Neutral Citation: [2015] IEHC 86

THE HIGH COURT

[2012 No. 3470 S.]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED

PLAINTIFF

AND

GAVIN PEACOCK

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered the 6th day of February, 2015

Preliminary Matter – Extension of Time

1. The Master of the High Court refused the plaintiff's application for summary judgment on Friday, 8th November, 2013. The plaintiff's solicitor communicated this fact to his client. On 13th November, 2013, the plaintiff instructed its solicitor to appeal this refusal to the High Court. On 14th November, 2013, the plaintiff's solicitor swore a grounding affidavit. The plaintiff's solicitor, Mr. Harte, asked his outdoor court clerk, to lodge the appeal papers in the Central Office of the High Court.

2. When the court clerk brought the papers to the Central Office, it was noticed that there was an error in the notice of motion, as it was stated that *"counsel for the plaintiff herein will apply to this Honourable Court sitting at the Master's Court"*. The court clerk returned to Mr. Harte. He amended the notice of motion by striking out the words *"the Master's Court"*. The court clerk returned to the Central Office on the following day, 15th November, 2013, which was one day outside the six day time limit for appealing the order made by the Master of the High Court on 8th November, 2013.

3. I am satisfied that the plaintiff did form the intention to appeal the Master's order within the designated time period. The reason why the appeal was not lodged within time has been satisfactorily explained by Mr. Harte in his affidavit sworn on 14th January, 2014. In the circumstances, it is reasonable and appropriate to extend time by one day to allow for the appeal to proceed. Accordingly, I will extend the time for lodging the appeal from the Master's order up to and including 15th November, 2013.

Notice to Cross Examine the Plaintiff's Deponent

4. By a notice dated 31st October, 2013, the defendant informed the plaintiff that he wished to cross-examine Mr. Stephen Egan, the plaintiff's deponent. By further notice dated 16th December, 2013, the defendant issued a similar notice in respect of Mr. Jason Harte, the plaintiff's solicitor.

5. When the matter was before the Master of the High Court, he dismissed the plaintiff's application on the basis that they had not produced Mr. Egan for cross-examination and accordingly, their grounding affidavit could not be used as evidence, save by special leave of the Master.

6. When the matter came before me on 24th September, 2014, the defendant indicated that he was most desirous that the matter should proceed before the court that day. He indicated that his wish to cross examine the plaintiff's deponent was one of the reasons why he was seeking to have the matter remitted to plenary hearing. In these circumstances, where the defendant wanted the matter to proceed, it was appropriate to deal with the matter on the basis of the affidavits and exhibits before the court.

The Plaintiff's Application for Summary Judgment

7. The plaintiff seeks to enter judgment against the defendant in the sum of €2,325,362.12, being the amount allegedly due by the defendant to the plaintiff as at the date of the application for judgment herein on 24th September, 2014.

8. The plaintiff's case was set out in an affidavit sworn by Mr. Stephen Egan, the head of the Recovery Management Ireland (Personal) Division of the plaintiff bank, sworn on 23rd September, 2013. In the Summary Summons herein, issued on 10th September, 2012, the plaintiff claimed the euro amount of €6,331,018.60 and the sum of STG£789,298.66.

9. These monies relate to the defendant's banking liabilities that remained due and outstanding by the defendant pursuant to his liability to pay arising out of seven loan accounts, the subject matter of four letters of loan offer as well as another account, regarding charges in the sum of €18,412.50. There were eight accounts in total in respect of which a liability arose being the subject of the within proceedings.

10. By letter of loan offer dated 8th March, 2006, the plaintiff loaned to the defendant the sum of STG£1,282,000.00, the subject matter of two loan accounts numbers 02409084 and 02408268. The defendant accepted the said loan offer by signing the attachment to the letter of loan offer on 16th March, 2006.

11. By letters of loan offer dated 12th December, 2006, and 3rd January, 2007, the plaintiff loaned to the defendant the sum of STG£2,628,000.00, the subject matter of three loan accounts numbers 02485142, 04260822 and 02444113. The defendant signed the said letters of loan offer on a date unspecified in respect of the first loan offer and on 5th January, 2007, in respect of the loan offer dated 3rd January, 2007.

12. By letter of loan offer dated 31st May, 2007, the plaintiff loaned to the defendant the sum of STG£550,000.00, the subject matter of loan account bearing number 02468121. The defendant signed the said loan offer on 11th June, 2007.

13. By letter of loan offer dated 5th June, 2012, the plaintiff loaned to the defendant the sum of STG£50,000.00, the subject matter of loan account number 026488196. The defendant signed the attachment to the said letter of loan offer on 14th June, 2012. There was also an account bearing number 02475581 in respect of charges relating to the sterling loan accounts in the sum of €18,412.54. The said loans were used by the defendant to purchase a large number of apartments in England.

14. Mr. Egan has sworn that as of the date of demand on 25th July, 2012, the balance of the amounts outstanding on the various loan accounts were as follows:-

Loan Account No. Balance as of 25th July, 2012
02409084 €1,094,728.32

02408268 €1,040,638.30

04260822 €2,178,745.61

02444113 €1,998,493.83

02475581 €18,412.54

Total: €6,331,018.60

15. In addition, the plaintiff claimed the sterling amount of STG£789,398.66 in respect of the outstanding balances on three sterling loan accounts as at the date of demand as follows:-

Loan Account No. Balance as of 25th July, 2012
02485142 STG£214,943.85

02468121 STG£568,516.81

02648196 STG£5,838.00

Total: STG£789,298.66

16. Mr. Egan has sworn that as of the date of demand, 25th July, 2012, the balance of the euro amount outstanding was €6,312,606.06 plus interest which continued to accrue in the relevant four loan accounts. The euro amount of €6,331,018.60 referred to in the Summary Summons relates partly to charges that had been set against the loan account number 02475581, relating to the defendant's outstanding loan accounts, which charges made in total the sum of €18,412.54. Mr. Egan stated that the euro amount due and owing representing the outstanding balance on the five euro accounts as of the date of demand including account number 02475581, was €6,331,018.60. He gave a breakdown of what was due and owing on each account.

17. In addition, the plaintiff claimed the sterling amount of STG£789,296.66 representing the outstanding balance on three sterling loan accounts as of the date of demand. Mr. Egan gave a breakdown of what was owed on each account.

18. When the defendant failed to pay what was due under these loans, the plaintiff disposed of eighteen of the properties in respect of which the loans had been given and which had been taken as security for the loans. The proceeds of sale have been applied to a number of the loan accounts thereby bringing to zero the amount owed on these accounts.

