[2019] IEHC 75

THE HIGH COURT

[2013 No. 4227 S.]

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF

AND

GERRY BURNS

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 13th day of February, 2019

1. In these summary proceedings, the plaintiff's application is for liberty to enter judgment for the sum of €27,644,377.23 together with further accrued interest.

Facts

2. The application is grounded upon the affidavit of Andrew Harris sworn on the 11th December, 2017. In this affidavit, Mr. Harris describes himself as a senior asset manager employed by Link ASI Ltd (formerly known as Capita Asset Services (Ireland) Ltd), to which he refers as the Servicer. In the first two paragraphs of the affidavit, Mr. Harris avers:

> "1. I am a senior asset manager employed by the Servicer. The Servicer provides loan administration and asset management services in respect of the loans of the defendant that are owned by the plaintiff. I am duly authorised to make an affidavit for the plaintiff and on the plaintiff's behalf.
>
> 2. I make this affidavit with the consent and authority of the plaintiff and do so from facts within my own knowledge save where otherwise appears and where so appearing, I believe the same to be true and accurate in every respect."

3. Mr. Harris then goes on to set out in his affidavit the background to the claim and exhibits a large number of documents including facility letters, guarantees and letters of demand.

4. In brief summary, the claim relates to a number of transactions that occurred between the defendant and Ulster Bank Ireland Ltd ("Ulster"). Between 2008 and 2010, Mr. Burns received five loans from Ulster on foot of various facility letters, some in common with his wife, Mrs. Ann Burns, who is separately sued. In addition, it is alleged that between 2006 and 2010, Mr. Burns executed four guarantees in respect of the liabilities of four different companies.

5. All of these transactions appear to have related to commercial property purchase and development in one form or another. Mr. Harris avers that all the loans were called in by letters of demand dated the 27th August, 2012 from Ulster. Similarly, Ulster called in the guarantees by various demand letters issued between November 2012 and January 2013. Mr. Harris further avers that the plaintiff acquired Ulster's rights under the facility letters and guarantees with the defendant by way of a deed of transfer called the Global Assignment Deed which is dated the 12th March, 2015 and he exhibits a redacted copy.

6. The summary summons in these proceedings was issued on the 16th December, 2013 by Ulster. In December 2015, an *ex parte* application was made to this court to amend the title as it now appears above. That order was made by the court on the 21st December, 2015. The notice of motion now before the court was issued on the 13th December, 2017.

7. In response to the plaintiff's claim, the defendant, who represents himself, swore a short one-page affidavit. At para. 2 he says:

> "(2) I say and believe that the DEPONANT (*sic*) Andrew Harris of Link ASI Ltd (formally (*sic*) Capita Asset Services) is not directly employed by the plaintiff and is not a party to the within proceedings and cannot make any averments on behalf of the plaintiff. He has no first-hand knowledge of any of the events to which he refers and is relying on hearsay. Hearsay evidence is no evidence (see *Bank of Scotland v. Stapleton* [2012] IEHC 549)."

8. In the third paragraph of his affidavit, the defendant says that the plaintiff has failed to validate the debt and by this, I understand the defendant to mean that the plaintiff has not proved its title to the loans and guarantees in issue.

9. In paragraph 4 he makes the bald assertion that he denies any debt as existing between the plaintiff and himself. The basis for this is that he claims there is no evidence of any debt existing which again appears to be related to the same point about transfer of title.

10. The only other evidence in the case is a supplemental affidavit of Mr. Harris sworn on the 21st February, 2018 in response to the defendant's affidavit. He makes identical averments at para. 1 and 2 in this affidavit to those appearing in his principle affidavit. He goes on to say that the matters raised in the defendant's affidavit are matters for legal argument rather than additional affidavit evidence. He reiterates that the debts were transferred to the plaintiff as outlined in his first affidavit and moreover the defendant was notified of this fact in writing by letter dated the 12th March 2015 which he exhibits.

11. At the hearing of the application, in addition to the matters raised in his affidavit, the defendant purported to make a number of submissions which were by way of purporting to give unsworn evidence himself. I indicated to him that the only evidence to which I could have regard was that contained in the affidavits to which I have referred.

