THE HIGH COURT

BANKRUPTCY

[No 5373]

IN THE MATTER OF A BANKRUPTCY SUMMONS ISSUED ON BEHALF OF ALLIED IRISH BANKS PLC OF BANK CENTRE, BALLSBRIDGE, DUBLIN 4 ON THE 14™ DAY OF MAY, 20112.

BETWEEN:

ALLIED IRISH BANKS, PLC

APPLICANT

AND

IVAN YATES

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 21st day of August 2012

The respondent herein was served with a bankruptcy summons issued on the 14th May, 2012. He has now sought to have that bankruptcy summons dismissed.

Background
The bankruptcy summons was issued in respect of the respondent (hereinafter referred to as "the debtor") herein on the 14th May, 2012, in respect of the sum of €3,692,852.13 being the sum claimed by the applicant on foot of particulars of demand served on the debtor in or around the 6th April, 2012. The said sum is stated to be due on foot of a guarantee dated the 13th April, 2010, and made between the debtor of the one part and the applicant of the other part, whereby the debtor agreed to pay on demand all the liabilities due and owing by Celtic Bookmakers Limited (now in liquidation) to the applicant herein, including those liabilities due pursuant to a letter of sanction dated the 26th February, 2010, issued by the applicant and addressed to the borrower as supplemented and replaced by a letter of sanction dated the 23rd November, 2010 subject to the principle limit of €6,769,000 together with interest thereon from time to time. The bankruptcy summons herein was served on the debtor on the 14th June, 2012, by ordinary prepaid post pursuant to an order for substituted service granted on the 6th June, 2012. By notice of motion dated the 25th June, 2012, the debtor sought to have the bankruptcy summons issued on behalf of the applicant dismissed on a number of grounds.

The Grounds for Seeking the Dismissal of the Summons
Six grounds were relied on by the debtor in seeking the dismissal of the summons namely,

> (i) That he did not owe any amount to the applicant.
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> (ii) That in the event that he owed any sum, the sum due is lower than the sum of €3,392,852.13 specified in the summons.
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> (iii) That the debtor was not served with a valid four day demand notice prior to applying for the issue of the summons as required by statute.
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> (iv) That the bank did not demand payment of the debt claimed on more than one occasion prior to applying for the issue ofthe summons.
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> (v) That prior to applying for the issue of the summons the applicant did not lodge with the proper office of the court, bills, notes, guarantees, contracts, judgments or orders referred to in the affidavit on foot of which the summons was issued and
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> (vi) That the applicant failed to serve a true copy of the affidavit on foot of which the summons was issued on the debtor.

The Law
There are a number of provisions on the Bankruptcy Act 1988, (hereinafter referred to as "the Act") which are of relevance. Firstly, s. 7(1)(g) provides as follows:-

"An individual (in this Act called a "debtor") commits an act of bankruptcy...

> (g) if the creditor presenting a petition has served upon the debtor in the prescribed manner a bankruptcy summons, and he does not within fourteen days after service of the summons pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor."

Section 8(5) provides:-

> "(5) A debtor served with a bankruptcy summons may apply to the Court in the prescribed manner and within the prescribed time to dismiss the summons.

(6) The Court

(a) may dismiss the summons with or without costs, and

(b) shall dismiss the summons if satisfied that an issue would arise for trial."

It would also be helpful to refer to the provisions of O. 76, r. 11 of the Rules of the Superior Courts. It provides as follows:-

> "r. 11(1) A creditor desirous that a bankruptcy summons may be granted shall, not earlier than four clear days after he shall have served a notice in the Form No.4, file in the proper office a copy of such notice, together with an affidavit in the Fonn No.5 of the truth of his debt made by himself or by any other person who can swear positively to the facts verifying the truth of his debt, and that no form of execution has issued in respect of such debt and remains to be proceeded upon, and shall lodge with the proper officer any bills, notes, guarantees, contracts, judgments or orders referred to in his affidavit together with the summons which it is proposed to issue."

The Issues

The first issue raised on behalf of the debtor was to the effect that he did not owe the amount alleged to be due. That point was expanded upon by him in his affidavit grounding this application and the point made was that he had signed a number of documents at various times in his capacity as a director of the company Celtic Bookmakers Limited and that the copy guarantee purported to have been signed by him was a poor and indistinct photocopy and for that reason he was unable to assess whether he had signed that guarantee. At the hearing of the application before me, it was accepted on behalf of the debtor that the document relied on by the petitioner had indeed been signed by the debtor and was authentic. Accordingly that issue was not pursued.

The second issue raised by the debtor relates to what is alleged to be an overstatement of the amount actually due. This arises in a number of ways. The first of these is stated to be an overpayment to the receiver of the company in the sum of €162,000 as a result of an excess of fees charged by a receiver over the assets of the company. A decision was made on the 2nd December, 2010, to appoint a receiver and it is stated by the debtor that the receiver, Neil Hughes had indicated that the costs of the receivership would not be more than €100,000. In fact, the sum of €312,000 approximately was paid in respect of receiver's fees and receiver's legal fees arising out of the sale of the assets of the company. Reference was made in this context to what was described as a "kicker payment" as part of the contract for sale in respect of the Lombard Street, Dublin premises to a third party. It is not necessary to set out all the details in relation to this issue save to say that it was contended that a minimum sum of €162,000 was wrongfully paid by the petitioner to the receiver in respect of fees. Mr. Hughes swore an affidavit in response to this issue on the 13th July, 2012 on behalf of the applicant and disputed very much the contention that there was an agreement to the effect that the costs of the receivership would be a maximum of €100,000. The applicant has also disputed the allegation that the sum alleged to be due has been overstated by the sum of €162,000 and Paul Dowling in his affidavit sworn herein on behalf of the applicant made the point that there was no agreement between the applicant and the debtor as to the level of the receivers fees. In addition it was pointed out that the receiver was appointed pursuant to a deed of charge and as is usual the deed of charge contained a provision to the effect that the receiver acted as agent of the company.