19. After the sales of the properties and as of 15th August, 2013, the amount outstanding on account number 02460822 was €2,224,318.21. The amount outstanding on account number 02444113 was €263,655.04. The amounts outstanding on the remaining accounts had been reduced to zero due to the application of the proceeds of sale of the apartments thereto.

20. As of the date of application for summary judgment herein on 24th September, 2014, the balance allegedly due and owing by the defendant was €2,325,362.12.

The Defendant's Defence
21. The defendant set out his defence in an affidavit sworn on 7th November, 2013. In that affidavit, the defendant seems to allege that the plaintiff's action had been settled between the parties such that the plaintiff was not entitled to bring the within proceedings. The defendant referred to a series of correspondence passing between him and the plaintiff. He seems to be making the case that due to the alleged existence of so called *"instruments"*, that there has been some agreement or settlement between the parties that prevents the plaintiff from continuing with its action.

22. At para. 4 of his affidavit, the defendant states as follows:-

> *"I say that I completed an administrative process with Mike Ainsley, the former IBRC CEO and that I issued a Notice of Default and Dishonour on 2nd February, 2012, which stated, as I state now, that the accounts are settled and closed and this matter is res judicata and respondent(s) is hereby in estoppel. And as such there is nothing for the court to decide."*

23. The following paragraphs also appear relevant to the defendant's defence:-

> *"7. I say affidavits were issued to Mike Ainsley who chose not to seek clarification or rebut same. It was highlighted to Mike Ainsley that a rebuttal would be needed if he wished to dispute the facts in my affidavit.*
>
> *8. I say the maxim in law states that the unrebutted affidavit stands as the truth in commerce which is supported by the Superior Court Rules, Order 19, rule 13.*
>
> *9. I say that I entered an entry of appearance relating to 2012/3470 S. on 25th September, 2012, and heard nothing substantial of the case until now. Delay defeats equity.*
>
> *10. I say that I believe the plaintiff are guilty of inter alia suppression of documents as per Part 2, section 11 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (see exhibit A).*
>
> *11. I say and believe that the plaintiff breached section 91 of the Land and Conveyancing Act 2009 (see exhibit B) which is the crime of suppression of documents, which is fraud in the concealment. Notwithstanding the account is settled and closed, fraud negates any contract. I believe no contract now exists.*

12. I say and believe that the plaintiff misrepresented themselves by reporting themselves as a licensed and regulated bank, which was fraud in the inducement.

13. I say and believe that the facts of this case are simple. The plaintiff has admitted that:

(a) Financial instruments were tendered by me to effect payment and settle any liability and there is no evidence to the contrary.

(b) That the said instruments were accepted by the plaintiff for the purpose that they were offered. And there is no evidence to the contrary.

(c) When offered these instruments, the plaintiffs were given the opportunity to seek clarification or highlight any defect in the instruments. Instead they honoured the instruments by their acceptance. And there is no evidence to the contrary.

(d) The financial instruments were addressed to and accepted by the CEO, Mike Ainsley. And there is no evidence to the contrary.

(e) That Stephan Egan has no experience with said financial instruments. And there is no evidence to the contrary.

(f) That the plaintiff is not an injured party and there is no evidence to the contrary.

(g) That the plaintiffs are not the holder in due course and there is no evidence to the contrary.

(h) That the plaintiff has no locus standi and there is no evidence to the contrary.

(i) The plaintiff has been placed in permanent estoppel some time ago and as such has no right to bring these proceedings."

24. In order to try to understand the defendant's defence, it is necessary to examine the correspondence which passed between the plaintiff and the defendant in an effort to identify the so called *"instruments"* which are alleged to be the foundation of the defendant's defence.

25. By letter dated 1st September, 2011, addressed to Mr. Mike Ainsley, CEO of the plaintiff bank, the defendant wrote seeking copies of three classes of document being:-

"1. Validation of the debt – the actual accounting.

2. Verification of your claim against me i.e. a sworn affidavit or signed invoice.

3. A copy of the contract binding both parties."

26. This request was followed by a second letter seeking the same documentation on 11th September, 2011. In the course of that letter, the defendant stated:-

"I now claim notice of my lawful right to dismiss this debt on the provision of your lawful obligation to provide documentation to substantiate your claim."

27. On 12th September, 2011, the Group Recovery Management Unit of the plaintiff wrote to the defendant enclosing a copy of the facility letters and account statements.

28. By letter dated 27th September, 2011, the defendant, in the course of a long letter, alleged that the plaintiff had acted unlawfully in relation to the contracts of loan. In the course of the letter, he made the following allegation:-

"Specifically, it is now apparent that you have been engaging in transactions and activities (covered amongst others under the Bills of Exchange Act 1882) and have:

1. Converted the initial supposed agreement or document into a Bill of Exchange or Promissory Note without my knowledge or concern, thus rendering any agreement invalid at its inception due to nondisclosure and gross misrepresentation.

2. Created money on this basis without knowledge or consent.

3. Used this money as an agent without my authority.

4. Taken commission on this money by selling this instrument funding to the merchant bank without my knowledge or consent.

5. Misled me to believe I or the above party was receiving a loan or credit line from you separately and validly obtained variable assets, where in fact there were no such assets and thus no loan or credit.

6. Charged interest on this supposed loan or credit when in fact there was none supplied.

The above actions constitute fraudulent activity and I demand nullification of the entire contract, as I firmly believe fraud has been taken place."

29. The defendant concluded the letter in the following terms:-

"Unless you can furnish me, a proof of claim and signed affidavit, within the next (10) ten days of the date of this letter,

it shall be taken as your lawful admission that the debt has been discharged/extinguished under the accepted and appropriate terms regarding primarily liability of instruments and the account is settled and closed. You will admit and agree that:

That I as the depositor for this account, that the Anglo Irish Bank risked none of the Anglo Irish Bank's assets at any time regarding this account and that the Anglo Irish Bank failed to disclose these facts to me.

Take notice that I hold you personally accountable under your full commercial liability for any personal, financial or other damages incurred as a result of any or all action proceeding the Anglo Irish Bank or any of its employees or agents in the absence of any proof of claim, signed affidavit and supporting documentation."

30. By letter dated 29th September, 2011, the plaintiff formally demanded repayment of the amounts due on foot of the contracts of loan. At the date of that letter, the amount owed was €6,185,775.37, and STG£767,449.46.

31. By letter dated 3rd October, 2011, the defendant requested copies of all information held by the bank in relation to the defendant. By letter dated 7th October, 2011, the plaintiff responded to the defendant's letter dated 27th September, 2011. They noted that correspondence from the bank had been returned with the following written on the envelope:-

"No contract – return to sender. I do not recognise you. I do not understand your intent. It is not my will or wish to contract. I do not have an international treaty with you. No assured value. No liability. Return to sender."