12. Accordingly, there are in substance only two points in this case. The first is whether the plaintiff's evidence is admissible at all and if so, whether it establishes the plaintiff's title to the debts in question. Without prejudice to the first point, I am satisfied that the documentary evidence, as far as it goes, does establish the plaintiff's title to the loans and guarantees in question. Beyond a bare assertion that it has not made out its title, the defendant did not seek to challenge, by way of submission or otherwise, the Global Assignment Deed and it seems to me therefore it must be regarded as *prima facie*, and thus sufficient for the purposes of this application, evidence of the plaintiff's title in the absence of specific challenge.

Is the Plaintiff's Evidence Admissible?

13. What remains therefore is the sole issue of the admissibility of the plaintiff's evidence. As O.37 r. 1 of the Rules of the Superior

Courts and the cases that have considered it make clear, a motion for judgment in summary proceedings such as this must be "supported by an affidavit sworn by the plaintiff or by any other person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed and stating that in the belief of the deponent there is no defence to the action."

14. As noted above, the defendant places express reliance on *Stapleton*. That was a Circuit Appeal in which the plaintiff obtained an order for possession in the Circuit Court against which the defendant appealed. In that case, as noted in the judgment of Peart J., the plaintiff ("BOS") had no physical presence in this country following the transfer of the assets and liabilities of its subsidiary, Bank of Scotland (Ireland) Ltd ("BOSI") to BOS.

15. From the 1st January, 2011, BOS outsourced the management of its loan portfolio to an independent service company called Certus and the affidavit grounding the application for possession before the Circuit Court was sworn by an employee of Certus, Joanne Finnegan. In her affidavit, she described Certus as providing customer support to BOS borrowers and administrative support to BOS. She explained what that involved in some detail.

16. It included dealing with queries from borrowers, dealing with mortgage accounts not in arrears, discussing with customers restructuring their mortgage, dealing with mortgage accounts in arrears, contacting customers about those arrears and liaising with solicitors for the purposes of instituting proceedings in the absence of an agreed solution. Ms. Finnegan averred that she was authorised in writing by BOS to give evidence on its behalf.

17. Her capacity to give that evidence was challenged both in the Circuit and High Court on the basis that it was necessarily hearsay given that she had no personal knowledge of the books and records of BOS. In her evidence, she referred to various documents including a written authorisation to give evidence on behalf of BOS and various copy statements that she had received from BOS relating to the defendant's account.

18. She also gave evidence that she was able to access the records of BOS directly herself and therefore be satisfied as to the amount owing by the defendant. The defendant challenged this evidence on the basis that it was hearsay and the exception to the hearsay rule afforded by the provisions of the Bankers' Books Evidence Acts, 1879-1959 was not available to Ms. Finnegan.

19. In the course of his judgment, Peart J. referred to the earlier decision of Clarke J. (as he then was) in *Moorview Developments Ltd & Ors. v. First Active Plc* (Unreported High Court 9th July, 2010) which was relied upon by the plaintiff. In commenting on that case, the court noted (at para. 14):

> "But this case is certainly not an authority for the proposition that somebody other than an officer or employee of the plaintiff bank may come to court with a copy of the bank's records and prove the bank's entitlement to the amount claimed, simply because he/she has a written authority from the bank concerned to give evidence on its behalf. In addition, *Moorview* cannot assist the plaintiff in these proceedings. The facts are completely different, as was the issue under discussion, because the witness in *Moorview* was an officer of First Active plc. He was not simply an employee of some company to whom the bank had outsourced its management of borrower's loans."

20. The court noted that the provisions of the Bankers' Books Evidence Acts only applied to a partner or officer of the relevant bank. Ms. Finnegan was neither. Peart J. continued (at para. 15):

> "While it provides in s. 3 that a copy of an entry shall be received as *prima facie* evidence, s. 4 makes it abundantly clear that this is permissible only where it has first been proved, and that this proof must be provided by a partner or officer of the bank. That function cannot be delegated to an employee of some other company to which the bank has outsourced, *inter alia*, its debt collection, even where that other company has direct access to the plaintiff's computerised banking records… They cannot simply delegate the task of giving evidence to some other person who is appraised of the relevant facts, and is authorised in writing to give the evidence for them. They must do it themselves. The fact that it is inconvenient cannot absolve the bank from complying with the normal rules of evidence. There is no exception to those rules by means of anything contained in the Bankers' Books Evidence Acts 1879 and 1959."

