Neutral Citation: [2014] IEHC 530

THE HIGH COURT

[2013 No. 1965 S]

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

MICHEAL BYRNE AND SEAN O'TOOLE

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 31st day of July 2014

Introduction

1. In these proceedings the plaintiff is seeking summary judgment against the first named defendant in the sum of €250,000 on foot of a personal guarantee entered into by the first named defendant in favour of the plaintiff.

2. The proceedings commenced by summary summons dated the 18th June, 2013. An Appearance was entered on behalf of the first defendant on 25th June, 2013. The plaintiff then issued a notice of motion seeking summary judgment on 24th July, 2013 which was made returnable to 14th October, 2013. This application was grounded on the affidavit of Niamh Kavanagh, an employee of ACC Bank PLC. sworn on 24th July, 2013. A replying affidavit was sworn by the first defendant and a further affidavit was sworn by Ms Kavanagh on 19th November, 2013.

3. The matter was heard before the Master on 23rd January, 2014. The Master refused the application. This matter comes before this court by way of appeal against the Master's Order.

The factual background

4. The factual background to this claim is set out in the grounding affidavit of Niamh Kavanagh. The sequence of events is as follows:

> (i) On 29th September, 2003 (as amended on 4th November, 2003 and as further amended on 25th August, 2009) the plaintiff agreed to loan a sum of €3.9m. to a company called China Girls Ltd, ("the borrower").
>
> (ii) It was a condition of the Letter of Sanction dated 29th September, 2003 that the bank would only make the facility available to the borrower if it obtained as security a Letter of Guarantee from each of the defendants up to a maximum of €250,000 each.
>
> (iii) On 24th March, 2004 the first and second defendant entered into a contract of guarantee with the plaintiff wherein the defendants guaranteed the payment of all sums due and owing to the plaintiff by the borrower.
>
> (iv) On 2nd March, 2004 the plaintiff advanced the sums of €3.9m. to the borrower.
>
> (v) The terms of the loan agreement were not honoured by the borrower and on 29th February, 2012 the plaintiff demanded repayment of the sum of €3.3m. (approximately) from the borrower but the borrower failed, refused and/or neglected to repay the said sum.
>
> (vi) On 8th March, 2012 the plaintiff demanded payment from each of the defendants on foot of the personal guarantees but the defendants failed, refused or neglected to pay the said sums. As result of the first defendant's refusal to pay the sum of €250,000 to the plaintiff, the plaintiff has issued these proceedings.

The Defence of the first named defendant.

5. The first defendant put forward two defences to the claim. These are:

> (A) that ADM Londis was a co-guarantor on the loan and insofar as the plaintiff released ADM Londis from the guarantee, that operates, as a matter of law, to release all other sureties under the contract of guarantee.
>
> (B) that the evidence produced by the plaintiff before the court does not satisfy the provisions of the Bankers' Books Evidence Act 1879-1989.

6. I turn firstly to deal with the defence on the nature of the ADM Londis guarantee and its release.

The ADM Londis guarantee

7. The main lines of the first named defendant's defence in this regard are set out in para. 6.8 (a) – (e) of his replying affidavit of 19th October, 2013. I will deal with each of these arguments in turn.

> (1) The first argument is that the original 2003 facility agreement between the plaintiff and the borrower provided that, as security for the company's obligations to the plaintiff, the guarantee would be provided by the first defendant, the second defendant and ADM Londis.
>
> (2) However, Mr. Byrne says, the plaintiff released ADM Londis from its guarantee after a period of two years without his knowledge or consent.

(3) Mr. Byrne also says that the plaintiff never disclosed to the first and/or the second defendant that it had released ADM Londis from its guarantee when the parties were negotiating a variation of the original 2003 facility in 2009.

(4) Mr. Byrne also submits that the standard form guarantee clauses do not give liberty to the plaintiff to release a co-guarantor without this impacting on the liability of any remaining surety.

(5) Mr. Byrne also submits that, as a matter of law, the release by a creditor of one of a number of co-sureties under a contract of guarantee discharges the other co-sureties.