32. In the course of its letter, the plaintiff also denied the allegations of fraud, misrepresentation, and illegality contained in the defendant's letter dated 27th September, 2011.

33. On 7th October, 2011, in a letter headed "Acceptance of Claim for Settlement and Closure", the defendant stated as follows:-

"I refer to you formal notice of defaulting account received from Anglo Irish Bank.

I wish to meet our lawful obligations and this is not a refusal to pay, nor has there been or will be any refusal to pay.

I have recently been informed that the Anglo Irish Bank contract references as detailed below date unknown may contain fraud and is unlawful."

34. In the course of that letter, the defendant went on to request a number of matters which he deemed were necessary as "proof of claim". In the course of the letter he went on to state as follows:-

"This is a private communication to you Mike Ainsley, representing Anglo Irish Bank in your individual capacity and is intended to effect an out of court settlement of this matter, conduct yourself accordingly. Failure to provide the above evidence within ten (10) days of the date of this presentment will deem your claims irrelevant and that undersigned reserves every right to have effected settlement enclosure in the private.

Unless you/Anglo Irish Bank can furnish me a proof of claim and signed affidavit within the next ten (10) days of the date of this presentment, including mailing, it is taken as your lawful admission, the debt has been discharged/extinguished under the accepted and appropriate terms regarding primary liability of instruments and the account is settled and closed. You also will admit and agree that:-

To report this account to all credit bureaus as paid as agreed.

That I am the depositor of this account, Anglo Irish Bank risked none of Anglo Irish Bank assets at any time regarding this account and that the Anglo Irish Bank failed to disclose these facts to me.

The date of last activity on this account is the date of this notice.

Take notice that I hold you personally accountable under your full commercial liability for any personal, financial or other damages incurred as a result of any or all action proceeding, the Anglo Irish Bank or any of its employees or agents, in the absence of any proof of claim, signed affidavit and supporting documentation. A fee schedule/service charge list will be presented to you and applied should you proceed with any action without first presenting facts and an opportunity to cure and I also advise you that if the information is not forthcoming, it will be reported to the court that you are trying to frustrate proceedings and denying us the opportunity to file a defence and counterclaim.

Furthermore, I will not enter into any verbal communication over the telephone. I will only accept written correspondence for my records. I respectfully request that you respect my legal rights and reputation and refrain from involving any third parties to this civil dispute."

35. The plaintiff replied by letter dated 17th October, 2011, in which it reiterated that the defendant should address his letters to the Group Recovery Management Unit of the plaintiff bank and not to Mr. Ainsley. The plaintiff pointed out that it had provided all relevant information to the defendant in response to his earlier demands.

36. By letter dated 27th October, 2011, the defendant pointed out that any further correspondence with Gavin Peacock™ or any copyright trademark derivatives will attract fees in the sum of €10,000.00 per claim in writing. He stated that all fees were payable in advance as evidence by registered mail. This letter was concluded with the words *"without malice or mischief, in sincerity and honour"*, signed by Gavin Peacock as agent of Gavin Peacock™. By letter of the same date and addressed to Mr. Ainsley, the defendant sent a document headed *"Notice of Irrevocable Estoppel by Acquiescence"*. The letter stated as follows:-

"Letters dated 1st September, 2011, 11th September, 2011, 7th October, 2011. With provision by Anglo Irish Bank for validation of debt. Verification of claim and valid contract to bind both parties. I hereby serve notice that Anglo Irish Bank's failure to provide Proof of Claim has created a permanent and irrevocable estoppel by acquiescence, forevermore barring Anglo Irish Bank from bringing any and all claims, legal actions, orders, demands, law suits, costs, levies, penalties, damages, interests, liens, and expenses whatsoever against Gavin Peacock™."

37. By letter dated 14th November, 2011, the plaintiff stated that the defendant had no right to unilaterally discharge his debt. The

existence of any alleged *"estoppel by acquiescence"* was categorically denied by the plaintiff. The letter also rejected any assertion by the defendant that the plaintiff was in breach of any copyright or trademark. By letter dated 4th January, 2012, the bank set out the amounts outstanding on the various accounts. The defendant returned these letters with lines drawn across them looking somewhat like the lines on a cheque. On the lines, was written the words *"amount"* and a *"€"* sign. Below the lines was written the words:-

> *"Accept for value. Return for value. Exempt from levy. Exemption ID 5466679 M. By G. Peacock, authorised representative. Deposit to Irish Exchequer and charge same to Gavin Peacock 54 – 66 – 67 – 9 M."*

38. By letter dated 12th January, 2011, (which should presumably read 12th January, 2012), the defendant wrote again to Mr. Ainsley in the following terms:-

> *"I trust this finds you in good health. Appearing as trustee for Gavin Peacock, I received your offer(s), Warning Notice loan account reference [and here he sets out a number of different account numbers] date received 6th January, 2012, but found no cheque attached. Therefore, I am accepting the offer(s) and returning it with a money order for settlement of these accounts. Mike Ainsley is nominated and appointed Fiduciary Trustee for the purposes of this express agreement and relation. The Gavin Peacock and IBRC are both operating in national bankruptcy, you are therefore directed to:*
>
> *• Close these accounts immediately and make or cause to be made all the necessary adjustments to include all interest, fees, legal, receiver and otherwise.*
>
> *• This serves notice that these accounts are now Accepted and Closed.*
>
> *• Adjust this account for the proceeds, products, accounts and fixtures and all good and valuable considerations and release the order to me immediately.*
>
> *• Complete the amount to be inserted on money order after appropriate calculations of the amount needed to satisfy all accounts.*
>
> *Nota bene*
>
> *If you wished to disclaim this appointment you are directed to disclaim by deed immediately; acceptance may be conveyed by non-response within seventy two (72) hours. If there is anything you do not understand, please contact me privately for assistance at the above address."*

39. Attached to that letter was a document in handwriting headed *"Money Order date 12/1/12"* and beneath that there were a number of lines similar to those found on a cheque and on the top line was written *"Credit to IBRC"* and on the bottom line it was signed by Gavin Peacock as authorised representative. At the bottom of the document, the following words appeared:-

> *"For deposit to IBRC account ref 9506110*
>
> *By G. Peacock*
>
> *Without recourse."*

40. On 19th January, 2012, the defendant sent a document to Mr. Ainsley which was purported to be an affidavit. It was headed *"Affidavit of Truth"* and contained what was termed a *"jurat"* which was signed by two witnesses. This *"affidavit"* was in the following terms:-

