THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2019/378
High Court Record No. 2017/2383S
Neutral Citation No. [2022] IECA 217

APPROVED
NO REDACTION NEEDED

Woulfe J.
Murray J.
Haughton J.

BETWEEN

FENITON PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY AND

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFFS/RESPONDENTS

– AND –

EUGENE McCOOL

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 6th of October 2022

I Background

1. The Order of the High Court under appeal issued following an application for judgment on foot of a summary summons and directed that the first plaintiff recover against the defendant in the sum of €2,429,789.73. The reasons for the Order are detailed in a reserved judgment delivered by Noonan J. ([2019] IEHC 473). The alleged debt the subject of the claim is said by the plaintiffs to arise from a combination of personal borrowings and a guarantee executed by the defendant of monies advanced to Lyngarth Ltd. ('Lyngarth'), a company of which he was a director and shareholder.

2. The original personal borrowings (€150,000) are said to comprise what is described as *'an electronic overdraft facility'* advanced by Bank of Scotland (Ireland) Ltd. ('BOSI'), and provided for in a facility letter of December 2003 as amended in March 2007. This advance is said to have been made available to pay tradesmen and suppliers for balances outstanding on redevelopment work in respect of a property at 159 Howth Road, Dublin. This loan is alleged to be repayable on demand. With interest, and at the time of the judgment of the High Court, the amount due on foot of this facility was said to be €325,780.91.

3. As recorded in the summary summons, the borrowings of Lyngarth are alleged to comprise advances from ICC Bank plc ('ICC') on foot of facility letters of 21 July 1999 (as amended on 21 September 2004, 5 July 2006, 8 April 2008 and 4 December 2008), (£1,000,000, or €1,353,492.64), 21 January 2002 (as amended by letters of 21 September 2004, 5 July 2006 and 4 December 2008) (€240,605.37) and (following the transfer of the business of ICC to BOSI in 2002) a facility letter dated 28 January 2009.

As recorded on the summons, €466,000.00 was advanced on foot of this facility, although in fact this was the amount of the facility, the evidence disclosing that €70,200.00 was drawn down. The first advance is said to have been for the purposes of the acquisition of a site and construction of a hostel in Kinsale, County Cork, the second for the purposes of funding capital expenditure and the third for the purposes of funding the costs of conversion of apartments in Kinsale.

4. These facilities were said to have been originally repayable (in the cases of the first and second facilities) by (respectively) 80 and 89 monthly instalments of principal and interest commencing on a date not later than 1 May 2010, and (in the case of the third facility) by one payment not later than 2 years from the date of the facility or such other later date as BOSI might determine. As of the date of the commencement of the hearing of the application for judgment (16 May 2019), it was said that the sums due on foot of these three facilities were, respectively, €2,014,366.76, €434,691.18 and €133,774.99. These included surcharge and default interest. In advance of the second day of the hearing (17 May) the defendant delivered submissions in which *inter alia* he took issue with the application of default and surcharge interest to the company facilities. By letter dated 20 May, the first plaintiff's solicitors wrote recording their instruction not to seek judgment in respect of the default interest portion of the debt outstanding on these facilities, which at that point stood at €478,824.11. The effect was to reduce the sums due on foot of the combined personal and company facilities to a total of €2,429,789.73.

5. The first plaintiff says that in consideration of ICC and BOSI agreeing to make available these facilities to Lyngarth, the defendant executed a guarantee and indemnity dated 30 January 2009 in favour of BOSI. It is said that pursuant to that instrument,

the defendant guaranteed the payment on demand of all sums due and owing by Lyngarth to BOSI at the date of the guarantee or at any time thereafter on any account whatsoever, together with interest thereon.