8. However Ms. Niamh Kavanagh in her replying affidavit effectively undermines all these aguments.

(1) Firstly, Ms Kavanagh states that the plaintiff's guarantee with ADM Londis was an entirely separate and distinct guarantee from the contract of guarantee entered into between the plaintiff and the first and second defendant (and she exhibits this ADM Londis guarantee). Therefore she submits, in my view, correctly, that there can be no suggestion that there is a right of contribution as between the defendants and ADM Londis under the two different guarantees:

(2) Secondly, the plaintiff and ADM Londis amended the Londis guarantee on 8th July, 2005 so that it provided, on its own terms, that it would expire on 5th March, 2006. (Again this amended ADM Londis guarantee is exhibited with her affidavit).

(3) Thirdly, Ms Kavanagh states that the plaintiff does not accept that the first defendant (or indeed the second defendant) was unaware that the ADM Londis guarantee was limited for a period of two years for a number of reasons as follows:

1. On 4th December, 2003 the plaintiff's solicitor at that time wrote to the solicitor for China Girls Ltd. (of which Mr. Byrne was a director) and informed them that the ADM Londis guarantee was only for two years.

2. Moreover, on 22nd September, 2008 Smith Stapleton & Co. Solicitors (acting on behalf of both the borrower company and the defendants in relation to the variation of the loan facility in August, 2009) wrote to ACC Bank and specifically requested a copy of the ADM Londis guarantees. On 25th September, 2008 ACC Bank replied to Smith Stapleton & Co. and enclosed a copy of the ADM Londis guarantee.

9. It is clear therefore, from all of the above, that the first named defendant was aware of the existence and terms of the ADM Londis guarantee through his solicitor. Therefore he had full knowledge of its existence, its terms and indeed its duration.

10. Moreover, Ms Kavanagh also avers to the fact that the relationship between the borrower and ADM Londis ended in or about 2009. Thereafter the borrower entered into a new agreement with a new company in respect of the supermarket premises and that new company operated the supermarket premises under the "Costcutters" brand from 1st March, 2009. In those circumstances the plaintiff says there is no way in which Mr. Byrne could reasonably have believed that ADM Londis would have remained liable for the company's borrowings indefinitely in circumstances where Londis's link with the borrower had come to an end.

11. Finally, the plaintiff says that the terms of the guarantee itself (entered into with the first defendant) permits it, as a matter of agreement between the parties, to amend its guarantee obligations with any other party.

12. In my view, the above submissions comprehensively undermine the defendant's claim in respect of the ADM Londis guarantee. It is clear that the ADM Londis guarantee was a separate and distinct contract of guarantee to that entered into by the first defendant with the plaintiff and therefore his arguments about the release of one surety operating to release all other sureties is to no avail. It is also clear that the first defendant had knowledge of the terms of the ADM Londis guarantee and, in particular, that it had expired. It was also clear that the first defendant either knew or must have known that the ADM Londis guarantee would have come to an end when ADM Londis was terminating its relationship with the borrower. Finally, in any event, the contract of guarantee between the plaintiff and the first defendant, on its own terms, provides that the liability under the guarantee would not be affected by any discharge or compromise which the plaintiff might have with any other person in respect of the obligations of the principal debtor.

13. In my view therefore these arguments on behalf of the first defendant must be rejected

The Bankers' Books Evidence Acts 1879-1989

14. The first defendant also made a legal submission (at the hearing before the Master and also at the hearing before this Court) that the plaintiff's evidence does not comply with the relevant provisions of the Bankers' Books Evidence Act 1879 and is therefore inadmissible as a matter of law. The submission essentially is that the plaintiff has not proven its debt against the borrower and therefore there is no evidence before the court that the borrower has defaulted on the loans and that the guarantee can properly be called in.

15. I turn now therefore to deal with the issue of the Bankers' Books Evidence Act 1879 (as amended).

The provisions of the Act

16. The Bankers' Books Evidence Act 1879 has been amended on two occasions. The first was by the Bankers' Books Evidence (Amendment) Act 1959 and the second was by S.131 of the Central Bank Act 1989.