> *"On January 12th 2012, affiant did cause to be posted by recorded service RL 345094200IE a full acceptance of these offers along with private credit instruments for settlement of these accounts and notice of the appointment of Mike Ainsley (DBA CEO, IBRC hereinafter 'respondent') as the private Fiduciary for this purpose.*
>
> *According to An Post on 13th January, 2012, service of RL345094200IE and the enclosed documents was made to the respondent.*
>
> *As of January 12th 2012, the Fiduciary appointment has been accepted by Respondent and the instruments accepted as payment for the IBRC accounts by reference 9506110 and account numbers 9506110 – 02468121, 9506110 – 02485142, 9506110 –02408268, 9506110 – 02409084, 9506110 – 0244113, 9506110 – 02460822, 9506110 – 02475581.*
>
> *Respondent has three (3) days from receipt of this Affidavit of Truth Your Ref AT/9506110 (hereinafter 'AT') which you can either respond to or rebut this affidavit on a point by point basis via sworn affidavit under your full commercial liability, signing under penalty of perjury that the facts contained therein are true, correct, complete and not misleading. Failure to respond in this manner and form will be deemed agreement with the facts stated herein and may lead to severe financial penalties for the respondent and/or IBRC to the value of ten (10) times the amount of the private credit instrument(s) as evidence by proof of delivery by recorded service RL 345094200IE.*
>
> *I Gavin Peacock, affiant, upon my unlimited commercial liability, do affirm and say that I have read the above AT and know the contents to the very best of my knowledge to be true, correct, complete and non misleading; the truth, the whole truth and nothing but the truth. In witness whereof, I Gavin Peacock, affiant hereunto set my hand and seal on this 19th day of January, 2011."*

41. This date is incorrect, as below the signature is the date 19th January, 2012.

42. On 26th January, 2012, the defendant sent a document headed *"Affidavit of Specific Negative Averment"* to Stewart Forman and Alan Gottsholk who were the receivers appointed by the plaintiff over some of the properties which had been taken as security for the loans. It is not necessary to set out the content of that letter at this juncture.

43. On the same date, the defendant sent to Mr. Ainsley a document headed *"Notice of Fault and Opportunity to Cure"*. This gave the plaintiff an opportunity to cure its alleged default in giving a response to the so called *"Affidavit of Truth"*. It was further stated

that *"failure to cure will constitute an operation of law, the admission of assent to and agreement with all the facts stated in the AT by tacit procuration"*.

44. On 2nd February, 2012, the defendant sent a document headed *"Notice of Default and Dishonour"*. This document recited the furnishing of documentation subsequent to the affidavit of truth. It stated that as the defendant was not in receipt of a sufficient response to the affidavit of truth, *"the respondent by tacit procuration, admits agreement with all facts stated in the AT"*. It concluded in the following terms:-

> *"6. Respondent(s) did not respond within the three (3) days granted by Affiant in NOFOC (Notice of Fault and Opportunity to Cure) with the effect of placing respondent(s) in default and dishonour.*
>
> *7. As of 02/02/12 Affiant is not in receipt of a sufficient response to AT.*
>
> *8. Respondent(s) by tacit procuration, admits agreement with all facts stated in AT.*
>
> *9. By the terms and conditions of the preceding AT and NOFOC you are under obligation to timely and in good faith respond or make proper answer. Your failure to do so is your dishonour and places you in default. This matter is stare decisis and res judicata and respondent(s) is hereby in estoppel."*

45. On 9th February, 2012, the defendant sent an *"Affidavit of Non-Response"*. This set out the alleged failure on the part of the plaintiff to furnish a response to the so called affidavit of truth. It concluded *"Respondents by Tacit Procuration admits agreement with all facts stated in AT and admits to default and dishonour"*.

46. In an undated document which was received by the plaintiff on 20th February, 2012, the defendant sent a document headed *"Actual Constructive Notice of Conditional Acceptance"*. This was addressed to Ms. Renee Duggan of the Group Recovery Management Unit. In the body of the document it was stated that the defendant was conditionally accepting an offer apparently made by the plaintiff bank in a letter dated 1st February, 2012, upon presentation of *bona fide* and verified proofs of claim that:-

> (i) Instruments were not tendered on 12th January, 2012, by An Post to the plaintiff.
>
> (ii) Instruments were not accepted as settlement of these accounts.
>
> (iii) That Mike Ainsley is not the liable party on these accounts.
>
> (iv) That these instruments did not provide sufficient funds to discharge the total amount of these accounts.
>
> (v) That receivers will not be trespassing on the properties and will not be committing the offence of trespass and harassment.
>
> (vi) That the property is subject for sale by the receivers and that they have a lawful right to do so.

47. Ms. Duggan was given a period of three days from receipt of the document to respond on a point by point basis via sworn affidavit to the matters stated therein. It was stated that failure to respond would be deemed agreement with the facts stated in the attached Affidavit of Specific Negative Averment and an inability to prove the bank's claim, thereby indicating no debt existed in association with the accounts and the various account numbers were given thereafter.

48. On 16th February, 2012, the defendant sent to Ms. Duggan a document headed *"Affidavit of Specific Negative Averment"*. The document stated that there was no proof that Mr. Mike Ainsley had not received the so called *"instruments"*. It went on to state that there was no evidence that the instruments were not accepted as settlement of the accounts and the affiant believes that none exists. He went on to state that there was no verifiable proof or evidence that Mr. Mike Ainsley was not the liable party on these accounts. There was not any verifiable proof or evidence that payment of Gavin Peacock's accounts (and he gives the various account numbers) have not been effected and the affiant believes there is no such proof. The document ended in the following way:-

> *"You have three (3) days from receipt of this affidavit in which you can either respond to or rebut this affidavit on a point by point basis, via sworn affidavit, under your full commercial liability, signing under penalty of perjury, that the facts contained therein are true, correct, complete and not misleading. Failure to respond will be deemed agreement with the facts stated herein."*

49. On the same date, the plaintiff responded by letter to the defendant's letters dated 19th January, 2012, 26th January, 2012, 2nd February, 2012, and 9th February, 2012. The letter stated that the bank did not accept the content of the defendant's correspondence. The letter stated as follows:-

> *"The bank does not accept the content of the above correspondence and does not propose to engage in correspondence of this nature, in circumstances where the sums due and owing by you to the bank pursuant to the facilities remain outstanding. The decision by the bank not to respond specifically to each allegation, claim or statement in your correspondence, should not be taken as an acceptance by the bank of any such allegation, claim or statement. In addition, please note that the bank is not required to abide by any unilaterally imposed timelines for responding to correspondence."*

50. On 23rd February, 2012, the defendant sent a further *"Affidavit of Specific Negative Averment"*, which was in similar terms to the earlier correspondence of the same heading. Again, the addressee, Ms. Duggan, was given three days to respond to or rebut the affidavit. A failure to respond thereto would be deemed agreement with the facts stated in the document.