6. In March 2002, the business of ICC was transferred to and becaome vested in BOSI. This occurred via the Central Bank Act 1971 (Approval of Scheme of Bank of Scotland (Ireland) Limited and ICC Bank plc Order) 2002, SI No. 27 of 2002. As of 1 January 2011, the business of BOSI was vested in Bank of Scotland Ltd ('BOS'), the alleged debts the subject of this claim being purportedly assigned by BOS to the first plaintiff in 2015. In the meantime (in October 2014) a receiver was appointed by BOS in respect of certain assets of Lyngarth and of two residential units owned by the plaintiff at 145A and 157A Howth Road (these having been charged as security for the personal facility). According to the plaintiff's submissions a total sum of €1,549,665.00 in net realisations was applied against the defendant's personal indebtedness to the first plaintiff, although this was applied to secured personal loans advanced to the defendant that are not the subject of these proceedings.

7. The assets and undertaking to which the Lyngarth receiver was appointed included a property owned by it in Kinsale, County Cork (to which I will return later). The receiver sold that property in September 2016. The first plaintiff says in its submissions that the sale of the Kinsale property by the receiver resulted in a total sum of €262,570 in net realisation being applied against Lyngarth's indebtedness to the first plaintiff.[1] These proceedings duly issued on 27 October 2017 (repayment of the personal facility

[1]It is not clear from the exhibited bank statements how this was actually done: the statements for account 101 record a bank credit balance of €249,167.00 on 27 June 2016. There is no similar credit on the other company accounts. The matter is not addressed on affidavit (although the defendant raised the issue of how this was credited in his affidavits).

and company facilities was demanded by BOS in July 2014 and by the first plaintiff in October 2017).

8. Following the judgment of the High Court, the defendant applied to this court by motion dated November 2019 for the joinder of BOS, the receivers and Lyngarth as parties to the proceedings and for Orders combining all current proceedings and all proposed or future proceedings originating from the accounts of BOS with the defendant or Lyngarth. That application was refused on 21 February 2020 by order of Costello J.

9. On 2 July 2021 (also by order of Costello J.) the second plaintiff (Pepper Finance Corporation (Ireland) DAC) was joined to the proceedings pursuant to Order 17 Rule 4 of the Rules of the Superior Courts ('RSC'), the first plaintiff having on 7 August 2020 assigned the legal ownership of *inter alia* the loans and guarantee the subject of these proceedings to that entity. Costello J. made it clear that in the event that the appeal was unsuccessful, it would be necessary for liberty to execute the judgment under Order 42 Rule 36 RSC to be sought before the High Court by the second plaintiff. It is at that point that any issues around the validity of that assignment fall to be determined. The first plaintiff is now in voluntary liquidation. The plaintiffs have requested that the court make an order amending the title to the proceedings to reflect the fact that the first plaintiff is now in voluntary liquidation, a course of action to which the liquidator has consented.

II Relevant principles

10. The relevant principles governing an application for summary judgment have been stated and restated many times. I summarised them in my judgment in *Onyenmezu v.*

Firstcare Ltd. [2022] IECA 11 (at paras. 23 to 24). A court in exercising the jurisdiction to grant an application for summary judgment must proceed with care and caution. The fundamental question it must address on such an application is whether there is a fair and reasonable probability of the defendant having a real or *bona fide* defence, in law, on the facts or both. This is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable. If the court concludes that there is a fair and reasonable probability of the defendant having a defence thus understood, the court must refuse to enter judgment. In interrogating that issue, the court must satisfy itself before entering judgment that it is *'very clear'* that the defendant has no defence. Necessarily, the court must assess the credibility of the defence presented, but in doing so does not engage in any qualitative assessment of the cogency of whatever evidence may be advanced by the defendant by way of asserting a defence. Indeed it must be remembered that in determining whether the defendant has established such a defence for the purposes of an application for summary judgment the court must assess not merely whether the defendant has established a fair and reasonable probability of a defence on the basis of facts known at the time of the application, but also whether there is a real prospect that some material support for that party's case would emerge if the case proceeded to plenary hearing with discovery, interrogatories and oral evidence.

