster Bank Ltd. (formerly known as Ulster Bank Markets Ltd. and originally known as Ulster Investment Bank Ltd.) ("Ulster"). These payments, made in 2004, were in respect of guarantees given, *inter alia*, by Thomas J.Roche and Michael Wymes to those banks, and judgments on foot of the guarantees obtained by the banks against the plaintiff, the defendant, the estate of Thomas J. Roche and Richard Wood.

3. The plaintiff, the defendant, Mr. Richard Wood, together with the late Mr. Thomas C. Roche, the plaintiffs' father (and the defendant's father-in-law), were co-guarantors to the indebtedness of Bula Ltd. ("Bula") to various banks and in particular to NBFC and Ulster. They were the main promoters of the company. The plaintiff says that, because the payments made eliminated or reduced Michael Wymes' financial obligations and insofar as he and his father's estate overpaid in discharge of these two debts, he is entitled to claim contribution from the defendant.

Background

4. Bula, a limited company incorporated in 1971, was formed to acquire lands comprising 120 acres at Nevinstown, Co. Meath. Underneath there were valuable mineral deposits. The lands were to be acquired from Patrick Wright. Thereafter the company was to exploit for sale the minerals.

5. Bula's shareholders were the State; a holding company, Bula Holdings ("Holdings"); and representatives acting on behalf of Patrick Wright (deceased). Voting control of Bula was at all material times vested in 'Holdings', an unlimited company. The shareholders of Holdings were Crindle Investments (36%), Loire Investments (24%), Bula Trust (36%) and Mr. D. Godson and Mr. F. Dillon. Loire Investments was beneficially owned, primarily by Mr. Richard Wood, his family and companies associated with them. Bula Trust was beneficially owned primarily, by the defendant, Michael Wymes, his family and companies associated with them. Crindle Investments was beneficially owned by the plaintiff. 'Holdings' was formed as a vehicle through which shares were held in Bula between Thomas C. Roche, Thomas J. Roche, Michael J. Wymes and Richard Wood and to govern their relationship with the State and the other shareholders in Bula.

6. NBFC, Ulster and Allied Investment Banks Ltd. provided banking facilities to Bula. The banks took charges from the company to secure its indebtedness. That company's indebtedness to the banks (up to certain limits) was also personally guaranteed by the late Thomas C. Roche, Thomas J. Roche, Michael J. Wymes and Richard Wood who are collectively referred to in this judgment as the "guarantors".

7. The relevant guarantees for the purposes of these proceedings are:-

> (a) a guarantee dated 25th April 1978 between NBFC and the guarantors for a maximum amount of IR£1,000,000 together with interest and costs;
>
> (b) a guarantee dated 10th January 1980 between NBFC and the guarantors in respect of an additional maximum sum of IR£1,000,000 together with interest and costs;
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> (c) a guarantee dated 22nd September 1981 between Ulster and the guarantors for a maximum amount of IR£1,828,506.

8. Bula defaulted on its liability to the banks and each of the guarantees was called in.

The 1982 NBFC judgment

9. Judgment was obtained by NBFC against the guarantors on foot of the 1978 and 1980 guarantees in the High Court, on 20th December 1982. This judgment is the starting point in the complex maze of evidence. The court has adopted the approach throughout in seeking to proceed on verifiable material, where possible corroborated independently or in documentary form.

The terms of that judgment.

10. The precise terms of the judgment (highly relevant to these proceedings) provided that NBFC was entitled to recover from the guarantors a sum (including interest) of IR£3,912,335.12 (€4,967,609.20), together with costs. The High Court granted a stay of execution on foot of the said judgment to 1st January, 1984 on conditions specified in the order. The judgment and order of the High Court were appealed to the Supreme Court which made an order affirming that of the High Court on 1st November,1983 with a stay

until 1st February, 1984 on condition that the guarantors pay the sums of IR£294,348 and IR£48,000 on or before 3rd January, 1984.

11. The defendant claims that payments were made by the guarantors to NBFC in pursuance of the orders in the aggregate amounts of IR£390,000 during January, February and March, 1984.

12. The judgment (with interest) grew enormously over the years. One of the greatest difficulties in the case has been establishing precisely how much was outstanding on foot of the debt. This is considered later. The interest on the judgment ran on 'commercial' rates for the Roches and Richard Wood, not so for Michael Wymes.

13. The court must seek to ascertain any payments said to be made by the sureties, the identity of the parties alleged to have made these payments, and whether these payments were made against the debt arising under the NBFC judgment, or on foot of other Bula loans. The High Court judgment of 20th November, 1982 and the Supreme Court Order of 1st November 1983 are, (unless otherwise indicated) referred to in the course of this judgment as the "NBFC judgment".

The Ulster judgment
14. The background here is somewhat simpler. On 2nd March 1984 Ulster obtained liberty to enter final judgment against the guarantors in the sum of IR£2,321,559.29 (inclusive of interest claimed to the date of judgment) together with costs of IR£122.50. The order provided that judgment on foot of the said order until 30th April 1984. Judgment on foot of the order on 7th March 1985 was entered against the guarantors in the sum of IR£2,321,559.29 and costs of IR£122.50 (totalling IR£2,321,681.79 (€2,947,908.90)). The Orders of the Master dated 2nd March 1984 and the High Court dated 7th March 1985 are (unless indicated otherwise) referred to in the course of this judgment as the "Ulster Judgment".

15. Following these two judgments, efforts were made by the creditors to secure payment. Correspondingly, efforts were made by the guarantors to defer enforcement of the judgments and to arrive at some alternative arrangements with the banks. For the Roches this involved in the execution of deeds of mortgage on 9th March, 1984 in favour of NBFC ("the NBFC Mortgage"). Pursuant to this mortgage both father and son jointly and severally covenanted that they would pay on demand the amounts outstanding together with interest on the amount remaining unpaid from the date of demand. This rate of interest was fixed at the same 'commercial' rate and in the same manner applicable to the facility given by NBFC to Bula itself. Both father and son further granted mortgages in favour of NBFC over their respective family homes and surrounding lands at Chesterfield, Cross Avenue, Blackrock, Co. Dublin and Woodford, Booterstown Park, Blackrock, Co. Dublin respectively. These were both valuable properties even then.

16. Continued pressure from the banks resulted in Richard Wood, another of the guarantors, providing further security to NBFC, (at commercial rate interest) and in the provision of further security by Bula. A number of payments were made by the guarantors to defray interest accruing on the Bula debts – as opposed to what was owed on the personal guarantees. An issue arises as to whether credit may properly be allowed for such payments to the guarantors.

17. On the 26th October 1983 NBFC registered a judgment mortgage on foot of the NBFC judgment against the interest of Michael J. Wymes in his former home, Bective House, and the substantial lands appurtenant thereto, comprised in Folio No. 7302F and Folio 10020F Co. Meath.

Other litigation
18. The financial difficulties of Bula did not abate. The mine never commenced normal operation. The banks finally called in the loans in September 1985. They appointed Lawrence Crowley as receiver to the company on the 8th October of that year.

19. The defendant claims that in December 1985 Ulster realised security held by it from Rockrohan Estates ("Rockrohan") over shares in Cement Roadstone and put the proceeds, including accrued dividends amounting in total to IR£690,405 into a non-interest-bearing account which was applied against the Ulster debt only in May 2003. He contends that Ulster ought to have placed these monies into such an account earlier and that, if it had done so, the accumulated principal would have been in excess of the amount claimed by Ulster to be due under the Ulster judgment as of May 2003. The defendant submits the plaintiff failed to take these matters into account when entering into the Ulster settlement in 2004 and that the Ulster settlement was thus an improvident transaction.

The 'Bank Proceedings'
20. On the 2nd July 1986 proceedings (hereinafter referred to as the "Bank Proceedings") were initiated. These proceedings (Record Number 1986/6624P) were as between Bula Ltd. (in receivership), Bula Holdings, Thomas C. Roche, Thomas J. Roche, Richard Wood and Michael J. Wymes plaintiffs, and Lawrence Crowley, NBFC, Ulster, AIIB and McKay and Schnellman defendants. The plaintiffs in these proceedings sought damages, including declarations that all loan agreements, securities, guarantees and judgments in favour of the bank should be set aside.

The 'Tara Proceedings'
21. On the 17th November 1986 yet further proceedings (Record Number 1986/10898P) were also issued by the same plaintiffs against Tara Mines Ltd., the Minister for Energy and Others (the "Tara Proceedings"). These concerned a dispute with Tara Mines Ltd. ("Tara") the owner of the mine adjoining the Bula lands.

Execution of the judgments - NBFC
22. NBFC made demand of Thomas C. Roche and Thomas J. Roche pursuant to the NBFC mortgage on the 7th December 1987. On the 12th January 1988 NBFC issued proceedings seeking possession of the Roche family lands. These proceedings were stayed pending the final outcome of the Bank Proceedings and the Tara proceedings referred to above.

Dispute between the Guarantors
23. In the early nineties, the Roches themselves formed a view of the merits of the Bank and Tara proceedings. It was one quite different from that of Mr. Wymes and Mr. Wood. The Roches were not optimistic. Mr. Wymes remained totally and entirely convinced of success. The subsequent outcome of the proceedings demonstrates Mr. Wymes' optimism was ill-founded and ill-judged. None of the relevant substantive proceedings was ultimately successful, despite the pursuit of every procedural avenue. At one point, the Roches had negotiated an outcome which would have allowed Mr. Wymes and Mr. Wood also to emerge relatively unscathed. Both refused. The plaintiff opined in evidence in this case that, had the two latter availed of the offer, both would now be wealthy men. Whatever the validity of that view, Mr. Wymes and Mr. Wood persisted on the course they had charted. Mr. Wood chose to ally himself with Mr. Wymes.

24. On the 4th October 1994 the Roches withdrew as the plaintiffs from the Tara Proceedings. In April 1997 they withdrew as plaintiffs from the Bank Proceedings having endeavoured unsuccessfully to bring about a negotiated settlement in both. The Roches also brought and succeeded in related minority oppression proceedings under Section 205 of the Companies Act through Crindle

Investments, the vehicle through which they held their shares. These proceedings involved the issues just described. That case was against Holdings, Bula Trust, Loire Investments, Michael J. Wymes, his son Michael T. Wymes and Richard Wood; that is effectively the Wymes/Wood interests, who acted largely in concert.