51. By letter dated 23rd February, 2012, the defendants sent to Ms. Duggan a document headed *"Actual Constructive Notice of Conditional Acceptance"*. It referred to the plaintiff's letter dated 16th February, 2012, and stated that the defendant was *"conditionally accepting your offer(s) upon presentation of bona fide and verified proofs of claim"*. It then set out a number of matters which had been set out in previous correspondence upon which the defendant required proof of claim. It again gave Ms. Duggan a period of three days to respond to the matters raised in the letter. It stated that failure to do so would be deemed agreement with the facts contained in the Affidavit of Specific Negative Averment and would be taken to be an inability on the part of the plaintiff to prove its claim, thereby indicating that no debt existed in association with the accounts, the subject matter of the proceedings.

52. On 24th February, 2012, the defendant sent to Ms. Duggan a *"Notice of Fault"* pointing out that she had not responded to his earlier correspondence. She was given a further period of three days in which to *"cure"* her alleged default. The document provided that *"failure to cure will constitute, as an operation of law, the admission of, assent to and agreement with all the facts stated in the CA & AOSNA by tacit procuration"*.

53. The plaintiff responded by letter dated 29th February, 2012, in which it simply pointed out that the bank's position remained as set out in their letter dated 16th February, 2012.

54. On 1st March, 2012, the defendant sent a further document headed "Notice of Fault and Opportunity to Cure" to Ms. Duggan. On the following day, 2nd March, 2012, the defendant sent a document headed *"Notice of Default and Dishonour"* to Ms Duggan. This document stated that as the plaintiff had not responded to earlier correspondence, the plaintiff had by tacit procuration admitted agreement with all the facts stated in the conditional acceptance. The document concluded as follows:-

> *"By the terms and conditions of the preceding CA & AOSNA you are under obligation to timely and in good faith respond or make proper answer. Your failure to do so is your dishonour and places you at default. This matter is stare decisis and res judicata and respondent(s) is hereby in estoppel."*

55. On 8th March, 2012, the defendant sent to Ms. Duggan a *"Notice of Default and Dishonour"*. It was in similar terms to the document sent on 2nd March, 2012.

56. On 12th March, 2012, Messrs. Mason Hayes & Curran, Solicitors, wrote on behalf of the plaintiff. They referred to the documents dated 2nd March, 2012, and 8th March, 2012, sent by the defendant. They stated as follows:-

> *"We write to inform you that the bank does not accept the content of the said correspondence and does not propose to engage in correspondence of this nature, in circumstances where the sums due and owing by you to the bank pursuant to the facilities remain outstanding. The decision by the bank not to respond specifically to each allegation, claim or statement in your correspondence, should not be taken as an acceptance by the bank of any such allegation, claim or statement. In addition, please note that the bank is not required to abide by any unilaterally imposed timelines for responding to correspondence."*

57. On 16th March, 2012, the defendant sent to Ms. Emer Gilvary, Managing Partner of Messrs. Mason Hayes & Curran, a document headed *"Actual Constructive Notice of Conditional Acceptance"*. It was in similar terms to previous correspondence bearing the same heading. Ms. Gilvary was given three days to respond to the document failing which, her failure to respond would be deemed agreement with the facts stated in the attached Affidavit of Specific Negative Averment and an inability to prove her claim, thereby indicating that no debt existed in association with the accounts specified in the document.

58. On the same date, the defendant sent to Ms. Gilvary, a document headed *"Affidavit of Specific Negative Averment"*. She was given three days to respond, failing which her failure to respond would be deemed agreement with the facts stated in the document. Also, on that date, a document headed *"Affidavit of Non-Response"* was sent to Ms. Duggan. It was in similar terms to previous correspondence.

59. By letter dated 22nd March, 2012, Messrs. Mason Hayes & Curran wrote in relation to the correspondence which the defendant had sent to Ms. Duggan. They again stated that the plaintiff did not accept any of the matters set out in the defendant's correspondence. They again stated that they would not engage in such correspondence, but that the failure to address the points raised by the defendant therein, should not be taken as any agreement or acquiescence therein.

60. On 27th March, 2012, the defendant sent a document headed *"Actual Constructive Notice of Conditional Acceptance"* to Ms. Laoise O'Shea at the solicitor's offices. It was in the same terms as previous correspondence and gave Ms. O'Shea three days to respond, failing which she would be taken to have agreed with the content of the previous correspondence. On the same date, the defendant also sent an *"Affidavit of Specific Negative Averment"* to Ms. O'Shea. Again it was in similar terms to that previously sent to other people connected to the plaintiff.

61. On 30th March, 2012, Ms. O'Shea replied to the defendant's correspondence stating that the plaintiff bank did not accept the content of his said correspondence. By letter dated 5th April, 2012, the solicitors wrote to the defendant in connection with the accounts and gave the defendant 21 days to remedy the breach of contract due to non-payment of the loans.

62. By letter dated 26th April, 2012, the plaintiff's solicitors formally demanded payment of the amounts due on foot of the loan accounts.

63. On 3rd May, 2012, the defendant sent a document headed *"Notice of Fault"* to Ms. Gilvary. It claimed that the solicitors had not responded to the earlier *"Conditional Acceptance and Affidavit of Specific Negative Averment"*. It gave Ms. Gilvary an *"opportunity to cure"* and ended with the statement that failure to cure would constitute as an operation of law, an admission of assent to and agreement with all the facts stated in the conditional acceptance and affidavit of specific negative averment by tactic procuration. A document in similar terms was also sent on the same date to Ms. Laoise O'Shea of the same firm of solicitors.

64. On the same date, the defendant forwarded to the plaintiff a document which purported to be an invoice, claiming the sum of €3,500,000.00, in respect of *"financial penalties"*. A similar invoice, but having a different number, was sent to Mr. Ainsley for the same amount.

65. By email dated 14th May, 2012, sent by the defendant to Ms. Renee Duggan, the defendant requested inspection of a number of documents. He stated that he would come to the bank's HQ in two days to inspect same. A response was furnished by the plaintiff's solicitor on the following day, stating that they would need more than two days to assemble the required documentation.

66. By letter dated 15th May, 2012, the plaintiff's solicitors wrote to the defendant stating that the plaintiff did not accept that any money was due from them on foot of the first invoice submitted by the defendant. A similar letter was sent on 22nd May, 2012, in relation to the second invoice for the same amount sent by the defendant to the plaintiff.

67. On 24th May, 2012, the defendant wrote to the plaintiff concerning non-payment of the invoices in the following terms:-

> *"There are two overdue invoices numbers 111/IBRC and 110/KA totalling €7,000,000.00. Please pay these within the next ten days.*

In the event that you fail to pat (sic) the amount demanded in accordance with this letter within the next ten days, I will issue legal proceedings with a view to securing judgment against you and IBRC. I trust that you are aware of the implications of this action and would therefore urge you to contact me with your settlement proposals immediately."