11. At the same time, while the court must be cautious in granting summary judgment, and while the requirement that a defendant establish a fair and reasonable probability of the defendant having a defence is a relatively low threshold, it is *a* threshold: it is neither in the public interest nor in the interests of the parties that straightforward claims for a debt or liquidated demands should require to be determined by plenary hearing, with the additional delay and cost that such a hearing involves and the additional burden

thereby placed on the resources of the courts (see *Promontoria (Aran) Ltd. v. Burns* [2020] IECA 87 (‘*Burns’* at para. 4). The defendant must, accordingly, lay a basis on which the court can conclude that there is in truth an issue to be tried, and that that issue is neither simple nor capable of being easily determined (see *Prendergast v. Biddle*, Unreported, Supreme Court, 31 July 1957). Thus, in *IBRC Ltd. v. McCaughey* [2014] 1 IR 749, Clarke J. (as he then was) stated that the type of factual assertions which may not provide an arguable defence are those that amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence may be available, or which comprise facts which are in and of themselves inconsistent or contradictory.

12. In this case, the following are particularly relevant and bear repetition:

(i) It will not be sufficient for a defendant to merely assert a given situation as forming the basis of a defence (*Harrisrange Ltd. v. Duncan* [2003] 4 IR 1, at pp. 7 to 8).

(ii) While judgment ought not to be entered where there are issues of fact between the parties which, if resolved in favour of the defendant, will disclose a fair and reasonable probability of a defence, the court must assess the overall credibility of the case advanced by the defendant having regard *inter alia* to any uncontested documentary evidence tendered in support of the plaintiff’s application. McGuinness J. in *Aer Rianta v. Ryanair* expressed this in terms that the defence must not be *‘so far fetched or self-contradictory as not to be credible’* (at p. 615). This will, in particular, be the case when the defendant’s averments are flatly contradicted by the documentation, or where the

defendant's own affidavit evidence contains contradictory evidence (see the judgment of Hardiman J. in *Aer Rianta v. Ryanair* at p. 623).

(iii) Moreover, the court may on an application for summary judgment resolve issues of law or construction (including the construction of documents) where the issues that arise are straightforward and where there is no real risk of injustice being done by determining those questions within the framework of an application for summary judgment (*McGrath v. O'Driscoll* [2006] IEHC 195, [2007] 1 ILRM 203, at p. 210).

III Reliance by the plaintiff upon hearsay evidence

(a) The Issue

13. The affidavit grounding the application for summary judgment was sworn on 21 November 2017 by John Burke. Mr. Burke described himself in that affidavit as a director of the first plaintiff, and averred that he made the affidavit in that capacity. Supplemental affidavits were sworn by Mr. Burke on 5 February and 15 June 2018, these being tendered in response to the defendant's first affidavit of 18 December 2017 (the defendant swore second and third affidavits on 5 July 2018 and 26 February 2019). Mr. Burke was not personally involved in the loan transactions or the guarantee prior to the assignment to the first plaintiff. He does not identify in his affidavit what involvement (if any) he had in the accounts of the defendant or of Lyngarth thereafter.

14. In these circumstances, the defendant says (a) that Mr. Burke's evidence is hearsay, (b) that because the first plaintiff is not a bank, it cannot rely upon the provisions of the

Bankers' Books Evidence Acts 1879, as amended, to admit that hearsay evidence and (c) that in his judgment, Noonan J. wrongly stated that the defendant did not dispute the facts set out in the first plaintiff's affidavits. This, he contends, is a fundamental error as his affidavits show that he did *'dispute and refute the plaintiff's claim and explain the basis of his counterclaim'.*

15. Indeed at para. 8 of the judgment, the trial judge stated that the defendant did not *'dispute any of the facts set out in Mr. Burke's affidavits'.* The specific argument as to hearsay was addressed by the trial judge as follows (at paras. 27 and 28):

> *'....As the plaintiff is not a bank, the Bankers' Books Evidence Acts have no application to it. The evidence of the debt in this case is to be found in affidavits sworn by a director of the plaintiff. The deed of assignment of the debt by BOSI to the plaintiff is evidence of what is contained therein and does not constitute hearsay.*
>
> *Subsequent demands for payment were made by the plaintiff and interest accumulated since the assignment have been calculated by the plaintiff. None of this is in dispute. Mr. McCool does not contest the fact that he executed the original facility letter in respect of his personal borrowings or that he executed the guarantee for the company's borrowings. There is thus no issue of hearsay arising and thus no issue in defence.'*