Other matters were referred to on behalf of the debtor as giving rise to the question as to whether the amount claimed was correct or not. One of these related to the fact that the bank apparently continued to apply charges for items such as night safe lodgements in respect of outlets no longer trading. No figure was given in respect of this item and no evidence was put before the court to substantiate this claim and for that reason, I cannot rely on this allegation as demonstrating that the sum said to be due has been overstated. The second matter is an issue in relation to the question of interest which was dealt with by the debtor at para. 14 of his affidavit sworn herein on the 23rd June, 2012. He stated that it was represented to him at the commencement of the receivership by the bank and by Neil Hughes that the interest running on the debts owed by the company would be frozen as of the date of the company entering receivership in January 2011. He brought the fact that those interest charges continued to arise to the bank's attention in 2011. He said that at a meeting held in May 2011, he was told by Barry Tierney and Philip McDermott of the applicant that these were "suspense interest charges" and mere "bookkeeping procedures by the bank" and further that "these would not be pursued". Nevertheless those charges have been pursued and a sum of €240,000 is claimed to have accrued since that date on the figures given in the bankruptcy summons. Mr. Dowling on behalf of the applicant stated at para. 16 of his affidavit sworn on the 13th July, 2012, that no agreement was reached between the bank and the debtor that the bank would suspend interest payments on the company's liabilities to the bank. He noted that a request was made on behalf of the debtor that the bank would agree not to charge any further interest on the company's liabilities in the course of the receivership process. In support of that contention, he relied on a document which came from Mr. Somers who was advising the debtor dated the 26th May, 2011, headed "Debt restructuring proposal/settlement" in which it was stated in the final section headed "Settlement proposal":

> "Ivan and Deirdre have noted that AIB continues to charge interest after the 4th January, 2011, on the company's debts and they request, as a helpful gesture, that AIB would agree not to charge any further interest during the receivership process. An indication from AIB, perhaps by the end of June, as to their response to this settlement proposal would be appreciated".

Mr. Dowling in his affidavit, while he referred to the Debt restructuring proposals/settlement document did not deal with the points made by the debtor as to the meeting held in May 2011, attended by two representatives of the applicant. I note that the meeting is stated to be a meeting held in May 2011, and the date of the debt restructuring proposal/settlement is stated to be the 26th May, 2011. There is an issue as to whether or not Mr. Tierney and Mr. McDermott did in fact indicate to the debtor that the interest running on the debts would not be pursued.

Counsel on behalf of the debtor having referred to the decision in the case of *O'Maoileoin v. Official Assignee* [1989] I.R. 647, *In Re Sherlock* [1995] 2 I.L.R.M. 493 and to the decision in the case of the *Minister for Communications, Energy and Natural Resources and M O 'C. v. M W and R. W.* [201OJ 3 I.R. 1, noted that, given the dispute on the basis that the sum claimed was excessive because of the fees charged by the receiver to the company and the alleged overcharging of interest, the applicant sought to rely on a provision of the guarantee which provides as follows:-

> "In consideration of the bank agreeing at my/our request to give time to make continued advances or otherwise give credit ... the guarantor hereby agrees to pay and satisfy to the bank on demand all sums of money which are now or shall at any time hereafter be owing to the bank anywhere on any account whatsoever whether from the borrowers solely or from the borrowers jointly ..."

The guarantee continues as follows:-

> "A certificate by an officer of the bank as to the amount for the time being due from the borrower to the bank or where the amount so due exceeds the amount up to which the guarantee may be enforced a certificate to that effect but without specifying the amount so due by the borrower and as to interest after demand from time to time payable hereunder shall be conclusive evidence for all purposes against the guarantor."

The point was made on behalf of the applicant that there was no dispute about the accuracy of the figures claimed in the proceedings. On the contrary, the point is made by the debtor that the sum claimed is excessive for the reasons explained above. On that basis, the applicant has sought to distinguish the authorities referred to above, namely, *0'Maoileoin v. Official Assignee* [1989] I.R. 647, *In Re Sherlock* [1995] 2 I.1.R.M. 493 and *the Minister for Communications, Energy and Natural Resources and M.O'C. v. M Wand R.W.* [2010] 3 I.R. 1.

I propose to refer to a number of passages from those judgments. The issue in *0'Maoileoin* focused on the appointment of a receiver by way of equitable execution and whether that amounted to a stay of execution in respect of the portion of the debt payable to the receiver. Hamilton P. as he then was reviewed the case law extensively and having done so, stated:

> "These cases clearly establish that the bankruptcy code, having regard to the consequences which flow from an adjudication of bankruptcy, is penal in nature and that the requirements of the statutes must be complied with strictly; that the debtor's summons to be served within the provisions of s. 21 of the Bankruptcy Ireland (Amendment) Act, 1872, must be served in the prescribed manner and the amount due in accordance with a judgment, when a judgment is relied upon, must be accurate and that a claim for an amount in excess of the amount due in accordance with such judgment would render the notice defective and a subsequent adjudication void."