17. Section 141 of the Central Bank Act 1989 provides that the Bankers' Books Evidence Acts 1879 and 1959, and s.131 and s.141 of the Central Bank Act 1989, may be cited together as the Bankers' Books Evidence Acts 1879 – 1989.

18. It is an Act whose eleven short sections have given rise to numerous difficulties of interpretations – particularly in recent years.

19. The original Act is entitled The Bankers' Books Evidence Act 1879. Its long title is, importantly, "An Act to amend the law of evidence with respect to Bankers' Books."

Sections 1 and 2

20. Section 1 provides that this Act may be cited as the Bankers' Books Evidence Act 1879. (now amended to become the Bankers' Books Evidence Acts 1879 – 1989).

21. Section 2 has been repealed.

Section 3 – Mode of proof
22. Section 3, (which has not been amended) has, as its side note, "*Mode of proof of entries in Bankers' Books*. It provides as follows:

> *"Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded"*

Section 4 – Proof that book is a bankers' book
23. Section 4 also has not been amended. Its side note reads "*Proof that book is a bankers book",* Section 4 provides as follows:

> *"A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank."*
>
> *"Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits" (Emphasis added)*

Section 5 – Verification of copy
24. Section 5 of the 1879 Act was amended by s.131 of the Central Bank Act 1989. The entire text of section 5 of the 1879 Act was effectively repealed and substituted by a new s.5 as set out at s.131 of the 1989 Act. The side note reads: "Verification of copy".

25. The new s.5 of the Banker's Book Evidence Act provides as follows:

> *"5(1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that:*
>
> *(a) In the case where the copy sought to be received in evidence has been reproduced in a legible form directly by either or both mechanical and electronic means from a banker's book maintained in a non-legible form, it has been so reproduced;*
>
> *(b) In the case where the copy sought to be received in evidence has been made (either directly or indirectly) from a copy to which paragraph (a) of this section would apply:*
>
> *(i.) The copy sought to be so received has been examined with a copy so reproduced and is a correct copy, and*
>
> *(ii.) The copy so reproduced is a copy to which the said paragraph (a) would apply if it were sought to have it received in evidence;*
>
> *(c.) In any other case, the copy has been examined with the original entry and is correct.*
>
> *(2) Proof to which subsection (1) of this section relates shall be given –*
>
> *(a.) in respect of paragraph (a) or (b) (ii) of that subsection, by some person who has been in charge of the reproduction concerned,*
>
> *(b.) in respect of paragraph (b)(i) of that subsection, by some person who has examined the copy with the reproduction concerned,*
>
> *(c.) in respect of paragraph (c) of that subsection, by some person who has examined the copy with the original entry concerned,*
>
> *and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits." (Emphasis added)*

Section 6 – Orders to produce
26. Section 6 of the 1879 Act has also been amended by the Central Bank Act 1989 s.131 (b). The only amendment is the deletion after the words "legal proceeding" of the words "to which the bank is not a party"

27. The side note to s.6 states "Case in which banker not compellable to produce books". Thus s. 6 now provides as follows:

> *"A banker or officer of a bank shall not, in any legal proceeding be compellable to produce any bankers' book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause."*

Section 7 - Inspection
28. Section 7 provides in its side note "*Court or judge may order inspection*". It provides as follows:

> *"On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs."*

29. Section 7 has been amended by the 1989 Act to add a new s. 7(A). This deals with applications made by a member of the Garda Siochána to a court where there are reasonable grounds for believing that an indictable offence has been committed. This has no application in the normal civil cases which are usually before the courts and therefore I will pass over it.

Section 8 - Costs
30. Section 8 deals with costs and provides as follows:

> *"The costs of any application to a court or judge under or for the purposes of this Act, and the cost of anything done or to be done under an order of a court or judge made under or for the purposes of this Act shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank where the same has been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceedings."*

Section 9 - Definitions
31. Section 9 is the Interpretation section which seeks to define "bank", "banker" and "banker's books". Section 9 was amended by the 1959 Act and amended again by the 1989 Central Bank Act.