Outcome of other litigation then pursued by Mr. Wymes and Mr. Wood
25. Near incessant litigation followed, unsuccessful in outcome for this defendant. It endured over years. On the 6th February 1997 the High Court dismissed all claims made by the remaining plaintiffs in the Tara Proceedings. On the 15th January 1999 the Supreme Court dismissed an appeal brought against that decision. On the 3rd July 2000 the Supreme Court refused an application by the remaining plaintiffs in the Tara Proceedings to set aside its judgment dismissing the appeal in the Tara Proceedings.

26. In June 1997 the High Court had found that the outcome of the Supreme Court Appeal in the Tara Proceedings would determine all issues in the Bank Proceedings, with the exception of issues as to the Statute of Limitations raised by the plaintiffs. The Supreme Court decisions of the 15th January 1999 and the 3rd July 2000 therefore left only for decision issues as to the Statute of Limitations in the Bank proceedings On the 1st February 2002 the High Court dismissed these issues and on the 13th February 2003 the Supreme Court dismissed the appeal against the High Court dismissal of the Statute of Limitations issues in the Bank Proceedings.

27. A further issue the Court must determine is whether, during the currency of the Bank Proceedings, Michael J. Wymes acknowledged either the NBFC or the Ulster judgments.

Proceedings for execution of judgments - Ulster
28. On the 26th February 1997 Ulster registered a judgment mortgage on foot of the Ulster judgment against the interest of Michael J. Wymes in Bective, his house and lands.

29. On the 5th March 1997 Ulster commenced bankruptcy proceedings against the four guarantors. Prior to his death in July 1999, Thomas J. Roche was still faced with the legal and financial consequences of this imbroglio.

30. On the 15th June 2001, Ulster brought a petition for an order for the administration in bankruptcy of Mr. Roche Senior's estate. These were adjourned from time to time pending the outcome of the Tara Proceedings and the Bank Proceedings. The sums claimed in the bankruptcy proceedings served upon Thomas C. Roche and then Thomas J. Roche were IR£2,321,681.79, being the judgment debt of IR£2,321,559.29 and costs of IR£129.50 a total of €2,947,908.90. No interest was claimed on this amount.

NBFC proceedings resumed
31. On the 1st July 2003 NIB, NBFC's successor in title, served a notice of intention to proceed with the NBFC Mortgage Proceedings on solicitors acting on behalf of the late Thomas C. Roche and Thomas J. Roche.

32. As is now well known, the plaintiff's financial position was not solely dependent on Bula. In the decade from the mid-1990s onwards other investments, including National Toll Roads, prospered remarkably. Thomas J. Roche's financial position had improved very substantially when, on the 25th November 2003 NIB wrote demanding in excess of €11.9 million from him and notifying the estate of Thomas J. Roche that in default of payment, NIB would pursue proceedings to trial in the High Court to seek possession of the entire of the family lands at Chesterfield and Woodford, now very much more valuable in the property boom. Mr. Roche was by then a very wealthy man. Mr. Wymes was not. But his true financial position was then not as dire as it might have appeared. The value of Bective had appreciated very markedly in the rising tide of the appreciation in values.

Payment of €1.4 million to Ulster
33. A hearing date was fixed for the Ulster bankruptcy proceedings of the 30th March 2004. On the 26th March 2004 the plaintiff and the executors of the estate of the deceased ("the executors") entered into a settlement agreement with Ulster ("the Ulster Settlement"). They agreed to pay the sum of €1.4 million. In consideration, Ulster released and discharged the plaintiff and the executors from all claims (excluding an Order for costs in the Bank Proceedings) and consented to the dismissal of the bankruptcy proceedings against the plaintiff and the executors. The circumstances are dealt with in detail.

Payment of €9 million to NIB
34. On the 23rd June 2004 the plaintiff and the executors entered into a settlement agreement with NIB (the "NIB Settlement"). They agreed to pay the bank €9 million. In consideration, NIB released and discharged them from all claims (excluding an order for costs made in the Bank Proceedings); agreed to discontinue the NBFC Mortgage Proceedings, and to execute a formal release and discharge of the mortgage.

35. The plaintiff says that both these settlements related solely to such obligations as he and the executors might have had to the banks but not to the obligations of any other party, including Mr. Wymes. This too is considered later.

Application by Michael Wymes to cancel NBFC mortgage
36. A year and a half later, on 19th October 2005, Michael J. Wymes applied for the cancellation of the judgment mortgage previously registered by NBFC against his lands at Bective. In that application he referred to the €9 million paid by the Roches under their settlement in support of the application to cancel his judgment mortgage. The judgment mortgage was ultimately removed from the lands in 2006.

The claim for contribution and revisions of the sums claimed
37. The plaintiff only became aware of Michael Wymes' NIB/NBFC application between Christmas, 2005 and New Year, 2006. On 1st February 2006, Mr. Roche's solicitors, Arthur Cox, wrote to the defendant's solicitors requesting payment of €2,669,478 as representing the rateable contribution due by the defendant to the plaintiff on foot of the two payments made to NIB and Ulster. That sum represented a total of €2,448,522 in respect of the two payments made to NIB and €220,956 in respect of Ulster. The defendant disputed that the amounts claimed were due. Proceedings followed.

38. Following the exchange of pleadings and discovery provided by the defendant the plaintiff recalculated his claim in relation to the NBFC judgment to €2,511,977.00; unless a payment stated to have been made by Richard Wood after these proceedings was instituted was proven to have been made. It is now accepted this payment was made. The plaintiff's NBFC claim against the defendant is therefore reduced to €2,048,375.

39. Having reviewed discovery provided by the defendant, the plaintiff revised his contribution claim in relation to the Ulster judgment to €241,320 unless the defendant proved the payment of €589,841.84 which he made to Ulster in 2006. This payment was made. Therefore the claim against the defendant in respect of the Ulster judgment is €93,860.

The Crindle Settlement
40. It is necessary to now briefly mention one other matter. On 5th October 2005 the plaintiff, the executors, and Crindle Investments entered into a settlement with Crindle's former solicitors in the sum of €2 million (inclusive of costs). This claim was brought for negligence in the context of the earlier Bula/Tara litigation. The circumstances are not material to these proceedings. The defendant contends that the plaintiff ought to give credit for the amount of the settlement that is referable to him.

41. It is necessary now to outline the legal framework of this case.

The law applicable

The right of contribution
42. The equitable right of contribution and the jurisdiction of the court sought to be exercised can be summarised as follows:-

> "The surety's right of contribution is based upon the equitable principle that a creditor should not be permitted to bring down the burden of the whole debt upon one surety only, and recognises that co-sureties have a common interest and a common burden. The right arises independently of contract from the essence of the relationship of co-surety itself and the concept that the burdens and the benefits of that position should be shared. Where a surety pays more than his rateable proportion of the debt, he is entitled to exercise this right against his co-surety because he has discharged their obligations to the creditor. It exists only where sureties guarantee the same debt." (See Andrews and Millett, *The Law of Guarantees*, 4th edition, pp.432-433.

43. In *Dering v. Earl of Winchelsea* [1787] 1 Cox EQ. CAS 318 Eyre CB stated:

> "In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burden. They are bound as effectually *quoad* contribution, as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were joined in the same engagement they must all contribute equally."

44. In *Gardiner v. Brooke* [1897] 2 I.R. 6, O'Brien J. observed:

> "The case of *Dering v. Winchelsea* clearly lays down that the right of a co-surety, who has paid more than his share, to contribution, rests on grounds of equity and is independent of contract, and could not therefore be affected by the lapse of time from the making of the contract. The right comes, in equity, originally and absolutely, by the payment and discharge of a common burthen, and has no existence inchoate or complete, until the payment is made (*per* O'Brien J. at p. 12).

45. In the same case, Johnson J. stated:

> "… [the cases] … establish that, if one of several co-debtors is liable to pay, or pays more than his aliquot proportion of the accrued common debt, he is entitled to require and enforce contribution from his co-debtors; that this right springs either from the rule of equity involved in the obligation arising out of their becoming, and at the same time when they became, co-debtors, or from a contract between them at that time, implied by law from the universality of that rule; that by virtue of the original common obligation, any co-debtor may enforce this right against his co-debtors, when, and as soon as, he is damnified by being liable or compellable to pay, or paying the accrued debt or more than his aliquot proportion of the accrued debt which his co-debtors so undertook to share with him."

46. In *Stimpson v. Smyth* [1999] 1 Ch. 340, Peter Gibson L.J. described the relevant principles as follows:

> "Let me start by setting out certain uncontroversial principles applicable in this area of law.
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> 1. Where more than one person guarantee to the creditor the payment of the same debt an equity arises such that if one of them pays more than his due proportion of the debt, he is entitled to a contribution from his co-guarantor or co-guarantors.
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> 2. It is immaterial whether the co-guarantors are bound jointly or severally or jointly and severally by the same instrument or by separate instruments or the same sum or different sums or the same time or different times or whether the co-guarantor making payment knows of the existence of the other co-guarantor or co-guarantors, the right of contribution is not dependent upon agreement, express or implied.
>
> 3. Normally an action for contribution cannot be brought until payment has been made by a co-guarantor of more than his share of the common liability.
>
> 4. In particular circumstances an action for contribution will lie even before payment is made; thus, when judgment has been entered by a creditor against one guarantor, who has paid nothing in respect of the judgment, he can maintain an action in equity against his co-guarantor, and obtain an order requiring payment of the co-guarantors due share to the creditor (if a party to the action) or (if the creditor is not a party) an order that the co-guarantor indemnify the judgment debtor, on payment of his own share, against further liability: *Wolmershausen v. Gullick* [1893] 2 Ch. 514. These principles are all subject to any contractual terms which may limit or extend the entitlement of an interested person."

47. *Gardiner, Wolmerhausen* and *Stimpson* all deal with the issue as to when the right to contribution arises. It is as soon as the surety has paid more than his rateable share of the common liability for the principal debt as between himself and his co-sureties. Then, and on foot of such payment, the surety is entitled to demand contribution from them in proportion to their respective liabilities. Thus, for the purposes of these proceedings, I am satisfied that time begins to run only at the time when the payment of more than the rateable share is made.