68. By letter dated 5th June, 2012, the plaintiff's solicitors wrote in response to the defendant's letter concerning non-payment of the invoices totalling €7,000,000.00. The bank did not accept that there was any money due by the plaintiff to the defendant on foot of these invoices.

69. By letter dated 3rd July, 2012, the plaintiff's solicitors wrote seeking payment by the defendant within 21 days of the amounts owed under the various loan accounts. The letter stated that in the event that the defendant failed to remedy this breach within 21 days of the receipt of this letter, the bank intended to issue a formal demand letter setting out the total balance together with the daily interest rate which would be payable by the defendant and legal proceedings may be commenced.

70. By letter dated 25th July, 2012, the plaintiff's solicitors wrote to the defendant requiring payment of the loan amounts. The letter continued:-

"As you have failed to remedy the breach, on behalf of our client, we hereby demand the payment by you of the entire sum on foot of the above loan accounts within the next ten days. In the event that you fail to pay the amount demanded in accordance with this letter within the next ten days, our client has instructed us to issue legal proceedings with a view to securing judgment against you.

We trust that you are aware of the implications of this action and would therefore urge you to contact us with your settlement proposals immediately."

71. By letter dated 20th September, 2012, the defendant inquired of Mr. Ainsley as to which jurisdiction his alleged loans were governed by. On 4th October, 2012, the plaintiff's solicitor informed the defendant that the loans were governed by the laws of Ireland.

72. On 28th May, 2013, (although this may be an incorrect date as the bank seemed to receive the letter on 7th May, 2013), the defendant wrote to the special liquidator of IBRC to see if there was any amicable way the liquidator and the defendant could resolve any outstanding issues they may have. The liquidator was given ten days to respond to the letter. On 10th June, 2013, the defendant wrote again to the special liquidator giving him five days to respond to the letter dated 28th May, 2013, otherwise they would have a tacit agreement: (i) that any debt due and owing by the defendant to IBRC was settled and closed on 12th January, 2012; (ii) that the special liquidator agreed that any property owned by the defendant that IBRC sold after January 2012, was at best sold in error and at worst with criminal intent; (iii) that the special liquidator would agree, within 21 days of this letter, that the defendant could take lawful possession of his remaining unsold properties; and (iv) that the special liquidator would forward to the defendant the proceeds from the sale of the properties that the IBRC or the liquidator had sold after 12th January, 2012.

73. The bank's solicitors responded by letter dated 1st July, 2013, that they did not accept the content of the defendant's letter dated 10th June, 2013, and they did not intend to engage in correspondence of that nature. However, if the defendant submitted a sworn statement of affairs in advance of a meeting, then the plaintiff would be prepared to have a settlement meeting with the defendant.

74. On 8th July, 2013, the defendant sent a further invoice to Mike Ainsley seeking payment of €3,000,000.00 in respect of *"financial penalties".*

75. By letter dated 16th July, 2013, the defendant replied to the solicitor's letter dated 1st July, 2013. The defendant did not accept that there was any outstanding debt due to the plaintiff. He stated as follows in this regard:-

"You are making the assumption that there is an outstanding debt. However, we have no problem in meeting the bank in order to clarify matters. In relation to the sworn statement of affairs to be sworn in front of a solicitor/Commissioner for Oaths, I have no problem doing that but in the interest of fair play and goodwill, I too will have prepared an affidavit for the bank to sign in front of the solicitor/Commissioner for Oaths. After all we are all equal in the eye of the law. When both are signed we can exchange them in person before the meeting is arranged. Please confirm your explicit understanding of this point and confirm same."

76. The plaintiff's solicitors responded to the defendant's letter by letter dated 7th August, 2013. They stated that in the circumstances there did not appear to be any benefit in having a meeting. This letter appears to mark the end of the correspondence passing between the parties.

The Defendant's Subsequent Affidavits

77. The defendant swore a further affidavit on 9th January, 2014. This was in response to an affidavit which had been sworn by Mr. Jason Harte on behalf of the plaintiff. In para. 5 of his affidavit, the defendant dealt with the hearing which had been held before the Master of the High Court. He stated at para. 5 of his affidavit:-

"I say that the plaintiff claims that the Master has erred in fact and law in that the Master did not even consider the content of the plaintiff's grounding affidavit. This is misconceived, as the Master was quite correct not to consider the content of the said affidavit. The production of the deponent was requested in accordance with Court Rules and the said deponent showed disregard for the decorum and Rules of the Court and chose not to come in, the Master ruled accordingly. The plaintiff has failed to show this Honourable Court either the law or the fact which he purports the Master has erred. And now the plaintiff has the effrontery to blame the Master for his shortcomings. I therefore request that this Honourable Court strike out this motion and grant me an order for costs."

78. The defendant swore a further affidavit on 19th September, 2014. In that affidavit, he stated that the plaintiff had proceeded on the wrong summons, as they had no evidence that there would be no defence on behalf of the defendant. He stated that the plaintiff knew that the opposite was in fact the case because of the following matters:-

"(1) They were in serious breach of banking Regulations. They had a direct causation to my alleged breach of contract affecting my ability to perform on the contract.

(2) I say that the bank knew as it is a matter of public record that they were guilty of, inter alia, violation of fiduciary

duty and duty of good faith, malfeasance in public office, breach of fiduciary duty, fraud, fraud in the factum and inducement, assignment and title fraud, slander of title, tortious interference in contract, unjust enrichment and breach of contract and breach of regulatory duties.

(3) The bank knew or in the alternative ought to have known that they were manipulating the interest rates and charges on my account causing a loss yet to be determined.

(4) They knew because it is averred to by the plaintiff's grounding affidavit of Stephen Egan that financial instruments were sent and accepted along with a fiduciary contract which was strictly in the private to Mike Ainsley with an offer to accept. Mike Ainsley duly accepted the offer and was given instructions on how to credit my account."

79. The defendant went on to state in the affidavit that the plaintiff had failed to show how the Master of the High Court had erred in his ruling. In this regard he stated as follows:-

"A3 I say that the plaintiff states that the Master erred in fact and law, however to date they have failed to reveal to me or to the previous judge what fact or what law the Master erred on.

A4 I say how am I expected to defend such a motion when the plaintiff refuses to state the facts and/or the laws on which the Master erred.

A5 I say that the plaintiff offered jurisprudence as a reason to overturn the Master's order in front of Judge Ryan. However jurisprudence supports the theory that a man has the right to face and question the witnesses against him. These origins can be traced back to Roman times, as well as to the Bible, Shakespeare and British Common Law.