32. Section 9 of the 1879 Act (as amended by the 1959 Act and as further amended by the Central Bank Act 1989) now provides as follows:

> *9 (1) In this Act the expressions "bank" and "banker" mean any of the following:*
>
> *(a) The Bank of Ireland, the Hibernian Bank Ltd., the Munster and Leinster Bank Ltd., the National Bank Ltd., the National City Bank Ltd., Northern Bank Ltd., the Provincial Bank of Ireland Ltd., The Royal Bank of Ireland Ltd., and the Ulster Bank Ltd.*
>
> *(b) Any other person who is the holder of a licence issued under s.47 of the Central Bank Act 1942*
>
> *(c) The Post Office Savings Bank*
>
> *(d) The Cork Savings Bank, the Dublin Savings Bank, the Limerick Savings Bank, the Monaghan Savings Bank and the Waterford Savings Bank*
>
> *(2) Expressions in this Act relating to "bankers' books"*
>
> *(a.) include any records used in the ordinary business of a bank, or used in the transfer department of a bank acting as registrar of securities, whether*
>
> *(i) comprised in bound volume, loose-leaf binders or other loose-leaf filing systems, loose-leaf ledger sheets, pages, folios or cards, or*
>
> *(ii) kept on micro film, magnetic tape or in any non-legible form (by the use of electronics or otherwise) which is capable of being reproduced in a permanent legible form, and*
>
> *(b) cover documents in manuscript, documents which are typed, printed, stencilled or created by any other mechanical or partly mechanical process in use from time to time and documents which are produced by any photographic or photostatic process."*
>
> *(3) [This sets out provisions on certificates as evidence for banking licences and is not relevant here.]*

Sections 10 -11
33. Section 10 of the 1879 Act has not been amended and provides an interpretation of "legal proceeding", "court" and "judge".

34. Section 11 deals with computation of time. This has also been amended by the 1989 Act.

Analysis of the Bankers' Books Evidence Acts.
35. As stated above, the Bankers' Books Evidence Acts 1879-1989 have as their long title, "*An Act to amend the law of evidence with respect to Bankers' Books*". The question which then arises is: in what respects did the Act seek to amend the law of evidence with respect to Bankers' Books.

36. In my view, the purpose of the Act was to amend the law of evidence in two important respects. The first was to relax the stringent requirements of the "best evidence" rule and the second was to relax the equally stringent requirements of the hearsay rule.

37. The best evidence rule provides that where the original of a document is available, that original should be produced in court. Given that many civil cases concern proof of a debt and given that these entries of bank loans were originally recorded in large bank ledgers, it was clearly a matter of great inconvenience to the bank and indeed all parties (and presumably added to the expense of a trial) to have to formally prove these debts by producing the original bank ledgers in court.

38. This "best evidence" rule was therefore amended by s.3 of the Act to provide that a "copy" of an entry in a banker's book "shall be received as *prima facie* evidence of such an entry". (The fact that it is only *prima facie* evidence means that it can be challenged or disproved by an opposing party if it should prove necessary or possible to do so).

39. The other purpose of the Act was to amend the hearsay rule. Under the hearsay rule, the person who made the original entry into the banker's book was the only person who could prove that he made such an entry and that the entry was a true and accurate record of the transaction.

40. However, in many cases, that employee might have left the bank; perhaps even on certain occasions it might not have been possible to discern who, in fact, made the entry into the banker's book.

41. Section 4 seeks to "cure" the hearsay problem. It provides that proof of the copy of the entry may be given by a partner or officer of the bank and not necessarily by the person who made the entry.

42. However, given that these two rules of evidence were being relaxed, the Act also introduced two sets of safeguards into the process to ensure that the Act was not abused and to provide safeguards for debtors of the bank. These safeguards are set out in ss. 4 and 5.