48. For clarity, one further fundamental point must be made. That is to say, the authorities make clear that the right of contribution can be asserted against the co-surety despite the fact that the *creditor's right of action against the surety has become time barred*. This is made absolutely clear in the decisions of *Wolmerhausen v. Gullick* and *Gardiner v. Brooke*, both of which have been

referred to earlier, and is also confirmed in the leading texts to which reference will be made later.

49. The surety is entitled to contribution in circumstances where his payment exceeds his rateable share even if it is less than the total limit of his liability (*re. Snowdon* [1881]). The essential requirement to give rise to a right to contribution is that the surety must pay the creditor a sum in excess of his rateable share. There may also be circumstances in which a surety is entitled to contribution where he pays an amount which is not in excess of the rateable share but payment is accepted by the creditor in full satisfaction of the liability guaranteed. In order to be entitled to a contribution, the surety must be under a legal obligation to pay the debt the subject-matter of the guarantee. Thus, a mere voluntary or 'officious' payment will not suffice to give rise to a cause of action.

50. The circumstances of legal compulsion surrounding the payments made by the plaintiff already demonstrate that no such question arises here. The payments were made under legal compulsion, and under the threat of the most serious legal sanctions were payments not made. It is entirely irrelevant whether at the time of the action for contribution, as between the creditor and the co-guarantor, a particular time had elapsed. What is material is the time of *payment* by the claimant or creditor surety. These payments were both made in 2004. No time issue arises therefore.

Application of the principles: identifying relevant evidence
51. It is now necessary to deal specifically with how the contribution in this case should be calculated and the factors which should be taken into account. The approach adopted in relation to the NIB debt applies equally, insofar as relevant, to the Ulster debt. *Prima facie* individual sureties like concurrent debtors are under an obligation to pay fully in the absence of an agreement between them. But this is displaced where the liability of one or more sureties is limited and the maximum sums concerned are different. In such a case liability should be apportioned proportionately to the respective maximum limits of the sureties (*Ellesmere Brewery Company v. Cooper* [1896] 1 Q.B. 75). This authority is highly relevant to the limitation of the defendant's liability. He claims the extent of his indebtedness is not co-terminous with that of the plaintiff and is limited to a sum of €7.326 million.

52. The challenge which arises in this case is as to how these principles are to be applied in the light of sometimes internally conflicting and unsatisfactory evidence which does not easily lend itself to precise modes of calculation and estimation.

Evidence concerning the NIB settlement
53. The NIB settlement was executed by the parties on 23rd June, 2004. It referred to the guarantee entered into by all four guarantors on 25th April, 1978 in respect of liabilities of Bula Limited to NIB, and to the guarantee entered into by the same parties on 10th January, 1980, also in respect of certain liabilities of Bula Limited to NIB. It provided that references to "the 1982 judgment" were to the judgment of IR£3,912,335.12 with costs and interest granted by the High Court on 20th December, 1982, and affirmed by the Supreme Court on 1st November, 1983 in favour of NIB against Thomas J. Roche, Thomas C. Roche, Michael J. Wymes and Richard Wood. It provided that the payment of the sum of €9 million by Thomas J. Roche and the executors jointly, released Thomas J. Roche, the executors and the estate of Thomas C. Roche, from all or any actions or suits and costs (excluding an order for costs and other proceedings in the High Court, 1986 No. 6624 P, brought between Bula and the Other Parties and Crowley and Others), which NIB might have against Thomas Roche the executors or the estate of Thomas C. Roche.

54. Clause 3.3 provided:-

> "The parties hereto hereby agree that this agreement relates *solely* to such obligations as Thomas J. Roche, the executors and the estate of Thomas C. Roche, deceased, or any of them, may have to NIB and not the obligations to NIB of any other party, whether jointly and severally liable for the same obligations or otherwise, in respect of which NIB expressly reserves its rights." (emphasis added)

55. Thus, NIB then reserved such rights as it might have remaining against the defendant and also Richard Wood.

56. I am satisfied that rigorous negotiations led to this settlement. The payment was under legal compulsion. There is no sense in which it could be seen as officious or improvident. The plaintiff himself, Ms. Isabel Foley, solicitor of Arthur Cox and Company and by Mr, Ger Ryan of NIB all on this question.

57. The defendant disputed whether the NIB settlement had actually been entered into at all. This was not seriously in contention in the course of the hearing. None of the witnesses were cross-examined on this basis. A further (related) issue, much agitated (among many others) in correspondence was an idée fixe of Michael Wymes that there had been some other collateral or "side deal" made between the plaintiff and the estate of Thomas C. Roche on the one hand and NIB on the other. There was no such evidence.

What was owed and by whom?
58. It is now necessary to consider the claims, the extent of the respective debts, and the negotiations leading to the settlement in some greater detail. Mr. Ryan, then Head of Credit Restructuring of NIB had written to the plaintiff indicating that he remained jointly and severally liable for the judgment obtained against himself, his father, the defendant and Mr. Wood together with the costs and interest pursuant to the guarantees granted. He said that the sum, with interest, was then in excess of €11.9 million plus costs. He indicated that the issues raised in the defence to the NBFC proceedings had all been determined against the plaintiff that the stay on the proceedings had expired, and that arrangements should be made for immediate payment in default of which NIB would bring the proceedings to trial. Negotiations took place in the shadow of legal enforcement proceedings. The plaintiff's other investments having been highly successful. He was a "mark". Messrs A & L Goodbody, NIB solicitors, wrote to Arthur Cox, solicitors, furnishing a breakdown of the claims being made by their clients. That letter attached a table showing the sum stated to be due on foot of the judgment less credits from the guarantor's account as being a *total* of IR£9,431,868.83 (€11,976,003) plus costs. The schedule claimed interest from the plaintiff and the estate of Thomas C. Roche at the higher commercial rates, a rate applied to the Roches and Mr Wood but not to Michael Wymes. Arthur Cox, solicitors, disputed these claims. In a letter of 27th February, 2004 they attached an amended schedule to reflect what it was contended represented the full value of NIB's claim based on Courts Act interest. Specifically they disputed the claim for commercial rate interest. They said also that credit had not been given for payments totalling IR£378,348 in early 1984. They contended that the total sum which could conceivably be claimed by NIB according to the schedule which they attached to their letter was €9,368,488.98. This figure was based on Courts Act interest and included credit for the payment of IR£378,348 in early 1984. They offered €4.5 million.

59. This offer was rejected by A & L Goodbody in a letter of 5th May, 2004. There was an impasse. Ultimately, direct negotiations took place between the plaintiff and Mr. Ryan. Mr. Ryan was obdurate on his instructions that no figure less the €9 million would suffice. This figure appears to have been fixed by Mr. Ryan's principals in Australia. How precisely it was arrived at is unclear. An agreement was reached that the plaintiff and the estate would pay that sum to release and discharge all liability pursuant to the NBFC guarantees, the judgment, the mortgage and the various proceedings. The Roches remained liable for the costs of the bank proceedings which the plaintiff and the estate of Mr. Roche senior were to pay up to March 1993.

60. But one remarkable aspect of the bank's position and conduct was that the full extent of each and all of the guarantors' indebtedness was never fully quantified or identified. This was particularly so of the defendant. One can only infer that the bank felt that Mr. Wymes was not a mark, or that his affairs were of such a complexity as to make it easier to pursue Mr. Roche, by then a prominent figure.

61. Having completed the drafting process, a meeting took place on 23rd June, 2004, at which a bank draft for €9 million was paid over. The plaintiff states he borrowed the €9 million from Bank of Ireland. It is not clear precisely how much was contributed by the estate, although Mr. Roche says that, as a result, the estate's assets were 'cleared out' and that perhaps a sum of €2.6 million was expended from that source. Were this so, it is unclear why it was necessary for him to borrow the full €9 million. One possibility is that the balance was used to discharge substantial costs which were still outstanding. The defendant was not informed of the negotiations or the result until afterwards in July, 2004. The evidence from Mr. Roche and Ms. Foley was that this was because of the obdurate stance he had taken at the litigation.

Steps taken by the defendant
62. NIB had taken well-charging proceedings on foot of its judgment of 1982 seeking an order that its judgment order was well charged on the two folios owned by the defendant. This was in proceedings entitled the High Court 2004 No. 133 SP.

63. In the course of a replying affidavit sworn on 8th July and filed on 15th July, 2004 in those proceedings, Mr. Wymes averred that - as of the 17th April, 1980, Hill Samuel Bank (Ireland) had a first charge on the lands and premises comprised in the two folios and had a possession order in respect thereof since May 1985; that as of 2001 he had not been the legal and/or beneficial owner of and had no interest or possession in the lands comprised in Folio 10020F, consisting of other lands adjacent to Bective; that he 'understood' that as of the 8th October, 2001, the first chargeant had sold this property to Gerard Dillon, Mr. Dillon is Mr. Wymes son in law; that the sale was at open market value confirmed by an auctioneering firm and by solicitor and counsel; that the transfer to Gerard Dillon of his interest in Folio 10020F was already known to NBFC; it had been notified of this by the Land Registry on 11th February, 2003; that Folio 7302F comprised the farm of circa 200 acres including a house of substantial proportions and various outbuildings; that since 2001, the defendant's son, Michael T. Wymes, a solicitor working in London had been the registered owner of the first charge entered on 17th April, 1980, of Folio 7302F having purchased that first charge, as well as acquiring that on Folio 10020F from Anglo Irish Bank successor entitled to Hill Samuel Bank (Ireland).

64. It is unnecessary for the purposes of these proceedings to consider these rather opaque averments, or to deal with the nature of the earlier transactions between the defendant, Hill Samuel Bank, and the defendant's son and son-in-law. The latter two are now apparently unfortunately engaged in litigation with each other in relation to these transactions. I will therefore refrain from any further comment in these issues.

65. However at para. 70 the defendant deposed:-

> "70 I am advised that at law the release of a joint and several promisee or debtor discharges the others and that any release to the Roches or one or other of them from the joint and several contractual obligation and judgment debt would result in discharge of the contractual liability and extinguishment, and no judgment debt remaining against the other co-debtors."

66. The defendant referred to some collateral 'arrangements' which he strongly (but wrongly) suspected had been made. He appeared convinced some other deal was done at the time Roches withdrew as plaintiffs in the bank proceedings on the 8th April, 1997. The extent and depth of these ill-founded suspicions are indicative of Mr. Wymes' state of mind, reflecting a near immovable belief that there had been some collateral deal done. He deposed:

> "… (f) It was reported in the Sunday Business Post of 2nd December, 2001 that the late Tom Roche had 'negotiated a way out of the guarantees years ago'.
>
> (g) It was reported in the Irish Times of the 12th May, 2004, that the property of Thomas C. Roche at Chesterfield, Cross Avenue, Blackrock, Co, Dublin, had been sold for €45 million."