In the case of *In Re Sherlock*, Murphy J. held that where the amount said to be due on foot of the notice requiring payment and on the bankruptcy summons is in excess of the amount actually owed, this constitutes a substantial defect rendering the notice and the summons defective. Therefore, failure to respond to the summons could not constitute an act of bankruptcy with the result that the subsequent adjudication was void. That was a case in which it emerged that on foot of a garnishee order a sum in addition to that which was anticipated to be recovered on foot of the garnishee order, in respect of interest, was also paid to the creditor. Murphy J. noted in the course of his judgment as follows:-

"Whilst it seems that this payment in respect of interest was not foreseen by the consent order of the 19th March, 1993, it is clear that the defendants in the proceedings, including the applicant, Gerard Sherlock, are entitled to credit for the interest which accumulated between the 11th January, 1993 and the making of the order in March of that year as against the principal sum of £167,506.92. In other words he is and was entitled to a credit of something in excess of £1,000 against the amount of the principal sum. I have no doubt whatever that the failure to give credit for this sum was due to an oversight. Furthermore, there can be no doubt that, on any computation, the amount due by the bankrupt far exceeds the minimum sum required to found an order for adjudication. Nevertheless, the question remains whether this error invalidates the bankruptcy summons and in turn the order for adjudication based on it."

Murphy J. went on to consider the decision in the case of *0'Maoileoin* referred to above and referred to a number of the authorities cited by Hamilton P. in the course of that case. He concluded by stating:-

> "It seems to me that in applying those principles to the present case where I have accepted that the sum demanded of the debtor exceeded the amount due by more than £1,000, it follows that the cause shown must be allowed and the adjudication set aside."

Finally I will refer very briefly to the decision in the case of *Minister for Communications v. M W* In that case McGovern J. referred to the decision in *0'Maoileoin v. Official Assignee* and also to the decision *In Re Sherlock*. He considered in that case that an issue arose as to whether or not interest on foot of a judgment could be claimed for a period in excess of six years and if not, whether the sum claimed was correct, given that an issue was raised, he was satisfied that the issue in question was one which necessitated the dismissal of the summons.

The applicant in considering these authorities sought to rely on the certificate in relation to the amount due and specifically on a decision in a case, *Bache and Company v. Banque Vernes* [1973] L.L.R. 437, to the effect that a conclusive evidence clause was binding according to its terms. I will return to a consideration of that judgment at a later stage. The applicant also submitted that even if the debtor was entitled to challenge the certificate, this was a case in which there was an undisputed sum in excess of €1,900 and it was contended that that being so, that the summons cannot be challenged unless no sum whatsoever is due or if a sum less than €1,900 was due. This was based on the wording contained in the bankruptcy summons to the effect that "unless you shall within the time aforesaid apply to the court to dismiss a summons on the ground that you are not indebted to the said Allied Irish Banks plc in any sum or that you are only indebted to Allied Irish Banks plc in a sum less than €1 ,900 ..." Reference was also made to the proviso on the second page of the bankruptcy summons which states:-

> "If, however, you are not indebted to the said Allied Irish Banks plc in any sum or are only indebted to Allied Irish Banks plc in a sum less than €1,900 you must make application to the court within fourteen days after service hereof, to dismiss the summons, by filing in the Examiners Office, Four Courts, Dublin, an affidavit in the prescribed form, stating that you are not so indebted, or only so to a lesser amount than €1,900 ..."

It was contended on behalf of the applicant that the inference to be drawn from the bankruptcy summons is that a challenge to the summons could only be made if no sum whatsoever was due or if a sum less than €1,900 is due. It may be that on one view such an inference is open to be drawn from the wording of the bankruptcy summons but such an inference flies in the face of the long and well established authorities to which reference has already been made. Indeed, the judgment of Murphy J. in *In re Sherlock* and the authorities cited by Hamilton P. in the decision in *O'Maoileoin* such as that in *Re. Collier* [1891] 64 L.T. 742 and in *Re. Debtor, ex parte a debtor* [1908] 2 K.B. 684 have made this clear. In the latter of those cases, Cozens-Hardy M.R. stated as follows:-

> "This appeal, though it relates only to a small amount, undoubtedly raises a point of importance. The petitioning creditors obtained a final judgment against the debtor. Certain sums were either paid or allowed by way of set-off so that the amount of the judgment debt was reduced. A bankruptcy notice was served on the debtor, and in the margin of that notice there are inserted certain figures which bring out the result that a sum of £984. 7 s. 1d. is the balance of the amount due on the final judgment. The bankruptcy notice proceeds in the usual form requiring payment and stating that a non compliance with the bankruptcy notice will involve the consequences, which to some extent are penal consequences,

> of bankruptcy. The amount claimed in the bankruptcy notice was not due. There was a mistake in the calculation of interest. For the present purpose I care not what the precise amount of the mistake was. It was, I believe, between one and two pounds. But putting aside the question of amount, this was a bankruptcy notice which said 'If you do not pay a judgment debt which is due and also a further sum which is not due you are liable to be made bankrupt'. It is said that is a formal defect which can be set right under s. 143, subs. (1), of the Bankruptcy Act, 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him. It is not necessary to say that there was any attempt on the part of the petitioning creditors wilfully to exact payment of that which they knew was not due. My judgment does not depend upon that. It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language ofs. 143. So much in point of principle."

Thus, I think it is clear beyond doubt that if the amount claimed on foot of the bankruptcy summons is in excess of that which is actually due, then in those circumstances there is no obligation to pay the amount claimed on foot of the bankruptcy summons and a failure to pay on foot of that summons will not constitute an act of bankruptcy. Therefore, I disagree with and do not accept the submission on behalf of the applicant to the effect that the application to dismiss the summons can only be brought if there is in fact no sum due at all or alternatively a sum less than €1,900.