21. Peart J. went on to conclude (at para. 16):

> "To allow otherwise would be akin to a foreign bank engaging a solicitor here to collect the debt, and that solicitor coming to court and giving evidence as to the amount due to the bank, having been authorised to do so by the bank. The evidence is necessarily hearsay and inadmissible. It offends first principles and in my view there is no basis in law for permitting it."

22. He allowed the appeal and dismissed the claim.

23. One of the points at issue in *Moorview* was whether First Active had complied with the provisions of the Bankers' Books Evidence Acts. However, Clarke J. (as he then was) held that the Acts did not arise for consideration in circumstances where First Active's deponent, Mr. Collison, was employed directly by it and could give evidence concerning the books and records of the bank without the necessity to resort to the provisions of the Bankers' Books Evidence Act. Thus Clarke J. said:

> "What Mr. Collison gave evidence of was an analysis carried out by him of documents kept by the bank in the ordinary was as part of the bank's records. Business records of that type are *prima facie* evidence of a course of dealing between parties, although, of course, any party is free to challenge the accuracy of any such records. However, the idea that a bank wishing to prove its case in debt against a customer has to produce a separate bank official who was personally involved in each individual transaction which gives rise to the customer's current debt is, in my view, fanciful. A witness from a bank is entitled to give evidence of the bank's records showing the amount due by a customer of that bank. That evidence and those records provide *prima facie* evidence of the liability. If a specific element or elements of those records is challenged, then the bank might well have a problem if it could not produce a witness who could give personal evidence of the contested matter."

24. The same point arose in *Bank of Scotland v. Fergus* [2014] 4 I.R. 428 where Finlay Geoghegan J. cited the above passage and said (at p. 433):

> "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 Company's indebtedness 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 matter in dispute."

25. In *Bank of Ireland v. Keehan* [2013] IEHC 631, these authorities were discussed by Ryan J. (as he then was). As in the previous cases, the bank's deponent, Mr. Murphy, was an employee of the bank and the defendant, without filing any replying affidavit to deny the debt, objected to his evidence on the basis that it did not comply with the requirements of the Bankers' Books Evidence Acts. For the same reasons identified in *Moorview* and *Fergus*, the court found that the Acts had no application on the facts.

26. *Stapleton* was considered by this court (O'Malley J.) in *Ulster Bank Ireland Ltd v. Dermody* [2014] IEHC 140. That was a summary claim on foot of certain guarantees given by the defendant in favour of Ulster Bank Ireland Ltd. The affidavit grounding the application for summary judgment was sworn by an employee of an associated, but different, company, Ulster Bank Ltd. In her judgment, O'Malley J. reviewed the relevant authorities including *Mooreview*, *Stapleton*, *Fergus* and *Keehan*.

27. O'Malley J. placed particular emphasis on the decision of the Supreme Court in *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168 where the court's judgment was delivered by Keane C.J. She noted that the issue in *Hunt* was the admissibility of bank statements which had been provided pursuant to a statutory power to a detective Garda who in turn passed them on to a Garda inspector. The inspector then gave evidence that he had raised a tax assessment on foot of these bank statements. She quoted from the judgment of the Chief Justice the following passage:

> "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 Acts 1879 to 1959. The documents in question, accordingly, should not have been admitted into evidence in the High Court unless, as the Bureau contends, they were [*otherwise admissible*]"

28. Having considered these various judgments, O'Malley J. went on to conclude (at para. 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. …
>
> 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 [*the employee of Ulster Bank Ltd*] is not admissible to prove the truth of the contents of the records unless it comes within the provisions of the Acts."

29. She went on to hold that, as Mr. Evans was not an officer of the plaintiff bank within the meaning of the Bankers' Books Evidence Acts, his evidence was inadmissible. She considered that the case was on all fours with the judgment in *Stapleton*. Although O'Malley J. found that there was a tension between the judgment of the Supreme Court in *Hunt* on the one hand, and the judgments of the High Court in *Moorview*, *Fergus* and *Keehan* on the other, it seems possible to reconcile them on the basis that in the latter cases, the affidavits were all sworn by employees of the plaintiff bank who could swear positively as to the facts whereas in *Hunt*, the Garda witness was several steps removed from the bank that provided the records and thus could not give such evidence. Indeed, in *Stapleton*, Peart J. felt there was no conflict between the views he expressed and those of Clarke J. in *Moorview* for that very reason.