67. This was substantially true. The defendant was disposed to rely on these reports as evidence regarding discharge of the debt.

68. These press reports were exhibited. This is followed by the following important averments:-

> "72 Accordingly, I say and believe that the release of the Roches from the guarantee and *judgment debt serves to discharge me from any obligation under the guarantee and judgment debt.* …"

The defendant also swore:-

> " …
>
> 74 Contrary to the averment (at para. 5 of Mr. Ryan's affidavit) 'that the entire amount of the aforementioned judgment remains due and owing, I say that the claim herein is excessive. *In particular it takes no account of the realisations of guarantor assets as security furnished on foot of the judgment. Certain of same are referred to at para. 33, 58 and 59 above and total approximately €10 million.*
>
> 75. I further say that allowance is required to be made for any sums received and/realised by NBFC on foot of the first charge over the properties of the late T.C. Roche and of Thomas J. Roche at Blackrock, Co. Dublin. The said property of the former was part of the security that he referred to at para. 50 and which as aforesaid at para. 71 was on 12th May, 2004, reported in the Irish Times to have been sold for €45 million." (emphasis added)

69. On foot of these averments the defendant sought discovery of all transactions between the Roches and NBFC.

70. The emphasised averment at para. 72 of the affidavit is of particular importance, in particular the contention that the release of the Roches from the guarantee and judgment debt served to discharge the defendant from any such obligation.

71. The later reference (at para. 74) to certain sums alleged to have been realised which should be discounted from the debt, related to payments stated to have been made following the Court order made on the 1st November, 1983.

72. The averments were made in the context of what were alleged to be defences to the NIB proceedings including:-

> "(c) *Discharge/release through release of Joint Debtors*/discovery".

73. This could only refer to the Roche payment.

The unavoidable conclusion is that then, in defending the NIB judgment mortgage proceedings in July, 2004, the defendant relied on some agreement or agreements between the Roches and NIB, albeit that at the date of the swearing of his affidavit on 8th July, 2004, he had not yet received a copy of the NIB settlement. He was told about it later that month by letter from Arthur Cox. In testimony, Mr. Ryan of NIB confirmed that "the Roche payment effectively closed out his (i.e. the defendant's) liability under the judgment/judgment mortgage".

74. He testified that a calculation of the defendant's own liability would be based on the judgment of €3,912,335.12 plus six years interest at Courts Act rate. (This was the only interest chargeable against Mr. Wymes.) But this was now approximately €7.326 million, much less than the €9 million which NIB had received from the Roches. NIB's legal advice too was that the defendant's liability had been eliminated by the Roche payment.

75. On the 17th October, 2004, Messrs A & L Goodbody wrote a letter to Messrs Ryan Smith & Co., acting jointly for the defendant and Mr. Wood saying that, in the light of 'developments' the well-charging proceedings pending before the Master were to be withdrawn.

76. The 'developments' can only refer to the Roche payment of which Mr. Wymes by then well knew. But, in evidence before this Court, the defendant claimed that this letter came "straight out of the blue". He said he was "mystified" by it and that the only thing he could attribute to it at that stage was the "good work" that he and his legal advisers had done in the replying affidavit. His attitude at this hearing to the €9 million payment was, frankly, evasive. He testified in this Court:-

> "It is quite likely that there was certainly a possibility that the Roche payment had had some effect, because in the light of the developments as mentioned in this letter, I remember myself Mr. Ryan (his solicitor) on a number of occasions asked each other what developments are being referred to".

77. When asked in direct examination whether he concluded that perhaps those 'developments' were the €9 million Roche settlement he responded:-

> "Actually, I was a bit dim for a few weeks, I remember it did not actually hit me".

78. He said he suspected that there had been a "secret side deal" done with the Roches. He claimed his averments in the affidavit were to be seen in the context of that suspicion rather than in the light of the discharge of the €9 million.

79. I regret I cannot accept the defendant's interpretation of events on this issue or others. I find it simply disingenuous. I do not accept that the defendant was "mystified" in October, 2004. The only reasonable conclusion is that he was relying and was disposed to rely on some payment, or the actual payment of the €9 million. No other tenable explanation has been given to the Court.

80. In cross examination, the defendant was asked:-

> "Q. You do accept, do you not, that on October 2004 when you received the letter from the bank that the payment of the money was what you understood had been the significant contributory factor towards this particular situation; isn't that right?
>
> A. I believe it could have been. I didn't know. I wasn't told."

81. I regret I find this was evasive. I infer the defendant in evidence was seeking to avoid the consequences which might follow his obvious reliance on the Roche payment, which he clearly relied on to discharge the NIB mortgage. The defendant sought to explain the withdrawal of the NIB claim on the basis of a contention that the claim itself was statute barred. I consider such a proposition entirely unconvincing. It is improbable, to say the least. It was not established in evidence, that NIB withdrew the claim by reason simply of some averments contained in an affidavit that a debt was statute barred. The only reasonable inference is that what caused the proceedings to be withdrawn were the "developments" that is the payment of the €9 million. What was striking was the defendant's willingness to seize and cling to any conclusion other than the obvious: he was content to rely on the payments when it suited (as will be seen); not content if it gave rise to potential liability. The truth is not to be thus compartmentalised.

Reliance on the €9 million payment by Michael Wymes

82. By contrast, the defendant made a statutory declaration to the Land Registry on 19th October, 2005, for the lifting of the NIB/NBFC well charging order. One item of relevance is to be found in the schedule. It was a reference to the Roche settlement. It was then specifically relied on by the defendant in order to demonstrate to the Land Registry that there were no further sums outstanding on the debt and that therefore the well charging order might be discharged. No reference was made to defences which might have been available relating to the NIB/NBFC debt under the Statute of Limitations. This is in stark contrast to a second statutory declaration relating to a charge held by Allgemeine Bank in relation to Folio 7302F Co. Meath, where the defendant specifically relied upon the twelve-year limitation period as a defence. This latter declaration was made on precisely the same day.

83. The only reasonable inference is that the defendant relied on the Roche payment as discharge of his NIB/NBFC liability. The second statutory declaration shows that any time issue was very much present to the mind of Mr. Wymes on the day. He made no such reliance then in regard to NIB.

84. The precise terms of this declaration are illuminating:-

> "4 Pursuant to realisations under securities granted and procured for the benefit of NBFC by the judgment debtors in respect of the judgment, NBFC has, by its own account to Ryan Smith & Co. (solicitors for Richard Wood and myself) in a different context, received payments to a minimum total of £8,278,175.40 (€10,511,114) during the period 21st May, 1984 to 24th June, 2004, which were attributable to the judgment debt. These payment details are set out in a schedule attached to this form.
>
> 5 *Accordingly, no sum remains due by me under the judgment, and the charge is paid.*"

The words 'by me' are of significance.

85. The schedule attached to the form 71B makes explicit reference to what is described as a "Roche lodgement" in the sum of £7,088,076.00 on 24th June, 2004, that is the payment of €9 million by the Roches.

86. These averments, taken together, constitute an express reliance on the payment of €9 million in order to cancel the defendant's liability. They are to be seen in the context of Mr. Ryan's evidence that the defendant received clear and very substantial benefit or advantage as a result of the payment of the €9 million. The effect of the payment was to 'extinguish' the defendant's liability, and was so treated or appropriated by NIB.

Credibility of the defendant

87. In passing, a further observation as to the defendant's testimony is apposite; of more relevance later. During the case, Mr. Wymes furnished a document to the Court headed 'Bective Closing', a single sheet outlining deductions due from the sale price of €12,975,000. Large sums, approximating to €9 million, were due to Ulster Bank, Laurence Crowley and Tara Mines, leaving a 'balance' of €257,500. To an untutored eye, this might be seen, in isolation, as the total position. But he was cross-examined with reference to those combined debts he discharged:-

"Q. In those circumstances that combined sum, nearly €9 million can I ask you to confirm have you sought any contribution from Mr Wood in relation to that payment which you made?

> A. I discussed it with Mr. Wood, My Lord, and he said he will honour his, as the honourable man that he is, when he is in a position to do so, if and when he is in a position to do so.
>
> Q. In those circumstances do I understand the position he has agreed to pay you the sum of half the amount that is due.
>
> A. If and when he is able to do so.
>
> Q. That is effectively an entitlement of €4.5 million to be paid by him to you; is that correct?
>
> A. *I would think so based on the law of this case.*
>
> Q. In this situation you are accepting as you see it an entitlement to be paid €4.5 million by Mr. Wood?
>
> A. Yes, I think so, yes.
>
> (emphasis added)

88. After the defendant had concluded giving evidence, the defendant's counsel (who was in no way responsible for the document Mr. Wymes himself prepared and submitted), quite properly clarified the position as to the extent of the joint and several liability of the defendant and Mr. Wood, and thus the defendant's expectation for a contribution. Rather than the sum in question being €4.5 million, it transpired the expected contribution from Mr. Wood could be as much as €6 million. That is not a sum of money one would forget, or to be omitted. The document was misleading; the truth, but not the whole truth. The emphasised excerpt from the transcript is self-explanatory. Because Mr Wymes had discharged a joint and several debt, Mr. Woods was under a legal obligation to pay him, not only as a matter of honour but under the law of contribution ('the law of this case'). For these reasons, I am unable to hold that Mr. Wymes is a reliable witness whose testimony can be taken at face value.

89. It is now necessary to deal again with the nature of the action in the context of the Civil Liability Act, 1961 and the applicability of time limitations.

The nature of the action

90. As a matter of law, I am satisfied that in an action for equitable contribution (not a form of action for damages encompassed by the Civil Liability Act 1961), the cause of action by one surety who has paid more than his due proportion of the debt against a co-surety for contribution, arises only when the surety making the claim has paid the debt (see Brady and Kerr (*The Limitation of Actions*) (2nd Ed.) p. 48 and see also *Wolmerhausen v Gullick* [1893] 2 Ch. 514; *Gardiner v. Brooke* [1897] 2 I.R. 6).