A6 I say that jurisprudence also supports the right to a fair and impartial trial as does Article 6 of the European Convention on Human Rights. Furthermore, both support a low threshold for proof of a defence. While that point was long surpassed with the admission of the tendering and acceptance of financial instruments. I have now listed for the court's information additional points that I have averred to in point B of this document. It is self evident that we have now surpassed the minimum threshold to move to a plenary summons."

80. He went on in the course of the affidavit to set out alleged grounds of counterclaim which he intended to pursue if the matter was remitted to plenary hearing or, if not, he intended to pursue them individually by means of issuance of a plenary summons. He indicated as follows in relation to his counterclaim:

"B1 I say that it was always my intention to seek damages from the plaintiff and possibly from Mike Ainsley for misappropriation of funds from the financial instruments and damages for my properties that were illegally seized. There was no court order sought or granted to the plaintiff for possession, they simply contacted my tenants and bullied them into submission. I even reported their illegal activity to the police in the UK and have all the crime numbers for same. I will be seeking damages for, inter alia, violation of fiduciary duty and duty of good faith, malfeasance in public office, breach of fiduciary duty, fraud, fraud in the factum and inducement, assignment and title fraud, slander of title, tortious interference in contract, unjust enrichment, breach of contract and breach of regulatory duties. It was obvious to me that the summary procedure would fail, as there is a low threshold of proof required in regards to a defence."

81. He also dealt with the issue of change of the identity of the plaintiff which is dealt with later in this judgment.

The Law

82. The law in this area has been well settled for some time. The following dicta from the judgment of Murphy J. in *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75, has been cited with approval in a number of subsequent cases:-

"In my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank Plc v. Daniel [1993] 1 W.L.R. 1453. The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms:—

> *'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.'*

In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:—

> *'I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"*

83. The formulation of the test in the Anglin case was adopted by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607. In the course of her judgment, McGuinness J. accepted the test as laid down in the *Anglin* case. Hardiman J. at pp. 621 – 623 stated:-

"More recent Irish authority, in my view, supports the impression gleaned from authorities from the early days of the summary judgment jurisdiction, that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is one to be used with great care…

In light of these authorities, I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in First National Commercial Bank plc. v. Anglin [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The 'fair and reasonable probability of the defendants having a real or bona fide defence', is not the same thing as a defence which will probably succeed, or even a defence whose

success is not improbable…

In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

84. In *Irish Bank Resolution Corporation (In Special Liquidation) v. McCaughey* [2014] IESC 44, Clarke J. stated as follows in relation to the nature of the defence which must be disclosed by the defendant in resisting an application for summary judgment:-

"It is important, therefore, to reemphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath, the Court may come to a final resolution of such issues. That the Court is not obliged to resolve such issues is also clear from Danske Bank v. Durkan New Homes.

Insofar as facts are put forward, then, subject to a very narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta . It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

Conclusions

85. The plaintiff through its own letters and through its solicitors made it clear that they did not accept any of the assertions made by the defendant in the correspondence.

86. The defendant attempted to unilaterally impose terms upon the plaintiff by declaring that unless the plaintiff responded within a certain time they would be deemed to have agreed to the terms set out in the various documents. The plaintiff did not accept any of these terms. The defendant was not entitled to unilaterally impose any such terms on the plaintiff. In the circumstances, I am satisfied that no settlement of the debts owed by the defendant to the plaintiff occurred as a result of this series of correspondence.

87. The plaintiff did not acquiesce in any of the terms stipulated by the defendant. The plaintiff at all times made it clear that it did not accept any of the terms suggested by the defendant. There was no representation by the plaintiff that it agreed to any such terms. Accordingly, the plaintiff is not estopped from seeking to enforce repayment of the loans by virtue of any of the correspondence which passed between the parties.

88. The various letters and *"affidavits"* failed to set out any realistic defence to the within proceedings. In the circumstances, the defendant has failed to establish that he has any *bona fide* defence to the plaintiff's claim herein. The plaintiff is entitled to judgment as against the defendant in the sum of €2,325,362.12.

Substitution of Deutsche Bank A.G. as Plaintiff

89. At the hearing on 24th September, 2014, the plaintiff's counsel also sought an order pursuant to O. 17, r. 4, substituting Deutsche Bank A.G. as plaintiff in these proceedings. Although under the rules, this can be done by an ex-parte application, in this case the application was made on notice to the defendant.

90. Counsel pointed out that under the general terms and conditions which accompanied each of the letters of loan offer, provision was made for the transfer of the benefit of the agreement and security documents in the following manner:-

"18.2 The bank may at any time transfer, assign or dispose of the benefit of the agreement and the security documents to any person on such terms as the bank may think fit whether as part of a loan transfer or securitisation scheme or otherwise without notice to the Borrower or any other person."

91. The application on behalf of Deutsche Bank A.G. was grounded on the affidavit of Clive Bull, Director in the Global Markets Division of Deutsche Bank A.G. sworn on 11th July, 2014. By a Loan Sale Deed in relation to a portfolio of assets dated 28th March, 2014, the plaintiff, as vendor and Deutsche Bank A.G., as purchaser, agreed to the sale and purchase of certain assets and related rights and collateral, more particularly set out therein. The Loan Sale Deed included the defendant's outstanding loans with the plaintiff.

92. Under the Loan Sale Deed, *"Assets"* were deemed to include:-

"All the rights, title, interest and benefits in and to (and only such rights, title, interest and benefit as the vendor may have); (a) all facilities; (b) all related security; (c) any and all of the vendor's rights, title, interest and benefits arising after the cut off date in and to the rent, claims and other rights of the vendor in and to any Net Collections and in and to any non-cash distributions with respect to the assets arising after the cut off date; (d) any and all of the vendor's rights, title, interest and benefits in and to the finance agreement; (e) all ancillary rights and claim."

93. In his affidavit, Mr. Bull referred to a copy of the facility letters referred to in these proceedings. He averred that this confirmed that the loans the subject of these proceedings formed part of the *"purchased assets"* under the Loan Sale Deed acquired by the purchaser from the vendor.

94. Pursuant to clause 9.1 completion was to take place on the *"completion date"*. In that regard, the purchaser and the vendor agreed that the completion date would be 23rd May, 2014, and on that date, the sale and transfer referred to in clause 2 of the deed, should occur.

95. Clause 9.6 of the Loan Sale Deed dealt with transfer of title to the Assets. It provided that at completion, the following should occur: upon receipt by the vendor of the initial consideration from the purchaser and subject to the purchaser satisfying its obligations pursuant to clause 9.3, the Assets [portion redacted] to the purchaser (and for the avoidance of doubt, transfer of the assets (or where applicable the economic benefit and obligations under and in respect of the Assets) shall be deemed to have occurred upon the receipt of the said initial consideration and upon the satisfaction of each of the purchaser's obligations under clause 9.3.