43. Section 4 provides that a copy of an entry in the banker's book shall not be received in evidence unless it is proved

(a) That the book was at the time of the making of the entry one of the ordinary books of the bank

(b) That the entry was made in the usual and ordinary course of business

(c) That the book is in the custody or control of the bank

44. The legislation thus provides a safeguard against any false or inaccurate copies of banker's books being admitted into evidence.

45. Section 5 provides an additional safeguard. As its side note states, it deals with the verification of the copy entry.

46. The original s.5 of the 1879 Act is stated in terms of limpid clarity and provided as follows:

> *"A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct."*

47. Unfortunately the simple and elegant clarity of that section has been totally obscured by the carbuncles added to it by the new s.5 in the 1989 Central Bank Act.

48. Despite the difficulty of the language in the new s.5 (1) (as inserted by the Central Bank Act 1989) I think the intention is clear. The copy must be compared with the original entry and it must be confirmed that it has been so cross checked with the original entry and that it is correct. Moreover if there is a copy of a copy, that too must be verified.

49. Indeed when one understands the logic of the Act the provisions are clear. The Act seeks to amend the law of evidence by amending the strict application of the best evidence rule and the hearsay rule. However, in return, there are certain safeguards to guard against abuse of the relaxation of the rules.

50. When viewed in this way, the Act seems a sensible and practical compromise between the needs of banks to prove their debts relatively easily (and the needs of debtors to be protected from bank mistakes that they may not be in a position to correct) and the application of the normal rules of evidence as they apply to proof of documents in civil trials.

Matters required by the Bankers' Books Evidence Acts 1879 – 1989

51. In my view therefore what the Bankers' Books Evidence Acts now require, for modern applications to court in today's world, where details of loans and other accounts are kept on computer, (and where bank statements are then printed off from computer records) is as follows:

1. A printed copy of a computer entry (e.g. a bank account statement) contained in the bank's computer records [see s.3 of the Act]

2. Formal proof, given by an officer of the Bank,

(1) that the computer records (from which the copy of the bank statement was taken) are one of the ordinary computer records of the bank [see s.4]

(2) That the entry of the account details into the computer records was made in the usual and ordinary course of the business of the bank[see s.4]

(3) That the computer records are in the custody or control of the bank [see s.4]

3. Formal proof that the bank account statements printed off from the computer and adduced in evidence have been reproduced directly from the bank's computer records [s.5 (1) (a)]

(This must be proved by the person in charge of the reproduction – see [s.5 (2) (a)]

4. Formal proof (if there is a copy of a copy) that the copy of the bank statement produced in court is a correct copy of the bank statement printed off from the computer (see 3 above) and that the two have been compared (see [s.5 (1) (b) (i)]

[This must be proved by the person who has compared the copy produced in court with the original copy (see s.5 (2) (b)]

5. Formal proof that the copy reproduced in court is also a copy which, in effect, could have been reproduced directly from the bank's computer records [see s.5 (1) (b) (ii)]

[This must also be proved by the person in charge of the reproduction at 3 above [s.5 (2) (a)]

6. Formal proof that the copy of the bank statement produced in court has been examined with the original entry in the bank's computer records and that it is correct [s.5 (1) (c)]

(This must be proved by a person who has examined the copy with the original entry in the computer [see s.5 (2) (c))

51. It is clear from the Act that all these proofs set out at s.4 and s.5 of the Act must be proved so that a copy of an entry in a bank's computer records can be received as evidence of the entry and of the account and of the transactions and accounts recorded therein (s.3)

52. If they are not proved, the Act is quite clear that the "copy of the entry" ….. "shall not be received in evidence." (See s.4 and s.5.) (Emphasis added)

Case Law

53. I turn now to an analysis of the case law in this area. The only Supreme Court case, it appears, in which this matter has been considered is *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168. One of the issues in this case was the admissibility of bank statements which had been provided to a detective garda who in turn had passed them on to an inspector. That inspector then gave evidence that he had raised a tax assessment on foot of these statements.