91. In *Lightwood* cited earlier, the following observations are made:-

> "The right of contribution as between co-sureties or co-debtors, though not founded on contract, but on general principles of justice (*Dering v Earl of Winchelsea …*) is analogous to the right of indemnity and is subject to similar rules. *It can be asserted against the co-surety notwithstanding that the creditor's right of action against him is barred. Wolmerhausen v Gullick …*; and no action will lie at common law in favour of a surety against his co-surety, or in favour of one co-debtor against the rest, until he has paid more than his share of the debt "whenever" said Parke, B. in *Davies v Humphreys* … 'it happens that one has paid more than his proportion of what the sureties can ever be called upon to pay, then and not till then, it is also clear that such part ought to be repaid by the others and the action will lie for it'. Consequently, until the surety has paid more than his share of the entire debt, there is no debt due to him from his co-surety upon which he can found the bankruptcy proceedings against the co-surety; *ex parte Snowden* …"

92. In *Andrews* and *Millettt* The Law of Guarantees (4th Ed.) 2005 para. 12-019, p. 140, the learned authors state:-

> "The fact that the creditors claim against the surety has become time barred at the time the sureties claim for contribution is made, will not effect the contribution claim (para. 12-019 p. 450; *Davies v Humphreys* [1840] 6 N & W 153."

93. *Wolmerhausen* and *Gardiner*, together with the other authorities referred to, clearly establish that the plaintiff's cause of action for contribution from the defendant in this case, did not accrue until the plaintiff paid more than his rateable share to NIB. Thus, the plaintiff's cause of action against the defendant in respect of the payment by him of what he claims is more than his rateable share (whether it be principal or interest) in respect of the judgment debt due to NIB/NBFC, did not accrue until 23rd June, 2004 at the earliest, when the sum of €9 million was paid to NIB. (Similar observations apply to the Ulster debt.) Even had the NIB/NBFC debt become statute barred at that time is immaterial.

Ratification

94. The defendant cannot either raise a technical objection that he was not informed or called upon to make a contribution in circumstances where (as has been found here) he has been satisfied to be a beneficiary of such payments thereafter. He has 'ratified' or acquiesced in the settlement. He freely accepted it. He has derived advantage from it. His testimony has been referred to. It is necessary only to refer back to the quotations from the defendant's affidavit of 7th July, 2004, in response to the well-charging proceedings brought by NIB and the reliance placed by him on arrangements which he alleged to have been made between the Roches and NIB, even though at that stage he did not have precise details of the NIB settlement which were sent to him in July, 2004, after the NBFC proceedings were discontinued against the plaintiff and the estate. cf. *Ramsey v. North Eastern Railway* (1863) 14 C.B. (NS) 641; Tettenborn: *Law of Restitution in England and Ireland*, 3rd edition, Cavendish, 2002 p. 119; Goff and Jones: *Law of Restitution*, 6th edition, par. 36-004 and cases therein referred to.

95. A court must, in exercising its equitable jurisdiction, look to the effect of the Roche payment and the benefit which the defendants derived therefrom. By his own actions the defendant freely acquiesced in or ratified the payment. He cannot now disavow such ratification. This is not to allow estoppel give rise to a cause of action: it may permit the equitable right of contribution to be exercised. The defendant's free ratification of the plaintiff's payment to his benefit and advantage created a duty between the plaintiff and the defendant which does not permit him to repudiate or disavow that ratification for convenience. The defendant freely accepted the benefit. He incurred a duty and a liability just as a passenger who rides free on a bus.

96. In the course of written submissions extensive authorities have been identified in relation to the applicability of the Statute of Limitations to this claim. I have already indicated that I do not consider these are material in the light of the authorities already outlined. In the course of the hearing this Court has been referred to a substantial number of acknowledgments in relation to both the NBFC and Ulster debts. I do not consider it is necessary to refer to these in detail. In summary, I will hold that there have been acknowledgments by the defendant for the purposes of s. 56 of the Statute of Limitations. These would have the effect that the right of action to recover debt would be deemed to have accrued on and not before the date of such acknowledgment. These were made either to the person or to the agent of the person whose title was being acknowledged, that is to say, NIB itself or the receiver, Lawrence Crowley, who was their agent. Such acknowledgments are contained in affidavits and in defences. To take one example, in a reply to an amended defence of 4th June, 1997, in proceedings 1986 No. 6624 P between *Bula Ltd. and Crowley & Ors*. at para. 1, it was pleaded on behalf of the plaintiff that under the control of Michael Wymes and Richard Wood:

> "The plaintiffs admit the particulars of the judgments appended to paragraph 2 of the defence of these defendants."

There are many other acknowledgments unnecessary to set out in detail.

Section 35 of the Civil Liability Act 1961

97. A further issue raised is whether the defendant is entitled to avail of the provisions of s.35(1) of the Civil Liability Act 1961 which, it is suggested, might permit the liability of a creditor, in this case NIB, to be identified with the liability of the defendant and Mr. Wood, in the event of the Statute of Limitations successfully being raised. No such finding has been or could be made on the basis of this type of equitable claim. Therefore there can be no issue of contributory negligence.

98. Section 35 (1) is designed and framed to allow for certain provision, for the purpose of "determining contributory negligence . . .". But one must first ask what is the essential nature of the claim here? Essentially, it is an equitable claim for contribution. It is not a claim relating to a "wrong" as defined in s. 2 of the Act, i.e. it is not in relation to a 'tort, breach of contract or breach of trust'. It is not a common law claim at all. Provision as to the issue of *restitution* as to cognisable wrongs under the Civil Liability Act is dealt with in Chapter 4 of the Civil Liability Act, see s. 45 (1) and (2). But any such reference is entirely inappropriate in the present context of a claim for equitable contribution. The point is misconceived. The next issue is of greater relevance. It goes to the heart of the decision which must be made and the application of the principles of law to the case as a whole.

Does the settlement release the defendant in respect of the balance?

99. The defendant contends that the NIB settlement did not purport to constitute a satisfaction of the full amount allegedly due to NIB in respect of the alleged judgment debt and did not purport to amount to a release of the defendant in respect of the balance allegedly due. Thus, it is claimed that if a balance does remain due and owing to NIB (which is denied by the defendant), the plaintiff has not paid more than his rateable proportion of the alleged judgment debt and is therefore not entitled to a contribution.

100. But as found earlier the effect of the NIB payment was to bring a benefit to the defendant. The payment of the €9 million was appropriated, not only to the debt owed by the Roches, but also to any debt owed by the defendant, Michael Wymes. It extinguished his debt. To that extent, it is irrelevant as to how the payment was banked in respect of Bula Ltd. What is relevant is the effect of the payment.

101. However, there is a real lack of clarity in the evidence as to how a calculation of the liability of the respective guarantors on the NBFC judgment is to be made.

102. As pointed out by counsel for the defendant, a difficulty which the plaintiff faced was in establishing the aggregate amount of the indebtedness of the guarantors for the purpose of, in turn, demonstrating to the Court whether or not he had paid more than his fair share. The plaintiff gave in evidence that he paid €9 million to NBFC. Prior to a payment made in 2007, Mr. Richard Wood had previously, in the 1980s, made payments amounting to €3,849,336. Nonetheless, NBFC sought €4,429,405 from Mr. Wood by letter dated 24th November, 2005. The sum of all these figures is approximately €17 million. It emerged during this case and was confirmed in writing that in November 2007, Richard Wood paid €2,639,781 in final settlement to NIB. Thus, taking the total of €9 million, €3,849,336.00 and €2,639,781.00, the total which NIB appears to have received from the Roches and Richard Wood, was €14,489,117.00. In his evidence, the plaintiff testified that he believed that the total indebtedness prior to the Roche settlement was €10,854,407.48. But NIB/NBFC had demanded €11.9 million. Thus, on that calculation, even after the discharge of the €9 million, there remained only a further €1.8 million to be paid. These figures are not readily reconcilable.

103. Mr. Ryan testified the total debt was €11.7 million when the Roche payment was made. He then refined this to the effect that €11.7 million was a sum which had been *sought* by the plaintiff but a lesser sum was due from the defendant. He testified that Mr. Wood settled his liability which ultimately stood at €4.2 million to NIB, for €2.5 million in 2004 (in fact €2,639,781). Having testified that the total debt was €11.7 million, he then corrected himself and stated that as of 23rd June, 2004, the total outstanding was €11.9 million and that the earlier figure was mistaken. Thereafter, he testified that the sum of €11.9 million was due on 25th November, 2003, and that that sum was greater by 23rd June, 2004. However, that he was unable to state how much was owed by the defendant on either of those dates. The aggregate liability on the basis of those figures was €15.3 million in respect of the Roches and Mr. Wood, that is to say €3.8 million plus €2.5 million for Mr. Wood and €9 million from the plaintiff and Mr. Roche.

104. The bank did not calculate individual aggregate liability of the defendant. The plaintiff's accountant, Mr. Carson, a partner in

KPMG, testified that there was no number he could identify that could be said to be the sum owed by the four guarantors to NBFC as of the settlement in June of 2004, but that the plaintiff said there would be a debt over and above the money paid by him of €1,800,000 and that NIB had testified that such debt would be €2,900,000. Mr. Carson refined his evidence to say that the residual amount of the debt was a sum between zero and €2,900,000 but that it was impossible to say with any degree of precision what the actual figure was. As it transpired, this is immaterial.

The 'same debt'
105. The defendant seeks to assert that in the absence of a calculation as to the aggregate indebtedness, the plaintiff has failed to establish he has paid more than his share of the common liability of the guarantors. But, as observed earlier, the starting point for the identification of any indebtedness with the defendant must be approached in a different way. It is to look to the common indebtedness of the guarantors, i.e. the 'same debt'. (See first paragraph in the passage in *Stimpson* cited earlier.) In his evidence, Mr. Ryan indicated that although the well charging proceedings had commenced against Mr. Wymes in April, 2004, the legal advice which NIB received was that they were limited to a recovery of IR£3.9 million (€4.95 million) plus six years Courts Act interest against Mr. Wymes. The total accrued debt was €7,326,000 as properly accepted by the defendant in closing submissions. The reason for this difference was that, as Mr. Ryan indicated, the position of Mr. Wymes was different from that of the other three guarantors and that the interest accruing against him was courts rate only. This sum was the shared indebtedness of the guarantors, even if that of the Roches or Richard Wood was greater.