96. The purchaser shall be deemed to have assumed and it shall perform and comply with all of the assumed obligations as if the purchaser was originally named as a party to the Finance Agreements and the Hedging Agreements and the vendor shall be released from the relevant Assumed Obligations in each case, on and with effect from the completion date.

97. Clause 11.8.5 of the Loan Sale Deed provided that as soon as possible after the relevant completion date, the purchaser would prepare and procure the filing of an application for substitution of the purchaser in respect of proceedings in the Irish Courts for the vendor in any litigation (plaintiff proceedings) in which the vendor is the plaintiff or claimant as the case may be as against an Obligor and which relates to an asset.

98. In Schedule 1 to the Loan Sale Deed, a list of assets and borrowers was set out. The loans in respect of the accounts numbered 2444113 and 02460822 held by the defendant were included in the list.

99. Pursuant to the Loan Sale Deed, a Deed of Transfer between the vendor (as transferor) and the purchaser (as transferee) was executed on 23rd May, 2014. The deed provided that subject to the terms of clause 4.2–4.6, the assignor unconditionally, irrevocably and absolutely transfers, conveys and assigns to the assignee all such rights, title, interests and benefits as the assignor may have in and to the assets relating to the specified connection (subject to and with the benefit in each case of the related financial agreement) and assumes the Assumed Obligations relating to the specified connections in each case, with effect from the Completion Date.

100. Pursuant to clause 5 of the Deed of Transfer, the parties agreed that notification of the transfer should be made to the borrowers in accordance with the Loan Sale Deed.

101. Notifications of the sale and assignment was made to the defendant as borrower in the following manner. On 30th May, 2014, the vendor sent a letter to the defendant in respect of the facilities extended to him, notifying him that it had agreed to sell amounts owing on the said facility and guarantee to the purchaser and indicating that it would write to him in due course to confirm the date upon which the sale would take effect. That letter was exhibited in the affidavit sworn by Mr. Bull.

102. In an affidavit sworn on 19th September, 2014, the defendant dealt with the issue of the change of the plaintiff in the proceedings. The defendant alleged that the plaintiff had breached the following regulations and statutory provisions: the Central Bank Code of Practice on the Transfer of Mortgages and Central Bank of Ireland Asset Securitisation, s. 117 of the Central Bank Act 1989, and s. 58 of the Asset Covered Securities Act 2001. The defendant also stated that he did not give his consent to the change of plaintiff due to the fact that the plaintiff, when seeking his consent to the transfer of the loans, did not give him sufficient information to make an informed choice in the matter.

103. In response, the plaintiff referred to s. 12 of the Irish Bank Resolution Corporation Act 2013, which provides as follows:

> *"12.— (1) The sale or transfer of any asset or liability by IBRC, acting through a special liquidator, or by a special liquidator where such asset or liability has vested in the special liquidator, to any person or the assumption of any obligation or liability relating to such sale or transfer shall take effect notwithstanding—*
>
> *(a) any provision of any enactment, rule of law, code of practice, contract, or other agreement—*
>
> *(i) providing for or requiring—*
>
> *(I) notice to be given to any person,*
>
> *(II) the consent, approval or concurrence of any person, or*
>
> *(III) any other step, consent, notification, authorisation, licence or document to similar effect,*
>
> *or*
>
> *(ii) prohibiting that sale or transfer,*
>
> *or*
>
> *(b) any other legal or equitable restriction, inability or incapacity relating to the sale or transfer of any asset or liability or the assumption of any obligation or liability relating to such sale or transfer.*
>
> *(2) On the sale or transfer of any cause of action or proceedings by IBRC, acting through a special liquidator, or by a special liquidator where such cause of action has, or proceedings have, vested in the special liquidator, to any person—*
>
> *(a) that person assumes all of the rights and obligations in relation to the cause of action or proceedings which IBRC had immediately before that sale or transfer, other than the obligations of IBRC to which paragraph (b) relates, and*
>
> *(b) IBRC retains obligations in relation to the defence of or liability for any counterclaim or cross-claim which, if successful, would not give rise to a right of set-off and, in respect of such defence or liability, IBRC has full rights in relation to, and is solely liable for, any remedy awarded in relation to any counterclaim or cross-claim which, if successful, would not give rise to a right of set-off.*
>
> *[...]*

(5) Notwithstanding any enactment or rule of law, IBRC, acting through a special liquidator, or a special liquidator, where such cause of action has vested in the special liquidator, may sell or transfer, on such terms and conditions and to such person as the special liquidator thinks fit, any cause of action, howsoever arising, which has accrued or will accrue to IBRC."

104. Further on in the defendant's affidavit, he stated that while he did not have an objection to Deutsche Bank as he believed that they were not as reckless a bank as Anglo Irish Bank or IBRC, he was concerned, however, that they had a number of major law suits pending against them. He noted that on 22nd May, 2014, Mr. Stefan Krause, Deutsche Bank's Financial Chief, told shareholders that the bank is *"expecting continued headwind from legal matters"*. He alleged that Deutsche Bank made a number of substantial settlements of legal actions brought against them. The defendant stated that he would consent to the change of plaintiff under the following conditions:-

"(a) Confirmation from them that they are fully aware of the misconduct and breach of banking regulations from the previous entities i.e. Anglo and IBRC and how they view them.

(b) That they are fully aware of my pending counterclaim and that they are aware of my defence.

(c) That the IBRC legal team have been fully transparent and shared with them all the documents and correspondence from this case so DB can make an informed decision on any liabilities they may be taking on. Upon reading the affidavit of Clive Bull, it appears that he is not.

(d) Confirmation that IBRC has not indemnified DB against any legal claims, as is my understanding that IBRC will neither have the assets nor the legal longevity to service any indemnification.

(e) That they are fully indemnified by a reputable insurance company for the said damages and a letter confirming that same is furnished to me.

(f) That they are fully aware of my case in its entirety and all correspondence to date. And that they accept all liabilities for Anglo and IBRC's actions to date. And that they do not use the (it was not us defence) in any future court cases."

105. I am satisfied that the defendant's loans were contained in the Loan Sale Deed dated 28th March, 2014. The loans were actually transferred by virtue of the Deed of Transfer dated 23rd May, 2014. The defendant was notified of this by virtue of the letter from the plaintiff dated 30th May, 2014. In the circumstances, I am satisfied that it is appropriate to substitute Deutsche Bank A.G. as the plaintiff due to the transfer of the plaintiff's interest in the said loans to the said Deutsche Bank A.G. Accordingly, Deutsche Bank A.G. will be substituted as plaintiff in the action herein. They are entitled to judgment in the sum of €2,325,362.12 as against the defendant.