The view I have just expressed leaves open the question as to the status of the certificate relied upon by the applicant in relation to the amount said to be due. If the conclusive evidence clause is binding on the debtor, then, in those circumstances, the applicant contends that no issue can be raised by the debtor in relation to the amount due on foot of the certificate. Accordingly, it is necessary to consider the arguments in relation to the certificate in this case. I have had the benefit of helpful written submissions in regard to this issue from both sides. Those furnished on behalf of the debtor made a number of points, namely, that the certificate was undated, that whilst the amount due is said to be due as of the 6th April, 2012, the certificate was never made available to the debtor prior to the service of the affidavit in which it is exhibited and he was not previously aware of its existence, the certificate is unsealed and finally, it was noted that, contrary to the express requirements of the guarantee, no officer of the bank is named in the certificate or avers on affidavit to having prepared the certificate. Instead the certificate purports to emanate from the bank as a corporation and is signed by two authorised signatories on behalf of the bank.

Accordingly, it was submitted on behalf of the debtor that:

> (a) That there was at least an arguable case as to whether reliance on such a clause is invalid as contrary to public policy and/or the Constitution particularly in the context of a penal process such as bankruptcy.
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> (b) It is well established that such clauses should be construed strictly against the bank, meaning that the failure to identify the officers of the bank certifying the liability on the face of the certificate must be fatal.
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> (c) It should not be possible to rely on such a certificate so as to exclude a deduction from the amount claimed arising from a mistake oflaw or an equitable set off.
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> (d) In light of the strict construction given to such clauses and guarantees generally, the language used in the guarantee must be interpreted to mean that the debtor has agreed only to reply the amount actually due and owing from the company and not the amount certified.

I now want to consider the decision in the case of *Bache and Company v. Banque Vernes* [1973] L.L.R. 437 in more detail. In that case, the plaintiffs were commodity brokers on the London Commodity Exchange and they demanded a bank guarantee before entering into buying and selling transactions on behalf of their customer, a French trading company. The defendants, who were the trading company's bankers, gave the guarantee which contained a conclusive evidence clause. The plaintiffs carried out various transactions for the trading company and subsequently there was alleged to be a balance due to the plaintiffs. The trading company failed to pay and a notice of default was served on the defendants on the 25th July, 1972. On the 28th July, 1972, the plaintiffs issued proceedings against the defendants claiming £60,000 under the guarantee. Judgment was given for the amount claimed and the defendants appealed on the grounds that the amount claimed was not correct and the conclusive evidence clause was contrary to public policy and invalid because (i) it attempted to oust the jurisdiction of the courts and (ii) made the brokers judges in their own cause. Denning M.R. in the course of his judgment noted that a claim in relation to the validity of a conclusive evidence clause had not come before the courts previously but he noted that a similar clause appeared in the Encyclopaedia of Forms and Precedents. He continued at p. 439:-

> "The question is whether that conclusive evidence clause is conclusive against the party who signs the guarantee. Is he compelled to pay under it, even though he alleges that the accounts are erroneous? As a matter of principle I should think the clause is binding according to its terms. In Halsbury's *Laws of England*, Vol. 15 at p. 278, it is said that:-
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> > 'The tendering of evidence which by statute or by agreement of the parties is declared to be conclusive, precludes evidence to the contrary, which is inadmissible, unless the evidence adduced is inaccurate on the face of it or fraud is shown ...'"

Denning M.R. then went on to refer to a decision of the High Court of Australia, *Dobbs v National Bank of Australasia Limited* [1935] 53 C.L.R. 643. That case concerned a guarantee given to a bank which contained a similar clause. Denning M.R. continued as follows:-

> "It was argued before the High Court of Australia that that claim was contrary to public policy as tending to oust the jurisdiction of the court. But the court rejected that submission, saying at p. 654:-
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> > 'It is a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the court prevents parties giving a contractual conclusiveness to a third person certificate as some matter upon which the rights a obligations may depend ... there are many familiar kinds of contracts containing provisions which make the certificate of some person, or the issue of some document, conclusive of some possible question.'"

The principle in that case was accepted by counsel appearing on behalf of the French bank, but it was sought to be distinguished because the certificate was to be given by the manager or officer of the branch at which the customer kept his account. It was argued that such a person was comparable to a named architect or an engineer but the argument was that as there was no definite or nominated person in the case before the court and that it was the brokers themselves who gave the certificate for their own

benefit, that the authority of that decision should be distinguished. Denning refused to accept that distinction. He stated:-

> "The brokers must act by a manager in the office, just as a bank does. So, here it seems to me the notice of default given by the English brokers is perfectly good. There is no public policy against it. On the contrary the public policy is in favour of enforcing it. ... This does not lead to any injustice because if the figure should be erroneous, it is always open to the French trading company to have it corrected by instituting proceedings against the brokers, in England or in France, to get it corrected as between them."
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> He went on to state:-
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> "I would only add this: this commercial practice (of inserting conclusive evidence clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so, that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross claims to be settled later by an arbitrator. So, if a banker or broker gives a notice of default in pursuance of a conclusive evidence clause, the guarantor must honour it, leaving any cross claims by the customer to be adjusted in separate proceedings."

It was submitted on behalf of the debtor that one could not stand over the reasoning adopted in that passage in the Ireland of today having regard to the economic crisis which has been contributed to by what was described as "unreliable and dishonest actions on the part of senior bankers".