106. It has been contended on behalf of the defendant that one approach which should be taken in calculating whether or not there has been overpayment would be to first identify the amount of the debt for which the four guarantors have a common liability. Thus, if some guarantors are liable to courts act interest but other to higher contractual interest, the common liability can only be the debt plus courts act interest. This is a proposition which I am prepared to accept. It is in accordance with established authorities.

107. But the second step suggested is to *identify* the sums paid by each guarantor towards the discharge of the common liability. Third, identify any other payments made by the guarantors for the mutual benefit of all guarantors which are stated to be referable to, although not necessarily in discharge or reduction of that liability, but in respect of which they all have derived a benefit, that is, by enjoying a deferral of execution of judgment. (This 'benefit' test is interesting in the light of the defendant's earlier evidence as quoted.) Fourth, gross up the payments at steps two and three by at least compound interest to reflect the time value of those payments. Fifth, ascertain whether the common liability has been fully discharged. Sixth, if the common liability has been discharged, the grossed up payments at steps two and three and divide by four to ascertain whether or not there has been an overpayment or underpayment by a particular guarantor. Seventh, if the common liability has not been discharged. Add up the grossed up payments at steps two and three and the outstanding balance of the common debt, then divide by four to ascertain whether or not there has been an overpayment or underpayment of a particular guarantor. But all of these steps are predicated on there being credible evidence as a basis for each stage.

108. In the *Dering v. Earl of Winchelsea* [1787] 2 Bos p. 270, the *principle* is to proceed upon the basis that co-sureties of the same debt are entitled to contribution from each other and that while prima facie co-sureties are equally burdened and therefore entitled to equal contributions, they may bind themselves as sureties for different amounts with a corresponding entitlement to proportionate contribution. The approach in *Dering* was summarised by Aldison B. in *Pendlebury v. Walker* [1841] 4 Y.C. Ex. 421 441:

> "Where the same default of the principal renders all the co- sureties responsible, all are to contribute; and then the law super adds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount, and if not equally, then proportionately to the amount for which each of the surety."

109. Where equality is a relevant basis for contribution, the sum to be awarded is easy to assess but the calculation is predicated on total sum of the debt which has been discharged. But difficulties emerge if the assessment of contribution is to be proportionate rather than equal. This may give rise to two alternative modes of calculation, that is to say either the 'maximum liability' basis, or, alternatively, the 'independent liability' basis (see *Commercial Union Assurance Company Ltd. v. Hayden* [1977] Q.B. 804 and see generally Burrows *The Law of Restitution*, 2nd Edition, Butterworths 2002, pp. 291-293.

110. The swamp-like state of the evidence in the instant case does not allow of such neat solutions as found in the calculation of proportionate liability of insurers in marine contracts (and in the legal text books). This confusion in the evidence was no fault of the plaintiff or his legal advisors. As will be seen, these criticisms apply to the defence evidence also. Here the defendant's legal advisors are in no way to blame. The difficulty there derives from the limited credibility of the defendant.

111. Instead, the approach which will be adopted in the application of the relevant legal principles takes as a starting point a total 'common' indebtedness of the defendant, that is to say the sum of €7.326 million which emerged, eventually, as the total which the defendant in any circumstance could have been required to pay. The division of that sum by four gives rise to a figure of €1.831 million. That figure will be used as a starting point in a process of a calculation to see whether there has been over or underpayment so as to give rise to a result which is to be fair, just and equitable. But this can only be done on the basis of credible evidence. The approach, therefore, is an application of the well-established principles in *Dering, Pendlebury, Gardiner, Wolmerhausen* and *Stimpson*.

Allowances or Credits?
112. It is now necessary to deal with the number of individual payments for which it was claimed credit should be given to the defendant.

113. The first was a payment made in 1984 by each of the four guarantors. Two issues arose here: first, how the money was allocated, second, who paid it.

Payment of IR£378,348 by each of the guarantors in total in 1984
114. Mr. David Carson, the plaintiff's accountant, is a partner in Deloitte and Touche. He is a Fellow of the Institute of Chartered Accountants in Ireland, and a graduate in law. He carried out a detailed forensic examination of the documentation available with regard to this matter and other payments. I am satisfied he was a reliable witness as to fact. Having considered documentation in relation to these payments he concluded that the payments were in respect of the Bula Loan Account as distinct from any payments made in discharge of the guarantor's liabilities under the judgment. This was not disputed.

115. The composition of the payments of £378,348 referred to was as follows:

Bula loan account £ £
R. Wood 205,174

Paid by guarantors in reduction of guarantee (115,028) (90,146)

M. Wymes 141,881

T.J. Roche 70,940

T.C. Roche Executors *70,941* 373,908

Reconciling Amount (Transfer of sum of £4,440 to the Bula loan account) *4,440* 378,348

116. As can be seen, Mr. Carson's calculation as to the payments of £378,348 include a reconciling amount of £4,440. But, as can be seen, the payments were made into the Bula loan account by the individuals referred to. These were not payments made under the guarantees. In an NIB statement of account for Bula Ltd dated 1st March, 1984; and correspondence dated the 30th January, 1984 from A & L Goodbody, Bula's solicitors, it was said that:

> "As regards to amount paid by the guarantors in January, 1984 our clients are holding these amounts in a suspense account. The amount of this suspense account will be taken into account and calculating of interest due to the principle with *Bula loan account.*"

This was never disputed by Bula or any of its directors.

117. A letter dated 10th January, 1985, from Bula to NIB and signed by the defendant, Michael Wymes contended:

> "This account which according to the statement has a balance of £378,348 CR on 8th January, 1985 is not an account of Bula Ltd and accordingly and should not be reflected on the books of this company."

He stated that NIB:

> "…are not entitled to offset the balance on this account against amounts due by Bula Ltd. except in the context of enforcing the guarantees which have been provided to you by certain Directors and Shareholders of Bula Ltd."

But in reply NIB wrote on 11th January, 1985:

> "The payments which were received by certain of the judgment debtors in January and February, 1984, were credited to the account, the statement of which referred to in your letter. The balance of the account has been taken into account and calculating interest due on the loan of Bula Ltd and this was advised to your solicitors Gerard, Scallon and O'Brien by letter of 13th January, 1984 from A & L Goodbody."

There has been no other evidence adduced which would supplant the evidence as to how these payments were treated by the bank. There was never any rejoinder to the brisk reposte from NIB on 11th January, 1985: it was paid to the Bula loan account and no other. It was not used to reduce the surety's liabilities at all. History cannot be rewritten.

£36,735 of a payment by Richard Wood in 1985 attributable to Michael Wymes by reasons of the Orpheus Mining Ltd. payment?

118. On the instructions from the defendant, his forensic accountant, Mr. Hyland, who testified, attributed the benefit of 100% payments of £36,735 from Orpheus Mining Ltd. to the defendant. It was subsequently stated, however, that the apportionment of these payments should be 76/24 as between the defendant and Mr. Wood. But this apportionment was entirely based on what Mr. Wymes told Mr Hyland (and what he said to the court). The defendant was cross-examined on this and agreed he had made an error in asserting 100% ownership of Orpheus. Mr. Wymes accepted that he had no documentation whatsoever to support the assertion that any payment emanating from that company should be attributable to him personally. He did not seek any such documents for the purpose of this hearing. Mr. Wood did not testify. In a schedule to a letter from A & L Goodbody to the Secretary of Barryscourt Ltd., dated 26th November, 2005, credit for these payments was made to Mr. Wood and no other person. The payments were made on 8/01/05 (O'Riada) and 31/10/85 (Bula Orpheus). Barryscourt is Mr. Wood's company.

119. The evidential deficits were the result of conscious choices by the defendant. No other explanation was tendered for the paucity of the evidence supporting this claim I an unable to reconcile the documentation and letter with the defendant's testimony. In those circumstances I prefer the evidence of Mr. Carson who recorded his conclusions by reference to contemporaneous documentation. It is not established Mr. Wymes should be entitled allowance on the basis sought by him. He was not a sufficiently reliable witness to permit of such face value acceptance. While the money was paid in to the creditor's account, there is insufficient evidence that any of the sum should be credited to the defendant. The absence of Mr. Wood as a witness, in the light of the letter of 26th November, is an important factor in weighing the evidence. So too are my previous findings on the defendant's credibility.

Payment of £475,886 made during 1984 on foot of the judgment agreements.

120. Mr Carson meticulously analysed relevant documentation on this payment. The defendant claimed credit due to him and to Mr. Wood on a 60/40 basis for payments of £348,713 and also said that a separate credit for £107,142 should be afforded to Mr. Wood in respect of payments attributable to him in 1984 to postpone execution. It was agreed by Mr. Carson and Mr. Hyland that the total sum of payments made by Bula to NIB during the period from March 1984 onwards was, in fact £475,886. Mr. Carson concluded that none of the guarantors were entitled to credit in respect of them as their payments were in respect of interest due by Bula itself to NBFC/NIB and did not actually reduce the guarantor's liability to the bank.

121. The defendant asserted that he was a source of at least some of the payments totalling £475,886 made by Bula. But again there was no record or witness to bear out this testimony. The defendant was unable to refer to any material which would indicate that he, as opposed to Mr. Wood (who was not called) was the source of any other payments made by Bula to NBFC during that period. I regret I cannot accept the defendant's testimony at face value as reflecting the factual situation that is to say as indicating what actually occurred in 1983 to 1985 by itself without some corroboration, be it positive or negative. In any case, the payments were not made to reduce the surety's indebtedness and are therefore not to be taken into account.

122. In a transcript of cross-examination of the defendant before the Master, conducted by counsel in the NBFC proceedings on 12th December, 1985 and on 18th December, 1985, the defendant made no claim to have been a source of payments on behalf of Bula to NBFC during the course of 1984. Significantly, though, he did refer to having advanced monies to Bula in 1977/1978 and 1979. This truncated portion of the transcript emanated from the defendant himself. Why in 1985 should he refer to earlier payments but not

more recent in the context of that cross-examination?

123. Mr. Wymes was well advised by his counsel in these proceedings. His case was presented with skill and integrity. The deficiencies in the evidence lie at the door of the defendant. When the defendant was asked whether he had taken any steps to obtain supporting records as to these transactions. He said he had not. The absence of Mr. Wood has not been explained at all. His evidence could have eliminated uncertainty. A court cannot make a hypothesis about past events. Either they occurred or did not. He who asserts must prove. This onus lay on the defendant and no-one else.