54. The Supreme Court held, on the facts of that case, that these bank statements were inadmissible. Keane C. J (with whom the other members of the court agreed) said at page 189:

> *"It is clear that, in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved only by their authors giving sworn evidence and being subject to cross-examination, unless advantage was taken of the provisions of the Bankers' Books Evidence Act 1879 – 1959. The documents in question, accordingly should not have been admitted in evidence in the High Court, unless as the plaintiff contends, they were admissible under the provisions to which I have just referred."*

55. In *Moorview Developments Ltd. and Ors v. First Active PLC* [2010] I.E.H.C. 275 Clarke J., (giving his 13th judgment in those proceedings) considered certain evidence tendered on behalf of First Active and the challenge to that evidence by the plaintiffs. It is clear that these proceedings were lengthy plenary proceedings. Mr. Coulson of First Active gave oral evidence to the court and he was cross-examined in respect of this evidence. Mr. Coulson gave evidence as to the calculations, the opening loan balance, payments made into the account, and other matters. Mr. Coulson also gave evidence that he had carried out the calculations himself subject to the fact that he was assisted by one of his colleagues. He also produced a series of lever arch files which contained back-up documentation in respect of each item which formed part of his calculations. Mr. Coulson, as Clarke J. noted, "gave clear evidence that each item in the calculation was derived from the books and records of First Active and was accurately reflected in the schedules which he produced to the court." (see para. 4.5 and para. 4.6 of the judgment)

56. Moreover at para. 4.7 Clarke J. stated "Subject to the individual points to which I will shortly turn, no challenge was made to any particular entry or to any of the calculations carried out."

57. In my view therefore, it seems from the above, that Clarke J. was satisfied - on the evidence - that in fact all the relevant provisions of the Bankers' Book Evidence Acts 1879 -1989 were properly and fully complied with. An appropriate officer of the bank gave all the appropriate evidence. Therefore the requirements of the Bankers' Book Evidence Acts were fulfilled.

58. I think it is in that context that the statement of Mr. Justice Clarke at para. 4.8 should be understood. At para. 4.8 Clarke J. stated as follows:

> *"A point was made on behalf of the Cunningham Group and Mr. Cunningham that some of the documents produced by Mr. Coulson were not documents which could be proved under the provisions of the Banker's Book Evidence Act 1879 – 1959. However that submission seems to me to misunderstand the object of that legislation. As pointed out in Volume One of the first edition of Halsbury Laws of England at para. 1301, the main object of the Bankers' Book Evidence Acts is to relieve bankers from the necessity for attending at court and producing their books under a subpoena duces tecum. The purpose of the Acts is not, therefore to facilitate banks in proving matters. The purpose is to enable evidence to be given of the contents of other parties bank accounts without the necessity for the attendance of a representative of the bank concerned and the production of the relevant books. However in this case a representative of the bank did attend and gave evidence that the records which he produced to the court were taken from First Active's electronic books and faithfully recorded what was present in them. In those circumstances there is no need for the relevant records to conform with the Banker's Books Evidence Acts. That legislation is irrelevant to a case where the contents of the bank's books are proved in the ordinary way by a witness who can give direct evidence of having analysed the books."*

59. In my view, that statement of Clarke J. must be read in the context that the evidence was given in a plenary (not a summary) hearing by oral evidence and that all the relevant proofs of the Act were complied with.

60. Another related case is *Bank of Scotland Plc. v. Fergus* [2012] I.E.H.C. 131 in which Finlay Geoghegan J. also considered the provisions of the Bankers' Books Evidence Act - again however in the context of a plenary hearing.