30. Similar issues were considered by the Court of Appeal in *Ulster Bank Ireland Ltd. v. Egan* [2015] IECA 85. The circumstances were somewhat akin to *Stapleton* in that an issue arose as to whether the primary deponent for the bank, a Mr. Holbrook, was employed by the plaintiff, or its associated company, Ulster Bank Limited. If it was the latter, the defendants claimed his evidence was inadmissible as in *Stapleton*. The Court of Appeal held that since Mr. Holbrook had, despite some initial confusion, unequivocally sworn that he was employed by the plaintiff bank and made the affidavit from a diligent perusal of the plaintiff's books and records arising in the ordinary course of business, the requirements of O.37 r. 1 were satisfied. Of note, the court was also of the view that *Hunt* was readily distinguishable on its facts from *Moorview*, *Fergus* and *Keehan*.

31. Some of these judgments were referred to in *Ulster Bank (Ireland) Ltd v. O'Brien* [2015] 2 I.R. 656. In that case, various facilities were advanced by the plaintiff to the defendants and the plaintiff brought a claim for summary judgment. It was grounded upon an affidavit sworn by an employee of the plaintiff bank, Mary Murray. She averred in her affidavit that she was responsible for the daily management of the defendants' loan facilities at the bank, she was the author of the relevant letters of demand and she had perused the plaintiff's books and records for the purpose of swearing the affidavit.

32. No replying affidavits were sworn by the defendants nor had they responded to the letters of demand. The defendant's case was confined to the argument that the plaintiff's affidavit was hearsay and did not comply with the provisions of the Bankers' Books Evidence Act rendering it inadmissible.

33. All three judges rejected this contention and found in favour of the plaintiff, albeit on somewhat different grounds. The judgments of McMenamin and Laffoy J.J. make clear that they considered that the plaintiff's evidence was not in fact hearsay and thus there was no requirement for the plaintiff to rely on the provisions of the Bankers' Books Evidence Acts. In his judgment, McMenamin J. observed (at p. 660):

"I mention this feature to illustrate the simple point that, if a plaintiff's deponent is the author of a letter of demand, then there can be no question of hearsay evidence. As Laffoy J. points out, in her judgment herein, the facts of this case are, therefore, are quite distinct from *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168 and *Ulster Bank Ireland Ltd. v. Dermody* [2014] IEHC 140."

34. In the course of her judgment, Laffoy J. similarly came to the conclusion that Ms. Murray's evidence was not hearsay as had been contended by counsel for the defendants. Indeed, she noted (at p. 664):

> "[*The averments in Ms. Murray's affidavit*], which were uncontroverted, in my view, were sufficient to comply with the requirement in O. 37, r. 1 in that Ms. Murray could swear positively to the relevant facts to establish the Bank's claim. It is difficult to envisage any person in a better position than her so to do, given that at the time she was a senior official of the Bank with specific responsibility for managing the O'Briens' loan facilities with the Bank."

35. She went on to note (at p. 666):

> "Ms. Murray could, and did, swear positively to the facts showing that the plaintiff was entitled to judgment in the sum claimed. The Bank did not have to rely, and was not relying, on an entry in a banker's book being admitted in evidence to establish the O'Briens' indebtedness to it in the sum claimed in accordance with the provisions of the Act of 1879, as amended, so that the necessity to comply with the provisions of ss. 4 and 5 of the Act of 1879, as amended, did not arise. Accordingly, the submission made on behalf of the O'Briens that there was no admissible evidence before the High Court proving the indebtedness of the O'Briens to the Bank is rejected."

36. Laffoy J. went on to consider in detail the judgment of the Supreme Court in *CAB v. Hunt*. She distinguished that case in the following terms (at p. 668):

> "[25] The decision in *CAB v. Hunt*, in my view, is of no relevance to the outcome of the Bank's motion in this case. The Bank did not have to take advantage of the Act of 1879, as amended, to establish its entitlement to judgment in the sum claimed, because the Bank put evidence before the High Court, which was not contradicted, which as I have found above, showed that the plaintiff was entitled to summary judgment in that sum."