16. The proper application of the rule against hearsay to an application for summary judgment on foot of lending facilities and/or guarantees in cases to which the Bankers' Books Evidence Acts are either inapplicable, or not complied with, had fallen for

consideration in a number of cases prior to what is – for the purposes of this judgment – the most recent and binding decision, that of this court (Baker J., Whelan J. and Collins J.) in *Burns*, (see *Moorview Developments Ltd v. First Active plc* [2010] IEHC 275 (*'Moorview'*); *Bank of Scotland plc v Stapleton* [2012] IEHC 549 (*'Stapleton'*); *Bank of Scotland plc v Fergus* [2012] IEHC 131 (*'Fergus 1'*); *Governor and Company of Bank of Ireland v. Keehan* [2013] IEHC 631 (*'Keehan'*); *Permanent TSB v. Beades* [2014] IEHC 81 (*'Beades 1'*); *Ulster Bank Ireland Limited v Dermody* [2014] IEHC 140 (*'Dermody'*); *Ulster Bank Ireland Limited v. Egan* [2015] IECA 85 (*'Egan'*); *Ulster Bank Ireland Limited v O'Brien* [2015] IESC 96, [2015] 2 IR 656 (*'O'Brien'*); *Bank of Ireland v. Heaphy* [2018] IESC 46 (*'Heaphy*'); *Promontoria (Arrow) Ltd. v. Burke* [2018] IEHC 773 (*'Burke'*); *Bank of Scotland plc v. Beades* [2019] IESC 61 (*'Beades 2'*) and *Bank of Scotland Ltd. v. Fergus* [2019] IESC 91 (*'Fergus 2'*). As I explain, to understand what precisely was decided in *Burns*, and what evidence is and is not sufficient to ground an application for summary judgment by the assignee of a debt such as the plaintiff, it is necessary to consider these decisions in some detail.

17. The rule against hearsay is – at least indirectly – reflected in the provisions governing applications for summary judgment: Order 37 Rule 1 RSC requires the affidavit grounding such a motion to be sworn by a person who can *'swear positively to the relevant facts to establish the plaintiff's claim'*. This mirrors the *general* common law requirement – to which there are of course many exceptions – that a statement made by a person (either orally or in a document) other than one which is made by a witness while giving oral evidence in proceedings, is inadmissible as evidence of any facts stated. Such a witness cannot depose as evidence facts that are unknown to the witness

but are merely recounted by him from information from an absent individual (see. *O'Brien* at para. 49 per Charleton J.).

18. So stated and without qualification, any such rule might create some difficulty in proof of debt in cases of any complexity, as – at least on one view – it could operate to restrict the persons who can give evidence to the contracting of a debt or the amount of an outstanding liability to those having some involvement in the underlying realisations. Strictly applied, a person who (although an employee or officer of a lending institution) gives evidence of the indebtedness of a defendant by reference to his or her perusal of the records of the lender may be giving evidence from their personal knowledge, but it is a personal knowledge derived from what the witness has been told by others. On that understanding of the rule, proof of debt in such cases might also involve the production of large volumes of original documentary evidence.

19. The Bankers' Books Evidence Act 1879 and the Bankers' Book Evidence (Amendment) Act 1959, as amended by s. 131 of the Central Bank Act 1989 and s. 126 of the Building Societies Act 1989 – although not originally enacted for the purposes of facilitating banks in proving debt in contested litigation – afforded a mechanism by which evidence contained in *'bankers' books'* (including electronically stored data) could be admitted in evidence without the production of the physical book or record.