61. It is clear from Finlay Geoghegan J.'s decision that Mr. Moroney, a manager of the plaintiff, gave evidence that he had checked the electronic records of the bank in relation to the company, that he had identified three subsisting accounts and stated that in his view these accounts were correct and accurate. Counsel for the plaintiff submitted that this was sufficient evidence of the debt. Finlay Geoghegan J. noted in para. 15 of her decision that there was no specific challenge to any aspect of the bank's records in relation to the alleged indebtedness of the company. The learned judge also out the relevant paragraph (set out above) of Clarke J. in *Moorview Developments* and at para. 14 states:

> *"I respectfully agree with the above approach as being correct. In this case Mr. Moroney, as a former official of the bank, is entitled to give evidence of the bank's records in relation to the indebtedness of the company to the bank. Those records include the electronic records of the bank. That evidence is admissible evidence and is prima facie evidence of the liability of the company to the bank. As pointed out by Clarke J., if a specific element of the records is challenged, the Court would have to decide on the factual dispute and the weight to be attached to the evidence of the relevant bank official would depend upon his personal knowledge of the matters in dispute."*

62. There is also a similar decision of Ryan J. in *Bank of Ireland v. Keehan* [2013] I.E.H.C. 631 in which he also adopted and applied the dicta of Clarke J. and Finlay Geoghegan J.

63. In *Ulster Bank Ireland Ltd v. Dermody* [2014] I.E.H.C. 140 O'Malley J. also considered the admissibility of bank statements and having considered the above authorities stated as follows:

> *44. "The issues to be determined are, firstly whether the records in this case are admissible by way of a common law exception to the rule against hearsay and secondly, if they are not, whether there has been compliance with the statutory formulation of the Bankers' Book Evidence Act 1879 – 1959."*
>
> *45. "It is clear from the judgments cited above, that Clarke J., Finlay Geoghegan J. and Ryan J. are of the view that business records of this nature are admissible as prima facie evidence of the truth of their contents, without reference to statute. Unfortunately I find myself unable to reconcile this with the decision of the Supreme Court in Hunt and I have not been referred to any other authority which includes such records as exceptions to the rule at common law. (It is true that a number of 19th century decisions predating the Act of 1879 held that entries made in business records were admissible but this appears to have been so only where the person who made the entries was deceased).*
>
> *46. The problems that can arise in non-banking cases as a result of the hearsay rule were highlighted in the decision of the House of Lords in the well-known case of Myers v. DPP [1965] A.C. 1001. In the United Kingdom, legislation followed shortly afterwards in the shape of the Criminal Evidence Act 1965. Since then the common law rules relating to hearsay in both the civil and criminal law spheres have been supplanted in that jurisdiction by a series of legislative measures which have significantly affected the rigidities of those rules.*
>
> *47. In this jurisdiction, the Criminal Evidence Act 1992 provides for the admissibility of business records in criminal cases. However there has been no equivalent legislation in relation to civil matters and the common law exclusionary rule continues to apply save where modified by statute or by recognised established exceptions.*
>
> *48. In banking cases specific provision was made by the Banker's Books Evidence Act as amended. It is certainly the case that the original Act in 1876 (repealed and replaced by the 1879 Act) was intended to relieve banks of the inconvenience associated with a subpoena duces tecum in litigation between third parties. However it is clear since, at least, the 1989 amendment (referred to at para. 18 above) the provisions of the Acts may also be availed of in proceedings to which a bank is itself a party. Both section 3 and section 6 are now applicable to all legal proceedings".*
>
> *49. Following, as I am of course bound to, the Supreme Court decision in Hunt, I find that in the instant case, the evidence of Mr. Evans is not admissible to prove the truth of the contents of the records unless it comes within the provisions of the Acts.*
>
> *50. The issue that arises then is whether Mr. Evans can be said to be "officer" of the plaintiff bank within the meaning of the Acts. In my view he cannot. I accept for the purposes of the Acts an employee may be considered to be an officer of the bank. However Mr. Evans is not an employee of the plaintiff but of a separate legal entity."*

64. In the present case no point has been taken as to whether Ms Niamh Kavanagh is an officer of the bank. In those circumstances I am assuming that Ms Kavanagh is indeed an officer of the plaintiff bank within the meaning of the Acts.

Conclusions

65. The courts have to have regard to developments in commercial life as they consider legislative provisions from a bygone age. The current legislative provisions of the Bankers Books Evidence Act 1879 as amended in 1959 and indeed in 1989 are difficult, convoluted and opaque. They need a simple restatement.