37. Laffoy J. then analysed the judgments in *Dermody* and *Stapleton*, citing the passages to which I have already referred. Having done so, Laffoy J. said (at p. 671):

> "[32] The decisions in [*Dermody* and *Stapleton*] are both premised on the assumption that compliance with s. 4 of the Act of 1879 was a prerequisite to establishing *prima facie* proof of the relevant plaintiff's claim, which had not been complied with because the deponent in each case was neither a partner nor an officer of the plaintiff. In fact, the kernel of the complaint made on behalf of the O'Briens in this case is that there is an evidential deficit in that Ms. Murray's affidavit did not contain averments to satisfy the three requirements of s. 4 and a further requirement of s. 5(1)(c) of the Act of 1879 as amended to the effect that the copy of the entry put in evidence had been examined with the original entry and was correct. While expressing no view whatsoever as to the correctness or otherwise of the outcome of [*Dermody* or *Stapleton*], each of which was decided by reference to its particular facts, the important point for present purposes is that this case is distinguishable from them on the facts and, in particular, the facts emphasised at paras. 16 and 17 above, as deposed to by Ms. Murray as a senior officer of the Bank with responsibility for managing the O'Briens' loan facilities."

38. The third judgment of the court was delivered by Charleton J. who provided a detailed analysis of the hearsay rule and considered exceptions to that rule including in the context of admissions against interest. He considered that in certain circumstances, silence in the face of a demand for a debt might be construed as a form of admission and thus an exception to the hearsay rule. He also noted that the documents exhibited in Ms. Murray's affidavit carried what he described as "indications of reliability", but noted that they were bolstered by her sworn evidence, coming, as it did, from a position where she had the means of knowledge to support what she said (at para. 57).

39. McMenamin J. agreed with both the judgment of Laffoy and Charleton J.J. As I have already noted, the court considered the judgments in *Stapleton* and *Dermody* but distinguished them, while expressly refraining from any consideration of whether or not they had been correctly decided. It seems to me therefore that I continue to be bound by those decisions.

40. In the course of the hearing of this application, particular reliance was placed by counsel for the plaintiff on a recent judgment of Barniville J. in *Promontoria (Arrow) Ltd v. Burke & Ors*. [2018] IEHC 773. As in the present case, that was a claim by a company related to the plaintiff herein for summary judgment against the defendants. Unlike in this case, the defendants, who were legally represented, raised four different points by way of defence.

41. The first was that the plaintiff's evidence was inadmissible as being hearsay, in circumstances similar to the present. The second was that there was inadequate proof of the transfer of the loans to the plaintiff. The third was a Statute of Limitations issue and the final point was that the loans comprised a joint venture with the lender where it was expressly agreed that there was to be no recourse personally to the defendants.

42. The application was grounded upon an affidavit sworn by Lisa Burns. She swore that affidavit in her capacity as an associate director employed by Capita Assets Services (Ireland) Ltd, now Link ASI Ltd as in the present case. Ms. Burns stated in her affidavit that Capita was appointed as "Servicer" on foot of a servicing agreement to provide loans administration services to the plaintiff including such services in respect of the loan facility granted to the defendants which was transferred to the plaintiff and that provided services as agents of the plaintiff.

43. In her affidavit, she explained that she was authorised to swear the affidavit on behalf of Promontoria and, unlike in the present case, that she had access to the computer records and other books and records of Promontoria relating to the accounts and the alleged liability of the defendants.

44. Barniville J. in dealing with the inadmissibility defence noted that the plaintiff relied on the judgment of the Supreme Court in *O'Brien* in support of its argument that the evidence was inadmissible. The judge said (at para. 47):

> "Promontoria contends that it has put forward evidence from its books and records relating to the defendants' accounts and put in evidence the relevant facility letter as well as the letter of demand. Promontoria submits that the evidence adduced by it complies with the provisions of O. 37, r. 1 RSC. It further contends that the defendants were in fact silent in the face of demands made and that such can be treated as acknowledgment of their indebtedness which is admissible by way of an exception to the rule against hearsay. Promontoria does not seek to, nor could it, rely on the provisions of the Bankers' Books Evidence Act, 1879".