20. In summary, s. 3 of that Act provides that a copy of any entry in a banker's book shall in legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts there recorded, while s. 4 states that a copy of an entry in such a book shall not be received in evidence under the Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business

and that the book is in the custody and control of the bank. Such proof, it provides, may be given *'by a partner or officer of the bank, and may be given orally or by an affidavit …'*. Section 4 (as substituted by s. 131 of the Central Bank Act 1989), makes provision for documents reproduced in legible form by mechanical or electronic means to be proved in the same way. Bankers' books are defined as including any records used in the ordinary course of business of a bank.

21. That legislation applies only to *'banks'* as defined, and there is no question but that the first plaintiff does not fall within this definition. Since the decision of the High Court, and while this appeal was pending, the application of the hearsay rule in civil proceedings generally has been significantly modified by the provisions of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (*'the 2020 Act'*).

(b) <u>Admission of bankers' business records at common law</u>

22. In his judgment in *Moorview*, Clarke J. found that the oral evidence of a bank official in the employment of the defendant of an analysis carried out by him of documents kept by the bank in the ordinary course of its business was admissible as representing *'prima facie evidence of a course of dealing between parties'* (at para. 6.3). The evidence was given in the course of a plenary hearing. Clarke J. reached that conclusion in a context in which an objection was taken that some of the documents produced by that witness were not capable of being proved under the 1879 Act.

23. That objection gave rise to the following statement (at para. 4.8 of the judgment) –

> *'However, that submission seems to me to misunderstand the object of that legislation. As pointed out in Volume 1 of the 1st Edition of [Halsbury's]* Laws

of England *at para. 1301, the main object of the Bankers Books Evidence Acts is to relieve bankers from the necessity for attending at court and producing their books under a subpoena duces tecum. The purpose of the Acts is not, therefore, to facilitate banks in proving matters. The purpose is to enable evidence to be given of the content of other parties' bank accounts without the necessity for the attendance of a representative of the bank concerned and the production of the relevant books. However, in this case* ***a representative of the bank did attend and gave evidence that the records which he produced to the court were taken from First Active's electronic books and faithfully recorded what was present in them.*** *In those circumstances there is no need for the relevant records to conform with the Bankers Books Evidence Acts.* ***That legislation is irrelevant to a case where the contents of the banks books are proved in the ordinary way by a witness who can give direct evidence of having analysed the books.****'*

(Emphasis added.)

24. Later, Clarke J. observed that it was fanciful to say that a bank wishing to prove its case in debt against a customer had to produce a separate bank official who was personally involved in each individual transaction giving rise to the customer's debt. He explained (at para. 6.3):

'What Mr. Collison gave evidence of was an analysis carried out by him of documents kept by the bank in the ordinary way 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…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 are 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.'*
>
> (Emphasis added.)

25. In other words, even though the evidence was derived from documents that were not authored by the witness and even though those records were generated in the course of transactions in which the witness had no personal involvement, his analysis of those documents placed him in a position where – as an employee of the bank whose records they were – he was entitled to recount his analysis of the documents as *prima facie* proof of the truth of their contents. Evidence based upon personal knowledge so derived was thus admissible to prove the fact and quantum of a liability.

26. A similar approach was adopted by Finlay Geoghegan J. in her High Court judgment in *Fergus 1*. There the relevant witness was at the time of the plenary action in question a former employee of the bank (having been employed subsequently by a servicing agent retained by the bank). Finlay Geoghegan J. approved the latter statement of Clarke J., continuing (at para. 14 of her judgment):

> *'I respectfully agree with the above approach as being correct. In this case, Mr. Moroney, as a former official of the Bank, is entitled to give evidence of the Bank's records in relation to the indebtedness of the Company to the Bank.*

Those records include the electronic records of the Bank. That evidence is admissible evidence and is prima facie evidence of the liability of the Company to the Bank. As pointed out by Clarke J., if a specific element of the records is challenged, the Court would have to decide on the factual dispute and the weight to be attached to the evidence of the relevant bank official would depend upon his personal knowledge of the matter in dispute.'