124. The remit of Mr. Hyland was confined to the consideration of:-

(a) the witness statement of Mr. Thomas Roche,

(b) the witness statement of Michael Wymes

(c) the statement of claim and

(d) certain information or explanations given to him.

125. His brief from the defendant did not include a forensic examination of the documentation relating to the payment of sums paid to NIB on foot of the Bula account. It did not involve any substantive consideration of the documents provided in discovery, save a limited number of excerpts. Why his brief was so confined was unexplained. Thus, in the consideration of the effect of all this material, I prefer the evidence of Mr. Carson to Mr. Hyland. The former examined the material in its context. The latter did not. The court is not prepared to call on Mr. Wymes' testimony at face value.

Limitation of the Mortgage £500,000, £600,000 or £750,000 plus interest.
126. It is now necessary to consider a further point raised by the defendant, whether the mortgage was limited to a certain sum variously claimed at £500,000, £600,000 or £750,000 plus interest. Mr. Ryan was cross-examined on behalf of the defendant on the basis that the limit of the mortgage was IR£750,000 plus interest. He was adamant in the light of the terms of the NBFC mortgage and the relevant correspondence that the limits referred to in the documentation were temporary only and, in any event, conditional on compliance or terms and conditions set out in the correspondence. Those limits effectively fell away as of September, 1984. On any consideration of the mortgage document itself the sum therein was not limited. If there were limitations, I consider that they were temporary and did fall into abeyance as of September, 1984. This was reflected in a letter from A & L Goodbody of 20th September, 1984, to the plaintiff and his late father. That letter was headed

"Northern Bank Finance Corporation Limited

Re: High Court Judgment for £3,912,335.12 confirmed by the Supreme Court on 1st November, 1983

Dear Sir,

As you are aware we are from Northern Bank Finance Corporation Ltd.

We are instructed by our clients that all agreements made to date for deferring execution of the above judgment have expired and accordingly we now apply to you for payment of the amount of same together with interest and costs. . ."

The claim was for the full amount of the debt, not any lesser sum.

127. As Mr. Ryan stated in evidence, the NBFC mortgage was not limited in any respect but was to secure all sums outstanding on foot of the judgments obtained by NBFC/NIB against the guarantors. While it was agreed in letters from A & L Goodbody to the Roches solicitors on 2nd March, 1984, and subsequent correspondence that the mortgage might be limited to £500,000, £600,000, and £750,000 plus interest *on certain terms*, these terms were expressly conditional on strict compliance with the terms and conditions set out in the letters which further expressly provided that the deferment granted by the letters would "in no way prejudice in position of the bank in any security or rights held by it" or constituted waiver of NBFC/NIB rights. I accept this evidence of Mr. Ryan on this issue that the amount which NBFC/NIB could claim under the NBFC mortgage was not limited and that the arrangements agreed during 1984 and referred to in that correspondence were temporary, which when the conditions provided for in the correspondence had not been complied with, lapsed, thereby allowing NBFC/NIB to enforce the mortgage for all sums due under the judgment.

128. When NBFC brought a claim against the guarantors, both the plaintiff and the defendant swore replying affidavits for the purpose of resisting the claim. In neither affidavit was the case made that the NBFC mortgage was limited in the manner now alleged. This point too is not borne out by evidence.

Consideration of the evidence
129. There are, too, a number of ironies which derive from the quality of evidence on both sides. The first derived from the very thoroughness of Mr. Carson's forensic consideration of the discovered documents. I have not omitted from consideration the fact that the 'credit' sums referred to above did not come from Bula's own resources. The company was insolvent. The Roches may well have contributed to the payment of some part of this first sum of IR£378,348 but the plaintiff does not claim the totality of that sum. The defence evidence as to the attribution of the Orpheus payment of IR£36,735 on a 76/24 basis, is fundamentally flawed and does not discharge the onus of proof. It is not in accord with documentary evidence. The claim for £348,713 of the total sum of £475,886 is to be seen in the light of acceptance that Mr. Wood paid the balance of £107,442. The 60/40 apportionment too is entirely uncorroborated. A court cannot act on unsubstantiated evidence where (as here) corroboration would be necessary to support the testimony of a witness whose credibility has been found wanting.

Richard Wood's payments
130. While Richard Wood made contributions, these are to be ignored both here and in the case of the Ulster debt as they were in the calculation of the *effective judgment sum* due against the defendant, that is to say in the payments which had the effect of subsuming the defendant's debt in the case of NIB or substantially reducing it in the case of Ulster.

131. The calculations made hereunder take into account that after 1984, the Roches made no payment on the NIB (or Ulster) debt

until they ultimately made the two payments in 2004.

132. Separate from these were payments made by Richard Wood in the years 1984 to 1986 and subsequently in 1991 and 1993, but no account can be taken of these payments.

Conclusion on NIB claim
133. I must conclude the defendant's liability for contribution is one quarter of €7.326 million. That is, €1,831,500. The plaintiff is entitled to contribution in that latter amount under this head of the claim.

The Ulster €1.4 million payment.
134. The plaintiff claims he is entitled to contribution from the defendant in respect of the payment of €1.4 million to Ulster Bank pursuant to that settlement on the 26th March, 2004. At the outset of the proceedings, it appeared that the plaintiff's claim for contribution in respect of the settlement was €220,956.

135. On discovery it was ascertained the certain payments were credited to the guarantors which it was said ought not to have been credited as those payments were made in reduction of the liability of Bula to Ulster and were not under the guarantees. On that basis the payments ought not to have been credited to the guarantor's account. Consequently the plaintiff's claim against the defendant increased to €241,320.

136. In an amended defence filed on the 16th October, 2006 the defendant stated that he had "recently" paid to Ulster the sum of €589, 841.84 out of the proceeds of sale of "Bective House". He was entitled to a credit in respect of that payment. The plaintiff did not have evidence of this at that time but Mr. Peter Hayes of Messrs. Whitney, Moore and Keller Solicitors acting for Ulster testified that the defendant had in fact made payment of the sum of €589,841.84 on the 1st August, 2006. Thus, the sum to be claimed against the defendant by way of contribution following the payment of the €1.4million under the settlement is now €93,860 or such sum as the court may find in accordance with equitable principles.

Evidence
137. The Ulster settlement was executed by the parties on the 26th March, 2004. The plaintiff himself, Mr. Carson, Ms. Isabel Foley of Arthur Cox and by Mr. Hayes of Whitney Moore testified on the issue.

138. Mr. Hayes testified that bankruptcy proceedings against the Roches, Mr. Wymes and Mr. Wood commenced in 1997. These were not advanced while the various issues in the bank proceedings were ongoing. Those issues were not resolved until determined by the Supreme Court, ultimately in May, 2003. Thereafter the bankruptcy proceedings were revived. As of October, 2003 the sum being claimed by Ulster against the guarantors on foot of the judgment debt was €1,989,841,85 together with further interest. This was evidenced in an affidavit of Dominic P. Williams sworn on behalf of Ulster on the 17th October, 2003. Mr. Hayes explained in evidence that the bankruptcy proceedings were adjourned from time to time but ultimately listed for 30th March, 2004.

139. In late 2003, negotiations between Mr. Hayes on behalf of Ulster, and Mr. James O'Dwyer and Ms. Foley of Arthur Cox on behalf of the plaintiff began. These too were described as being "tough". Ultimately these resulted in agreement by the plaintiff and the estate to pay €1.4 million to settle their liabilities. Additionally, Ulster were insistent that the plaintiff and the estate pay costs were ordered by Barr J. in the bank proceedings up until 1993. Mr. Roche and the estate paid all of the plaintiff's costs in the bank proceedings (including those incurred by the defendant and Mr. Wood) up until 1993, as well as the €1.4 million.

140. Ms. Foley prepared a draft of the settlement agreement. This was amended by Mr. Hayes. She explained that those bank costs (together with the costs which the plaintiff and the estate had to pay in respect of all the plaintiffs, including Mr. Wymes and Mr. Wood in the Tara proceedings up to October, 1994) came to approximately €3 million. The plaintiff borrowed the €1.4 million euro to fund the settlement from his wife. It is not impossible that monies from the Thomas J. Roche estate were also directed to the costs claim, although there is no evidence on this point. It is immaterial to the claim.

141. Following this payment Whitney Moore wrote to the defendant's solicitors referring to the payment of €1.4 million and confirming that Ulster's claim against the defendant and Mr. Wood would be reduced by that sum. As a consequence, Ulster were claiming the balance of €589,841.84 against Mr. Wymes and Mr. Wood in the bankruptcy proceedings. The payment of €589,841.84 by the defendant was made on the 1st August, 2006. It is clear from the covering letter from the defendant's solicitor of 1st August, 2006, that the payment was not made on a "without prejudice basis". In the course of his evidence the defendant sought to contend that the payment was made on foot of some form of "economic duress". I reject this evidence which appears contrived as a misconceived effort to provide a line of defence. The payment was to discharge the judgment debt. The payment, together with the sums of €1.4 million was sufficient to discharge the liability of the guarantors under the Ulster judgment. Therefore there can be now no residual liability. The findings made as to time of accrual of the cause of action are applicable here also. They require no repetition.

Acknowledgment
138. Were it necessary to do so, I find that in the course of an affidavit sworn in well charging proceedings brought against him by Ulster on the 5th March, 1995, the defendant swore an affidavit on the 4th June, 1997.

139. It is impossible to avoid the conclusion that the defendant accepted and acknowledged that the Ulster judgment was entered against him on the 7th March, 1985. In the course of that affidavit he stated at para. 10:-

> " …
>
> 10. Thereafter judgment was entered against your deponent in order to enforce the said guarantee on the 7th March, 1985, as alleged in the affidavit of Donald Williams." (*sic*)

The words speak for themselves. There is no dispute as to the judgment itself.

140. Were it necessary to do so I would hold that there were other acknowledgments by the defendant. These were contained in affidavit sworn by him on the 4th June, 1997, in response to the judgment proceedings brought against him by Ulster; a second affidavit sworn by him in those proceedings on the 7th April, 2005; a supplemental affidavit sworn by the defendant on the 29th March, 2004, bankruptcy proceedings brought against him by Ulster; and a letter written by Pearts (the defendant's solicitors) to Whitney Moore and Keller dated 27th February, 1997. It is unnecessary to refer to each in detail.