It will be noted from the passages cited above that Denning M.R. in the course of his judgment made reference to the decision in the case of *Dobbs v. National Bank of Australasia Limited* and in that case some useful comments were made in relation to the nature of such certificates. Having cited the particular clause in that case, the court stated:-

> "This clause does not purport to impose upon the bank the necessity of obtaining the certificate it prescribes. It is not a qualification of the undertaking to pay contained in the first clause. It does not make a certificate a condition precedent to recovery. The promise remains a promise to pay the amount owning; it does not become a promise to pay the amount owing if certified or a promise to pay only what is certified as owing. The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtness may be ascertained conclusively by a certificate. It was contended, however for the appellant that upon its true construction, the clause did not make the certificate conclusive of the legal existence of the debt but only of the amount. It is not easy to see how the amount can be certified unless the certifier forms some conclusion as to what items ought to be taken into account, and such a conclusion goes to the existence of the indebtedness. Perhaps such a clause should not be interpreted as covering all grounds which go to the validity of a debt; for instance, illegality, a matter considered in *Swan v. Blair*. But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness. But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness. The clause means what it says, that a certificate of the balance due to the bank by the customer shall be conclusive evidence of his indebtedness to the bank. Upon this construction the appellant contends that the clause is void. The contention is based upon the view that it attempts to oust the jurisdiction of the court upon an issue essential to the guarantor's liability and to substitute for the judgment of the court the determination or opinion of an officer of the bank. This argument appears to us to involve a misunderstanding of the principle upon which it professes to rely. It confuses two different things. A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the courts might have been required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the courts of law was ever recognised as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the courts to enforce them. The parties may agree in the sense of arriving at a common intention as to their future action but, because they do not contemplate legal relations, avoid the creation of rights and thus preclude resort to the courts (See *Rose and Frank Company v. J.R. Compton Brothers Limited; Cohen v. Cohen)*."

The passage above cited is a useful explanation of the nature and purpose of such certificates. Thus, it seems to be clear that the conclusive evidence clause can be relied on by a bank against a surety in a case such as this. The reliance on such a clause does not oust the jurisdiction of the courts - it simplifies the proofs in respect of the amount alleged to be due. It is also clear that in certain cases the certificate can be challenged, for example, in circumstances involving illegality or fraud. No such issue has been raised in the present case. Nonetheless, that decision left open the possibility of challenging the validity of the underlying debt referred to in the certificate.

Reference was made on behalf of the debtor in the course of the submissions to a number of statutory provisions granting conclusive evidential status to either a certificate or statement made by named individuals. In that context, I was referred to the decisions in the case of *Maher v. A.G.* [1973] I.R. 140 and *The State (MacEldowney) v. Kelleher* [1983] I.R. 289. Those decisions relate to conclusive evidence clauses incorporated into statutory provisions and it seems to me that the fact that such statutory provisions were found to be unconstitutional does not avail the debtor in this case. A unilateral statutory provision conferring such status on either a certificate of statement made by a specific individual is entirely different from the situation in which two parties mutually agree how they will determine certain issues that may give rise to disputes between them. I do not think that the situations are analogous.

I would also observe in relation to the certificate at issue herein that the existence of or furnishing of the certificate referred to in the guarantee is not a prerequisite to claiming judgment from a debtor. As was noted from in the decision in *Dobbs v. National Bank of Australasia Limited* referred to above, the bank can recover without the production of a certificate if by ordinary legal evidence it proves the actual indebtedness of the customer. The clause, assuming it is valid, enables the bank by producing a certificate to dispense with proof of the amount of the indebtedness.

That gives rise to the question as to whether or not the certificate in this case could be said to be valid. It was argued on behalf of the debtor that on a strict construction of clause 5 of the guarantee, that the certificate herein did not comply with the terms of the

clause. Reference was made in this context to Lewison on *The Interpretation of Contracts* and in particular to a passage at para. 13.06 in which it was stated: "A certificate need not be in any particular form, but it must be clear and readily understandable and must be given by the person named or described in the contract". The certificate in this case is in the following terms: "Allied Irish Banks, plc hereby certifies that at 6th April, 2012, the sum of money specified below is and remains owing to Allied Irish Banks, plc by the party specified below on the account specified below". A sum is then given, the borrower is identified and the accounts are also identified. After that it is stated that the common seal of the bank was affixed in the presence of two authorised signatories. The certificate therefore appears to be a certificate of the bank itself as opposed to an officer of the bank as referred to in the guarantee. Lewison in the paragraph referred to said:-

> "However some contracts also prescribe fonnal conditions of validity for a certificate or determination; and in such cases the court may adopt a relatively strict approach to the question of whether the form of the certificate satisfies the contractual requirements. Thus in order to be valid the certificate must be given by the person named or described in the contract."

Having referred to a number of authorities Lewison went on to state:-

> "In *Equitable Trust Company of New York v. Dawson Partners Limited*, a contract required a certificate to be issued 'by experts who are sworn brokers'. A certificate by a single broker was held to be bad. Lord Sumner said:-
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> > 'There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines'."

Thus it was contended on behalf of the debtor that there was no evidence either in the certificate or before the court that the certificate at issue here was prepared by an officer of the bank. On the contrary, the certificate is stated to be from the bank as a corporate entity. It was submitted that, as the basis of a court deferring to such a certificate is the purported reliability of the certifying party and that in circumstances where no such party can be identified, the certificate could not stand.