27. Both decisions thus emphatically declare the admissibility of the evidence of a present (or former) bank official that the defendant is indebted to the plaintiff because this is what the records in the possession of the plaintiff that the official has read and produced say. Each concludes that if such evidence is adduced, the court may grant judgment against the defendant on the basis thereof if the defendant fails to controvert that evidence or otherwise establish a defence to that claim. While each judgment unequivocally posits that principle, neither explains its relationship to the hearsay rule and, in particular, whether the admission of that evidence is permissible because it was understood not to be hearsay at all, or, because it was consequent upon an exception to the general rule, admissible hearsay. Neither decision cited authority in support of the proposition.

28. The judgments of Ryan J. in *Keehan* (at para. 20) and of McGovern J. in *Beades 1* (at para. 15) cited and adopted these passages from the judgments of Clarke J. and Finlay Geoghegan J.: in *Keehan*, the affidavit evidence adduced in an application for summary judgment was from a bank official who averred that he had perused the plaintiff's books and records. That evidence was not controverted. Ryan J. rooted his conclusion as to admissibility in common practice, deciding that bank records are *prima facie* evidence of a liability they record. He said (at para. 24):

> *'The judgments of Clarke J. and Finlay Geoghegan J. reflect an acknowledgement that courts have to take judicial notice of the obvious and commonplace facts and circumstances of ordinary life. Companies maintain computer records that are cited and exhibited in summary proceedings as evidence of debt. Similarly with banks.* ***The records are prima facie evidence that the defendant owes the money to the plaintiff.*** *If the defendant contests the liability in whole or in part, the evidence required to prove the case depends on the issues raised. If the matter is not disputed, there is no need of proof. Where a party chooses to stay silent in face of a claim, prima facie proof is sufficient.'*
>
> (Emphasis added).

29. That being so, even though the evidence tendered in that case did not conform with the requirements of the Bankers' Books Evidence Acts, the bank had made out a *prima facie* case by exhibiting the signed loan acceptances, the statements which were printed from its computer records showing the amounts outstanding, and the letters of demand. In *Beades 1*, McGovern J. cited *Moorview*, *Fergus 1* and *Keehan* in support of the proposition that '*[i]t has long been held that a witness is entitled to give evidence of the bank's records showing the amount due by a customer of the bank and that the records of the bank provide prima facie evidence of the liability'* (at para. 15). In that case, it should be said, McGovern J. concluded that the Bankers' Books Evidence Acts had been complied with.

30. The first three of these decisions were cited with approval in this Court by Mahon J. (with whose judgment Irvine J. (as she then was) and Peart J. agreed) in *Egan.* There,

the issue arose in an application for summary judgment from the fact that the plaintiff's deponent was an employee not of the plaintiff, but of a related but distinct company, Ulster Bank Limited. As an employee of Ulster Bank Limited (it was argued), the witness could not prove a debt due to Ulster Bank Ireland Limited. While such a witness could not rely upon the provisions of the Bankers' Books Evidence Acts, Mahon J, held that he could nonetheless prove the debt. Citing *Moorview, Fergus,* and *Keehan*, Mahon J. said that the witness had in his sworn affidavits, demonstrated that he has had access to the computer, bankers' books and records of the plaintiff relevant to the amounts being claimed as due and owing to it by the defendants, that he had perused same for the purposes of establishing the quantum of such amounts, and that he had been appropriately designated by the plaintiff to so do in the proceedings. He also stressed (at para. 36) that the defendants had *'unequivocally'* acknowledged the indebtedness.

(c) Stapleton and Dermody

31. However, two decisions of the High Court – each of which is referred to by the defendant in his submissions in this appeal – had signalled some discomfort with this approach. Both judgements referenced the decision of the Supreme Court in *Criminal Assets Bureau v. Hunt* [2003] 2 IR 168 (*'Hunt'*). There, proceedings were brought by the plaintiff in its statutory capacity as an officer of the Revenue Commissioners seeking to recover monies alleged to be due on foot of tax liabilities of the defendant. The matter proceeded by way of plenary hearing, following which the High Court granted declaratory relief that the first defendant was obliged to discharge the sums claimed by the plaintiff to represent taxes due and owing. In the course of the trial, the

plaintiff had been permitted to rely on bank statements which had come into its possession for the purposes of establishing that liability. The bank statements had been obtained on foot of statutory powers of compulsion vested in the plaintiff by the provisions of the Criminal Assets Bureau Act 1996, and the plaintiff contended that the effect of certain sections in that Act was that having obtained the statements in this way, they were admissible in evidence.