45. It is relevant to point out that in that case, the plaintiff had acquired the loans in 2015 and itself issued letters of demand in January 2017 followed by proceedings in May 2017. In dealing with the issue raised by the defendants, the court said (at para. 57):

> "[*Ms. Burns*] further stated that she had access to the computer records and other books and records of Promontoria relating to the accounts and alleged liability of the defendants. While it is arguable that that, in itself, would not amount to sufficient compliance with O. 37, r. 1 RSC which, as noted earlier, requires the affidavit grounding the application for summary judgment to be sworn by a person who can 'swear positively to the facts showing that the plaintiff is entitled to the relief claimed… ', it does make clear that Ms. Burns … has had access to Promontoria's computer records and other

> books and records relating to the defendants' accounts and their alleged liability to Promontoria. As I say, in itself this may not be sufficient to demonstrate compliance with O. 37, r. 1 RSC. However, the second reason combined with the first is, I believe, sufficient to defeat the defendants' objection to the admissibility of the evidence adduced by Promontoria on its application for summary judgment."

46. Barniville J. went on to deal with the second reason which was that not only had the plaintiff's deponent exhibited the relevant facility letters and letters of demand but the defendants themselves had done so explicitly for the purpose of relying on them in contending that the plaintiff's claim was statute barred. The court continued (at para. 57):

> "However, in my view, the fact that the defendants seek to contend that the facility letter of 6th February, 2009 (as amended), did not reflect the full agreement between the parties does not undermine the admissibility of those letters and other documents in circumstances where they have been referred to, described and exhibited in an affidavit sworn by one of the defendants on his behalf and on behalf of another defendant and concurred in and supported by the remaining defendant".

47. The court was accordingly of the view that even though Ms. Burns had access to the computer records of the plaintiff, that, without more, may not be sufficient to comply with O. 37 r. 1. However, the fact that the defendants themselves had exhibited and relied upon the documents in issue was, in combination with deponent's means of knowledge from the computer records, sufficient to comply with O. 37 r. 1 to defeat the inadmissibility argument.

48. In my view, *Promontoria v. Burke* is clearly distinguishable from the facts of the instant case. All that is said by the plaintiff's deponent here is that which appears above. No reference is made by Mr. Harris to the books and records of the plaintiff, be they computer generated or otherwise. No explanation is provided, unlike in some of the authorities to which I have referred, of the precise relationship between the Servicer and the plaintiff and the nature of the services it provides. In effect, all that Mr. Harris says in his principle affidavit is that he has the plaintiff's consent to swear it. It also appears that the plaintiff's case here is several steps removed from *Promontoria v. Burke* where the demands had been made by Promontoria which subsequently issued the proceedings. All of that had already taken place in the present proceedings before the transfer took place.

49. Moreover, the defendant having taken express issue with the hearsay content of Mr. Harris's first affidavit, Mr. Harris swore a second affidavit in which he puts the position no further and does not engage in any way with the defendant's complaint. It is therefore difficult to see how Mr. Harris's position is, in substance and fact, any different from any person who is simply given an authorisation by the plaintiff to swear an affidavit. The fact that the plaintiff authorises him to swear the affidavit is of no materiality in the context of whether it is hearsay or not.

Conclusion

50. To that extent therefore, in my view there is no material distinction arising between the facts of this case and those in *Hunt*, *Stapleton* and *Dermody*. Mr. Harris is to my mind in precisely the same position as the deponents for the plaintiffs in each of those cases. The plaintiff has therefore not satisfied me that Mr. Harris is a person who can swear positively to the facts, being the prerequisite stipulated by O. 37 r. 1.

51. The evidence as it currently stands therefore, is in my view insufficient to enable the court to grant judgment for the plaintiff. In a case such as this, O. 37 r. 7 provides a range of options for the court. The court may give judgment for the relief claimed, dismiss the action or adjourn it for plenary hearing. The court has a fourth option under the rule which is to make "such order for determination of the questions in issue in the action as may seem just."

52. There is only one issue arising in this case and it is an issue which may be capable of being easily remedied by a further affidavit or affidavits from the plaintiff. I must also bear in mind that beyond a bare denial of the debt, the defendant has not contested any of the factual averments made on behalf of the plaintiff. In that circumstance, it would I think be unjust to dismiss the claim at this stage, without affording the opportunity to the plaintiff to put further evidence on this issue before the court, should it wish to do so. By the same token, I think there is little to be gained by adjourning this matter for plenary hearing when the issue arising is capable of ready resolution by the court without the necessity for the parties incurring the substantially greater costs arising in a plenary hearing.

53. Accordingly, I propose to discuss further with the parties whether they wish to put any further evidence before the court confined to that single issue.