The further question was raised as to whether the certificate could be regarded as conclusive if an issue arose as to a question of law or the right to an equitable set off. Reference was made to the decision of the Supreme Court of New South Wales in the case of *Shomat Pty Limited v. Rubenstein*, an unreported judgment of the Supreme Court of New South Wales Equity Division, 4th December 1995, in which Young J. made a number of pertinent observations. In dealing with a conclusive evidence clause, he stated at p. 12:-

> "In *National Australia Bank Limited v. Samson*, 9th September, 1991, unreported, I said that clauses such as 6(e) 'providing for certificates of this nature must be strictly construed'. The reason is that parties who have agreed to forego their rights to dispute the quantum claimed by the other party to the financial transaction expect that the certificate will be given fairly and in proper form. Again, in the instant case it is clear that the certificate does not, as clause 6(c) says it should, indicates the date upon which the amount set out in the certificate is due and owing.
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> Mr. Newlinds says that it is too great a requirement of form to say that the certificate must on its face indicate that it is given by a duly authorised person. As there are so many defects in the form of the statement/certificate, this point is not decisive, but I would respectfully disagree with the submission. It is usual where there is a precondition to a certificate being effective that the certificate should show on the face of it that the preconditions have been fulfilled; ...
>
> Mr. Black then goes further. He says that clause 6(c) requires for good reason that the certificate states that the amount is secured by the mortgage. Again, this is not said in the certificate/statement. I would agree with this submission also.
>
> For completeness I should note that it was also argued that a certificate under a clause such as 6(c) cannot affect questions of law *(Hall v. Westpac Bank Corp. Limited,* Waddell J. 18th July, 1986, unreported (the Court of Appeal dismissed an appeal from this decision without dealing with this point). Nor is such a clause effective to deny equitable set off*: Long Leys Company Pty Limited v. Soapdale Pty Limited* [1991] 5 B.P.R. 11512. However, it is not necessary to discuss these matters further except to say that I respectfully agree with both statements."That decision was relied on to argue that the certificate could not defeat a question of law or deny an equitable set off.

It was argued that the latter part of that decision was consistent with the decisions of Clarke J. in the case of *Moohan v. S. & R. Motors* [2008] 3 I.R. 650 and Murphy J. in *Hegarty and Sons v. Royal Liver Friendly Society* [1985] I.R. 24. Those cases involved the interpretation of building contracts as to whether an equitable set off could be invoked so as to reduce the amount due pursuant to a certificate expressed to be conclusive as to the amount due and owing. In the *Moohan* case, Clarke J. stated at p. 660:-

> "The default position is that a party is entitled to a set off in equity in relation to any cross-claim arising out of the same contract. Thus if a builder is owed money on foot of a construction contract, the employer is *prima facie* entitled to a set off in equity, in principle, in respect of any defective works. The question which arises is as to whether that *prima facie* position has been displaced by the terms of the contract. There is no doubt but that the parties are free to agree that there will be no set off. The question is whether they have in fact done so. I am not satisfied that the balance of the authorities favours the view that the current standard form RIAI template does give rise to an agreement to exclude a set off, at least, and this is the only issue relevant in this case, in circumstances where the contract is completed to the stage of a certificate of practical completion having been issued by the architect and where, therefore, any entitlement to arbitration on the part of the employer is immediate. It is, of course, the case that Finlay P. in *John Sisk and Son Ltd. v. Lawter Products B. V.* [1976-1977] I.L.R.M. 204, had significant regard to the fact that, in the case then under consideration, there was no immediate right to arbitration as the contract was ongoing.
>
> In those circumstances I am satisfied that, as a matter of construction of the contract in this case, the defendant is *prima facie* entitled to a set off in respect of any cross-claim which it can maintain. However, that set off arises in equity and is, as I have previously noted, subject to the defendant itself having done equity."

A right to a set off in this case is said to be due to the bank's overpayment of the receiver out of company monies in breach of an alleged prior agreement; the bank's failure to stop accruing interest on the account in breach of an alleged prior agreement; and the bank's continued charging of bank charges in circumstances where none should have arisen after the date upon which the company went into liquidation although as I have said earlier, the debtor cannot rely on this point in my view.

Much of the argument in this case centred on the role of the conclusive evidence clause. I think it can be seen from the authorities referred to, that the use of a conclusive evidence clause is something which contracting parties are free to provide for in a contract

of guarantee. The fact that such a clause may be used does not in my view preclude a party from raising an equitable set off or counterclaim in respect of the sum claimed against them. That much is clear from such cases as *Moohan* referred to above. It is also clear, I think, that if such a clause is to be used, a certificate provided on foot of such a clause must comply strictly with the terms provided for in the particular contract. Thus, in this case there is an argument as to whether the certificate in this case complies with the requirement that it be a certificate of an officer of the bank. As has been seen from some of the authorities referred to in Lewison, referred to above, if a certificate calls for completion by "brokers" it is not sufficient for a certificate to be furnished by a broker. Therefore, there is undoubtedly an argument to be made as to the validity of the certificate in this case. It seems to me that in this regard, the debtor has raised an issue which, to paraphrase the words of McGovern J. in *Minister for Communications v. M.W* cited above, is a real and substantial issue and one which is, at least, arguable and which has some prospect of success. (See p. 9 of the judgment in that case).

I think it is also clear from the authorities that such a certificate cannot be relied on to affect any question of law that might arise between the parties (see, for example, *Shomat* referred to above). I think there can be no arguing with the proposition that such a certificate could not be relied on in the event of illegality or fraud.

I would add one further note of caution as to the use of such certificates. Reference was made in the course of the decision in the case of *Bache and Company* referred to above, to the fact that a certificate of a bank or a broker must be honoured as it ranks "as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract".