32. In allowing the appeal, this argument was rejected by the Supreme Court. Keane CJ. (with whom Murray, McGuinness, Fennelly and McCracken JJ. agreed) held that on the proper construction of the provisions of the Criminal Assets Bureau Act 1996, evidence based upon the bank statements could only be given by officers of the plaintiff if these were *'properly proved'* (at p. 190). What this meant was explained by Keane CJ. as follows (at p. 189):

> *'It is clear that, in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved* ***only*** *by their authors giving sworn evidence and being subject to cross-examination, unless advantage was taken of the provisions of the Bankers Books Evidence Acts 1879 – 1959.'*
>
> (Emphasis added).

33. The issue in *Stapleton* arose from the fact – to which I have earlier referred - that the facility extended by the Bankers' Books Evidence Acts requires that the witness who seeks to prove the copy documents admission of which is thereby enabled, be a partner or officer of the bank. It arose in the context of an appeal from the Circuit Court against

an order for posserssion in favour of the plaintiff as the mortgagee over lands owned by the defendant. The action and the appeal were heard on oral evidence. However, there the plaintiff (as it happens, BOS) had outscourced the management of the former BOSI loan portfolio to a service company, Certus, and it was an employee of that company who sought to prove the debt. Citing *Hunt*, Peart J. found that the evidence of the Certus employee was inadmissible hearsay. He explained (at para. 16):

> *'Where a bank needs to prove by sworn testimony the amount it is due by a defendant customer, that evidence must be provided by an officer or partner of the bank – in other words an employee of the bank itself, and not some person employed by some other company to whom the task of … collecting the debt has been outscourced for whatever reason. 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.'*

34. *Moorview*, he found, was distinguishable because there the witness was in fact an employee of the bank. The case, he said, *'is certainly not 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'* (at para. 14).

35. *Dermody* involved the same issue as subsequently arose in *Egan*; the deponent of the affidavit used to ground an application for summary judgment was an employee not of the plaintiff, but of Ulster Bank Limited. Therefore, O'Malley J. held, the plaintiff could not rely upon the Bankers' Books Evidence Acts to admit his evidence. More importantly for present purposes, she rejected the contention that having regard to the decisions in *Moorview, Fergus 1,* and *Keehan* the plaintiff was entitled to rely upon what was termed *'a common law exception to the rule against hearsay'* (at para. 44). She explained this conclusion – having regard in particular to the decision in *Hunt* as follows (at paras. 45 to 49):

> *'It is clear from the judgments cited above that Clarke J., Finlay Geoghegan J. and Ryan J. are of the view that business records of this nature are admissible as prima facie evidence of the truth of their contents, without reference to statute.* ***Unfortunately, I find myself unable to reconcile this with the decision of the Supreme Court in Hunt and I have not been referred to any other authority which includes such records as exceptions to the rule at common law. (It is true that a number of nineteenth century decisions pre- dating the Act of 1879 held that entries made in business records were admissible, but this appears to have been so only where the person who made the entries was deceased.)***
>
> *The problems that can arise in non-banking cases as a result of the hearsay rule were highlighted in the decision of the House of Lords in the well-known case of Myers v Director of Public Prosecutions [1965] A.C. 1001. In the United Kingdom, legislation followed shortly afterwards in the shape of the Criminal Evidence Act, 1965. Since then the common law rules relating to hearsay in*

both the civil and criminal law spheres have been supplanted in that jurisdiction by a series of legislative measures which have significantly affected the rigidities of those rules.