141. Correspondence between Ryan Smith & Co. (the defendant's solicitors) and Whitney Moore in July 2006 culminated in a letter from Ryan Smith & Co. to Whitney Moore on the 1st August, 2006 pursuant to which the payment was made. It was expressly not on

a "without prejudice" basis.

142. I consider all of these are "acknowledgements" for the purpose of the statute together with the payment itself. Ulster's claim was not statute barred having regard to the commencement of bankruptcy proceedings on 5th March, 1997.

143. The settlement as signed did not release the defendant. The Ulster settlement contained at clause 3.3 a term very similar to clause 3.3 of the NIB agreement. Under the relevant clause in the Ulster settlement the parties agreed that the settlement related only to obligations which the plaintiffs and the executors of the estate of his late father may have to Ulster and not to the obligations to Ulster of any other party. There Ulster was expressly reserving its rights. However, as a matter of fact, Ulster did appropriate the payment of €1.4m to the Roches and the estate to the Ulster judgment debt and actually gave credit to the defendant for that payment. The defendant received, ratified and freely accepted that benefit. This was clearly the effect of Mr. Hayes evidence and was demonstrated by the fact that the defendant obtained credit of the €1.4 million by the plaintiff and the estate on foot of the Ulster settlement.

144. By a letter dated the 29th March, 2004, Whitney Moore and Keller the solicitors for Ulster confirmed the payment of the €1.4 million and confirming that they would be pursuing the defendant purely for the balance of €589,841.84 in the bankruptcy proceedings.

145. The well charging proceedings against the defendant which had been adjourned generally with liberty to re-enter pending the determination of the bank proceedings were re-entered and proceeded with by Ulster. Ulster gave credit to the defendant for the €1.4 million received from the plaintiff and the estate of his late father in the context of those proceedings also. This was borne out in an affidavit sworn on behalf of Ulster by David Peacock on the 4th January, 2005. Mr. Peacock swore on behalf of Ulster that the sum of €589,841.84 remained due and owing by the defendant to the plaintiff on foot of the judgment debt less realised securities and what was described as "amount received from co-guarantors" on 26th March, 2004, namely the €1.4 million received from the plaintiff and the estate. Furthermore in the second affidavit sworn by the defendant in the bankruptcy proceedings on the 7th April, 2005, the defendant himself sought to rely for credit on the receipt of the €1.4 million paid to Ulster by the plaintiff and the estate. Ultimately the defendant did pay the sum of €589,841.84 to Ulster. The logic of this position is unavoidable: the defendant clearly obtained benefit and advantage of the payment of €1.4 million. But here the consequence is quite different.

146. Mr. Hayes said that the payment left nothing due by the guarantors on foot of the judgment. In Ulster's books the latter payment resulted in the entire judgment debt being cancelled and extinguished in respect of all of the judgment debtors. All the judgment guarantors, including the plaintiff, the estate, the defendant and Mr. Wood had no further liability to Ulster on foot of the judgment debt. The debt must therefore be seen as €1,989,841, that is €1.4 million plus €589,841.

I turn to the claim for credit.

The payment by Orpheus Mining Limited of £64,152 in March 1986.
147. In March, 1986 it is recorded that a payment was made by Orpheus. But it was credited to the Bula loan account on the 23rd May, 1986. It was not a payment credited to the guarantors account. The findings on the Orpheus issue earlier as to credit and consequence do not require repetition. The same evidence as to apportionment of shares was tendered by the defendant. It is insufficient and flawed for the reasons as found earlier.

Credit due to the defendant and Mr. Wood on the 60/40 basis for payment of £253,408 in 1984 in consideration of UIB postponing the entry of judgment against the four guarantors.
148. This contention was again made on the basis of assertion without corroboration. Mr. Carson's testimony was that this payment is question was made to Bula. It was in respect of payment of interest arising on the Bula loan account. His testimony was based on an examination of all the relevant contemporaneous documents, unlike Mr Hyland's remit. I consider Mr. Carson a reliable witness on this issue. I do not think that any reliable evidence has been adduced other than to the fact that these were payments of interest arising on the Bula loan. I do not consider that the defendant's evidence on this issue was satisfactory. There was no corroborative evidence to support Mr. Wymes' precise contention that he was responsible, on a 60/40 basis, or at all, when payments of £253,408 were made during 1984. I consider the court can only adopt the same approach as earlier. I do not consider the defendant has discharged the onus of proof which devolves upon him on these claims.

Rockrohan
149. A further issue to be considered briefly is whether Ulster should have applied the proceeds of sale of certain CRH shares held by Rockrohan, a company controlled by Mr. Wood, towards the alleged Bula debt until May 2003. It is suggested that if this had been done earlier, the amount standing to the credit of the Bula account as of May 2003 would have been in excess of the amount allegedly due to Ulster. It is claimed that this should have been taken into account by the plaintiff and the estate in reaching the Ulster settlement.

150. I am unable to conclude that this claim for allowance is at all relevant to the debt in suit. It is quite different. The manner in which Ulster treated certain other monies paid by Mr. Wood's company is irrelevant to this plaintiff's contribution claim or the defendant's case. No relevant legal authority has been cited such as would afford the defendant a defence or set off to the contribution claim brought herein. It is an unattractive claim seeking credit for the defendant, on this occasion for Mr. Wood's company's payment. It again raises the question as to why Mr. Wood did not testify.

151. Furthermore, I find the same claim was made in the course of the bankruptcy proceedings and in defence of the well charging proceedings brought against the defendant by Ulster. Ulster defended its position in those proceedings as set out in an affidavit sworn on its behalf by Peter Hayes in the bankruptcy proceedings on the 19th March, 2004, and in correspondence.

152. The consequence of the payment is clear. The defendant did, ultimately, pay the sum of €589,841.84. He thereby gave up any grounds for defence which he might have had at that point or which he might have raised. The payment was free acceptance and ratification. It is not open to the defendant to seek to re-litigate or further re-litigate issues in the defence of the contribution claim made against him by the plaintiff. To do so would be an abuse of the process of the court (see judgment of Murphy J. in *Bula Ltd. (in Receivership) and Others v Lawrence Crowley and Others* (2005) IEHC 212, Unreported, High Court, (Murphy J.) 10th June, 2005.) where proceedings brought by the defendant inter alia against Ulster and NIB/NBFC were dismissed as being an abuse of process and certain other orders were made against the defendant.

Credit for payment to Ulster against sums claimed in respect of NIB settlement
153. The defendant claims that the payment to Ulster in the sum of €589,841.84 out of the sale of "Bective House" in discharge of the balance due in respect of the Ulster judgment affords an entitlement to have that sum credited against all amounts being claimed

by the plaintiff by way of a contribution and/or indemnity (including the NIB settlement).

154. The issue was not advanced on behalf of the defendant during the course of the hearing. It was not raised in the course of the defendant's outline legal submissions. But against it is evidence of the defendant's 'catch all' approach. The guarantee given by the guarantors to NBFC and Ulster were different instruments to different creditors. The NBFC (now NIB) and Ulster were different entities. Each obtained entirely separate judgments against the guarantors under different guarantees for different debts. Whilst any guarantor who has paid more than his rateable share in respect of the sum due on foot of the guarantee (or any judgment on foot of it) it entitled to seek contribution from his co-guarantors under that guarantee, that entitlement does not arise in respect of entirely different instruments of guarantee or judgments obtained on foot of them in favour of a different creditor. No legal basis has been established for the contention that the defendant is entitled to have this sum attributed in discharge of the "general debt" due on foot of both judgments.

Settlement of the Crindle damages claim
155. A final issue for determination is whether the defendant is entitled to credit from the plaintiff and the executors in respect of monies received by them on foot of a settlement in proceedings brought against a number of parties including a firm of solicitors.

156. The solicitors in question were sued by the plaintiff, his late father and Crindle Investments along with Bula Holdings and Bula Limited on 21st February, 1997 seeking (*inter alia*) damages for negligence breach of duty and breach of contract. The firm had acted for all of the plaintiffs in the Tara proceedings. As a result it was contended that the plaintiff, Mr. Roche Senior and Crindle suffered losses. Amongst the losses alleged were the costs awarded against the Roches in the Tara proceedings and the bank proceedings. An order for costs was made against the Roches in those proceedings up to the date of their withdrawal of those proceedings in October 1994. A further order for costs was made against the Roches in the bank proceedings up to the 1st March, 1993. The plaintiff discharged those costs which came to approximately €3 million. Evidence to this effect was given by Ms. Foley.

157. These costs, including the costs of the plaintiffs in the Tara and bank proceedings included the costs of the defendant and Mr. Wood. In addition to the loss arising from the payment of these costs, the plaintiff, also alleged further losses including loss of an opportunity to settle the Tara and the Bank proceedings as well as losses arising from having to make the payments under the NIB settlement and the Ulster settlement. The proceedings were ultimately settled on the 5th October, 2005, with a payment by the solicitors without admission of liability in the sum of €2 million inclusive of costs, a sum significantly less than the full estimate of the claim

158. As was open to the plaintiffs to bring the proceedings, it might have been open to the defendant to do likewise if he felt that he had a cause of action against the solicitors. He did not do so.

159. I am unaware as to any principle which might require the plaintiff in these proceedings to give credit to the defendant for any part of the settlement monies received on foot of the settlement with the solicitors. The evidence disclosed clearly that the amount received under the settlement was less than the amount paid out by the plaintiff and the estate in respect of the costs of the bank proceedings and the Tara proceedings. What was received under the settlement with the solicitors was considerably less, even than the monies paid out in respect of the cost of the Tara proceedings and the bank proceedings, including those costs for which the defendant was responsible and for which the defendant therefore received substantial benefit.

160. I am unable to find that there is a basis for any credit to the defendant on this footing. No counterclaim was brought by the defendant on this issue.

Calculation
161. The total Ulster debt was €1.989,841.84. One quarter of this sum is €495,460. But here the defendant has therefore made an overpayment and is entitled to allowance therefor. That overpayment is €589,841 less €495,480, a difference of €124,381.

Total claims NIB and Ulster
162. The sum identified for contribution is:

NIB: €1,831,500

Less: Ulster (credit) (set off): €124,381

Total: €1,707,119

There will be judgment for €1,707,119. I will hear counsel in the form of the order.