Some misgivings were voiced by counsel on behalf of the debtor as to the standing of banks in the light of the current economic crisis. I do not think it is necessary for me to express any view on that particular argument but I would say this - I do not think that the position of a bank or a broker or someone in a similar position is entirely analogous with the position of an arbitrator, an engineer, or an architect in a building contract case for this reason- an arbitrator or an engineer or an architect is an independent third party who is not affected by the giving of the certificate in any way and does not benefit from the giving of the certificate. If one looks at the position of an architect in a standard building contract case, one would see that the architect is an independent person employed by the customer who pays the architect's fees, the architect certifies the sums due to the contractor; the customer is then obliged to pay the contractor and obviously, the architect derives no benefit from the certificate issued in respect of the funds due to the contractor. The position of a bank issuing its own certificate either through a manager or officer or other designated person employed by the bank is different and as such one may have to be somewhat more circumspect in accepting that such certificates are unlikely to be mistaken. I do not think one could be as sanguine as Denning M. R. in giving such certificates the status "as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract".

It is clear from the authorities to which I have referred above that an error on the face of a certificate can clearly be challenged. But it seems to me there must also be an argument in an appropriate case for a challenge to be made to a conclusive evidence certificate in the event that it could be demonstrated that there was a significant error in the figures certified, whether that error appeared on its face or otherwise. I derive some support from a very recent decision of the Court of Appeal in the case of *North Shore Ventures Limited v. Anstead Holdings Inc and Others* [2012] 1 Ch. 31 and to a number of passages commencing at para. 45 of the judgment, to which I was referred. It is stated therein by Sir Andrew Morritt C. at para. 46 as follows:-

> "46. It is necessary to consider these rival submissions in stages. I start with the proposition, which was not disputed, that conclusive evidence clauses are to be strictly construed with any ambiguity being resolved in favour of the guarantor: see *British Linen Asset Finance Ltd v Ridgeway* [1999] G.W.D. 2- 78. The first step must be to ascertain what it is that the Guarantors agreed to pay. In my view it is clear that they agreed to pay as primary obligors the actual indebtedness of Anstead to North Shore. This is clear from the definition of indebtedness in clause 1.2 which, by clause 2, the Guarantors agreed to pay. They did not agree to pay the indebtedness as certified, rather the entitlement to certify was limited to the indebtedness for the time being.
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> 47. It follows that the decision of this court in *I.I. G. Capital L.L. C. v. Van Der Merwe* [2008] 2 All ER (Comm) 1173 is distinguishable because in that case the terms of the guarantee were materially different. As indicated by Waller LJ in para 31 the definition of 'guaranteed moneys' which the guarantors agreed to pay included those 'expressed to be due, owing or payable, to the Lender from or by the Borrower'. He considered that this provision, with others, showed that the guarantors were undertaking more than a secondary obligation, thereby approximating a performance bond; see, by way of contrast, the decisions on such questions of construction of Blair J in *Carey Value Added SL v Grupo Urvasco SA* [2010] 132 Con L.R. 15 and Sir William Blackburne in *Vossloh AG v Alpha Trains (UK) Ltd* [2010] 132 Con L.R. 32.
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> 48. The second step must be to ascertain of what the certificate was conclusive evidence. Both the terms of clause 3.4 and of the certificate show that it was the amount for the time being of the indebtedness and/or the amounts due to North Shore, namely quantum. I have great difficulty in seeing how a certificate as to 'amount' due could be conclusive as to either the fact of the variation or its legal effect. The former would seem to be outside any reasonable limit as to what is meant by 'amount', the latter is a question of law which is not a matter for evidence whether conclusive or otherwise. It would follow that in those respects the certificate is not conclusive: see, for example, *Jones v Sherwood Computer Services plc* [1992] 1 W.L.R. 277, 284- 287 and Mercury *Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48, 58.
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> 49. In that connection we were referred to the decision of this court in Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA [1973] 2 Lloyd's Rep. 437. There a conclusive evidence clause was upheld as effective in accordance with its terms and not contrary to public policy. The dispute was as to the amount of the liability. The ground relied on by Lord Denning M.R. was that if the certificate was erroneous the surety could recover the excess paid by him to the creditor from the debtor. There was no such issue as arises in this case. Further I cannot see any basis on which the guarantors could recover any excess from either North Shore or Anstead. North Shore would contend that the sum paid was properly due by the guarantors as primary obligors under the guarantee; the latter would say that the amount of the excess was not due by Anstead to North Shore because of the variation so that there was no basis on which it could be obliged to refund the guarantors the amount of any excess."

In para. 50 of the judgment Sir Andrew Morritt referred to the passage quoted from the judgment of Lord Denning M.R. as to the commercial practice being acceptable because bankers or brokers are known to be honest and reliable men of business who are most unlikely to make a mistake. He then commented as follows:-

"Whatever the force of that statement in 2011 it cannot apply to North Shore. Megaw L.J. recognised that such a certificate would not be conclusive in cases of fraud or mistake on the face of the certificate. Scarman L.J. relied on the fact that there was nothing to preclude a subsequent adjustment between debtor and creditor. For my part I do not consider that the decision in the Bache case

precludes a conclusion in this case that the certificate does not prevent the Guarantors relying on the November variation to the Loan Agreement as a partial defence to the claim from North Shore. However in view of the dictum of the High Court of Australia in *Dobbs v National Bank of Australasia Ltd* [1935] 53 C.L.R. 643, 651 to which Tomlinson L.J. has referred and my conclusion in relation to the third of the steps to which I have referred, and to which I now turn, I would not determine this part of the appeal on the ground that the certificate cannot be conclusive as to the existence and effect of the variation."