66. However the governing principles of the 1879 Act are still intact. It is an Act to amend the law of evidence with respect to Bankers' Books. It is a law to simplify the giving and taking of evidence in relation to bank statements and the like. It means that the person who created the original document or who made the original entry into the computer record does not have to be called to give evidence. Another person in the bank can give that evidence when he has carefully reviewed the bank account statements. However the Act sets out in some detail what those proofs are and they must be complied with. If they are not complied with, then that evidence is not admissible. The Act is quite clear: "the copy" "shall not be received in evidence" unless the requirements of the Act are fulfilled.

67. The governing principles in the statute were applied in the Supreme Court in *Criminal Assets Bureau v. Hunt* and indeed by O'Malley J. in *Ulster Bank Ltd v. Dermody* to exclude evidence because the sections of the Act were not complied with. Likewise, the principles of the Act were applied by Clarke J. in *Moorview*, Finlay Geoghegan J. in *Bank of Scotland v. Fergus* and Ryan J. in *Bank of Ireland v. Keehan* because they were of the view that the relevant provisions of the Act had been complied with. The issue in each case is whether on the evidence before the court the relevant proofs required by the Act have been complied with.

68. With that in mind, I turn now to consider the averments in the plaintiff's affidavits.

The Averments in the affidavit of Ms. Kavanagh

68. In the first sentence of her affidavit Ms. Kavanagh describes herself as follows:

> *I, Niamh Kavanagh employee, of ACC Bank PLC., Charlemont Place in the city of Dublin aged eighteen years and upwards make oath and say as follows.*

69. Ms Kavanagh in para. 1 of her grounding affidavit states as follows:

> *"I am employed by ACC Bank PLC ("The Bank") as a special asset manager in the Credit Special Asset Management Department of the bank and I am duly authorised by the bank to make this affidavit for it and on its behalf and I do so from facts within my own knowledge and from a perusal of the Bank's books and records save where otherwise appears and where so otherwise appearing I believe the same to be true and accurate."*

70. At para. 7 of her affidavit she states as follows:

> *"On or about 2nd March, 2004 the Borrower drew down funds in the sum of €3,900,000 in respect of the loan account number 10005567. In this regard I beg to refer to a true copy statement of account and a spreadsheet detailing the total amount due and owing to the plaintiff as of the date of demand (referred to in para. 8 below) upon which pinned together and marked with the letters and number MK3 I have signed my name prior to the swearing hereof"*

71. At para. 8 of her affidavit she says as follows:

> *"I say that the loan advanced by the Bank pursuant to the facility letter was repayable on demand. In circumstances where a breach of the terms of the facility letter had occurred and no acceptable proposal was forthcoming from the borrower in respect of its liabilities to the plaintiff pursuant to the facility letter, by letter dated 29th February, 2012, the plaintiff demanded repayment of the sum of €3,362,547.37 from the borrower but the borrower has failed refused or neglected to repay the said sum or any portion thereof. In this regard I beg to refer to a true copy of the letter of demand as aforesaid, upon which, marked with the letters and number MK4 I have signed my name prior to the swearing hereof."*

72. When one compares the requirements of the statutory provisions with the averments provided by Ms Kavanagh it is clear that there is a deficit.

73. There is no evidence before the court that provisions of s.4 have been complied with i.e. there is no formal proof

(1) that at the time of the making of the entry this banker's book was one of the ordinary books of the bank

(2) that the entry was made in the usual and ordinary course of business

(3) that the banker's book was in the custody or control of the bank

74. Moreover the formal requirements of s.5 have also not been complied with.

Conclusion
75. In the circumstances I have come to the conclusion that, on the current state of the affidavit evidence before the Court, the relevant provisions of the Bankers' Book Evidence Acts 1879 – 1989 have not been complied with.

76. I will hear further submissions from counsel on any further applications in respect of this matter and in particular on any application to file supplemental affidavit evidence to deal with the above matters.