He then went on to consider whether there was, as it was contended on the behalf of the guarantors a manifest error in the case of the certificate used in that case.

That case is a useful summary of the limits as to the extent to which such a certificate can be relied on although that was not the basis of the decision. Summarising the position in this case, there are a number of issues that have arisen relating to the fees due to the receiver and to the question of the charging of interest on the amount of the debt due by Celtic Bookmakers Limited to the applicant. The certificate relied on by the applicant does not preclude the debtor from challenging the amount said to be due either on the basis that the sum demanded is overstated as alleged or on the basis that the debtor is entitled to a set off in respect of the alleged overpayments. In this case, I am satisfied that having regard to the decision of McGovern J. to which I have referred, who in turn relied on the well known *ex tempore* decision of the Supreme Court in the case of *St. Kevin's Company against a Debtor* (unrep., Supreme Court 27th January, 1995) that so far as the amount due by the debtor to the applicant is concerned, the debtor has raised issues which have to be litigated separately outside the bankruptcy process. The issues raised are real and substantial and have some prospect of success. For that reason, I would indicate at this stage that I will dismiss the bankruptcy summons.

A number of other issues were raised by the debtor in seeking to challenge the validity of the summons. One of those related to the question as to whether or a valid four day notice was served prior to applying for the issue of the summons. Given that I have decided to dismiss the bankruptcy summons it is not necessary to decide that issue. Having said that, the issue that arises relates to a time period during the period when the petitioner and the debtor were in negotiation with a view to trying to resolve the issues between them. There was indeed a formal demand on the 13th March, 2012, which sought payment by the 13th May, 2012, and undoubtedly that was in the context of the discussions taking place. Subsequently the reasons that have been described previously for the bankruptcy demands were subsequently sent by the petitioner on the 6th April, 2012, and complaint was made that no explanation was given at that time for the demand given the letter of the 13th March, 2012, which requested monies to be paid by the 13th May, 2012. I have some doubts in respect of the argument put forward by the debtor that in the circumstances, the letters of the 6th April, 2012, were not valid demands, but having said that it is as I have pointed out not necessary for me to decide that issue.

The fourth issue relates to an alleged to demand payment of the debt more than once. In regard to that issue I note that McGovern J. in the course of the judgment in *Minister for Communications v. M W.* at p. 8 made the following observation:-

> "In my mind, there is some uncertainty as to whether it is necessary to make a demand more than once. But I am quite satisfied that in this case, a claim for the costs in some form has been made of the applicants on more than one occasion."

In the present case, I think it is equally clear that demand has been made of the debtor on more than one occasion. There was the letter of the 13th March, 2012, and subsequently there was a demand made on the 6th April, 2012. There was a previous demand on the 4th April, 2012, which was withdrawn at the debtor's request. In all the circumstances I am satisfied that there was a demand on more than one occasion, whether or not that is strictly necessary.

The fifth issue raised, relates to the provisions of O. 76, r. 11(1) and the requirement contained therein to lodge "bills, notes, guarantees, contracts, judgments or orders". The applicant argued that this issue was now moot as the court had granted liberty to issue the summons. In the affidavit sworn on behalf of the applicant in respect of the application for the issue of a bankruptcy summons reference was made to the guarantee in this case and it was duly exhibited in that affidavit. It is manifestly clear that the applicant relied on the guarantee as the basis for the application for the issue of the bankruptcy summons. Reference was also made to a number of other documents, namely a mortgage dated the 24th January, 2006, between the debtor and the petitioner, a mortgage debenture from the borrower and two assignments of Key Man life policies from the borrower. The latter documents were not lodged prior to the application to issue the bankruptcy summons.

Notwithstanding, the bankruptcy summons was issued and in such circumstances it seems to me that it would be open to the court to consider an application to permit the late lodgement of those documents in an appropriate case or to deal with the matter pursuant to the provisions of the Rules of the Superior Courts in regard to non compliance with the Rules. This is not a case in which there is any suggestion of any prejudice occasioned to the debtor by virtue of the failure. I do not think that this gives rise to a basis for the dismissal of the bankruptcy summons.

The final issued raised on behalf of the debtor was an apparent failure to serve the debtor with a true copy of the affidavit on foot of which the summons was issued. The applicant is unable to confirm whether this is so nor not. As mentioned previously, the bankruptcy summons in this case was served by ordinary prepaid post on foot of an order of the court, the applicant having been unable to serve the debtor personally. It is thought by the bank that if the debtor is correct in saying that the affidavit was not served that it may have been that the affidavit in respect of the debtor's wife was placed in the envelope with the summons for the debtor in this case. The affidavit in each case is, in substance, identical and it is submitted on behalf of the bank that it is difficult to see what, if any prejudice could have been suffered by the debtor if in fact the position is that the affidavits were mixed up in the posting of the bankruptcy summons and the affidavits. Obviously, it goes without saying that a bankruptcy summons should be served with the correct affidavit. In the context of this case, it is clear that no prejudice has been suffered by the debtor by any error in the service of the affidavit. There is a conflict on the affidavits in relation to this issue but the bank has put forward a possible explanation for an error if such an error occurred. I do not think it is necessary for me to resolve this conflict, given the fact that I have already decided to dismiss the bankruptcy summons herein.

In conclusion, for the reasons already outlined in relation to the matters referred to above, I am obliged to dismiss the bankruptcy summons herein having regard to the provisions of s. 8 (6) (b) of the Act.