In this jurisdiction, the Criminal Evidence Act of 1992 provides for the admissibility of business records in criminal cases. However, there has been no equivalent legislation in relation to civil matters and ***the common law exclusionary rule continues to apply save where modified by statute or by recognised, established exception.***

In banking cases specific provision was made by the Bankers' Books Evidence Acts as amended. It is certainly the case that the original Act in 1876 (repealed and replaced by the 1879 Act) was intended to relieve banks of the inconvenience associated with a subpoena duces tecum in litigation between third parties. However, it is clear since, at least, the 1989 amendment (referred to in paragraph 18 above) the provisions of the Acts may also be availed of in proceedings to which a bank is itself a party. Both s.3 and s.6 are now applicable to all legal proceedings.

Following, as I am of course bound to, the Supreme Court decision in Hunt, I find that, in the instant case, the evidence of Mr. Evans is not admissible to prove the truth of the contents of the records unless it comes within the provisions of the Acts.

(Emphasis added).

36. The decisions in *Stapleton* and *Dermody* were distinguished on various grounds in those judgments post-dating them in which the admission of evidence of this kind was

allowed. Insofar as *Stapleton* is concerned, it has been said that the court did not express any dissent from *Moorview* (*Keehan* at para. 21) and that the court was not referred to s. 131 of the Central Bank Act 1989 and the amendment it made to the Bankers' Books Evidence Acts so as to include computer records (*Keehan* at para. 22). It was also said that the case was concerned with a situation in which BOS had maintained no presence in the State, and had not transferred the loans to any third party and was seeking to rely on the evidence of the employee of an independent service company (*Beades 1* at para. 17 and *Egan* at para. 22). In *Egan* the decision of O'Malley J. in *Dermody* was treated on the basis that it was grounded on an application of *Hunt* which, in turn, was not concerned with the position of a bank seeking to prove a debt (at para. 22).

(d) <u>O'Brien</u>

37. Six months after the decision in *Egan*, the Supreme Court delivered its judgment in *O'Brien* - the first of four decisions of that court considering the admission of evidence in debt recovery proceedings. As it happens, each of the cases was heard by a three judge panel of that court.

38. In *O'Brien*, the plaintiff sought summary judgment against the defendants on the basis of the affidavit of an officer of the bank. The affidavit did not comply – seemingly in an entirely technical way[2] – with the requirements of ss. 4 and 5(1)(c) of the Bankers' Books Evidence Acts. However, the official was not merely an employee of the bank,

[2] See para. 39 of the judgement of Laffoy J.: the bank in fact delivered an affidavit on a 'without prejudice' basis while the appeal was pending, remedying the defects.

but was the person with responsibility for the daily management of the defendants' loan facilities. She exhibited the relevant signed facility letters, and letters of demand, deposing that her evidence was based upon *'a perusal of the Bank's books and records'* (at para. 16). The letters of demand detailed the amounts said to be due and owing, were accompanied by three computer print outs as to the loans, and were issued by the deponent herself. However, the defendants contended that the debt had not been proven; they said that because the plaintiff was precluded from relying on the Bankers' Books Evidence Acts, there was no admissible evidence of the debt. The affidavit of the official was, they said, inadmissible hearsay.

39. In understanding what, precisely, the court decided it is important to note that the most detailed judgment was delivered by Charleton J. (who did not express agreement with the reasons given by the other members of the court). Laffoy J. agreed with the judgment of Charleton J., delivering also reasons of her own, while MacMenamin J. delivered a short judgment agreeing with both. It is the judgment of Charleton J., accordingly, that represents the binding decision of the court insofar it is with that decision alone that all three judges agreed.

40. Charleton J. made it clear that there was *no* entitlement to overstep the hearsay rule simply because records were made by a person in the course of a business, irrespective of reliability. He cited the well known decision to that effect, *Myers v. DPP* [1965] AC 1001, but at the same time observed of that case (a) '*our courts have taken no such rigid position'* (at para. 9) and (b) that there has been little sign that the principles as to admissibility of hearsay evidence inherited in 1922 were subject to change on the basis of reliability (citing *DPP v. Prunty* [1986] ILRM 716, while noting that the issue of inherent reliability had not been argued in that case (at para. 9)). Nor, he observed, had

there been any request for the creation of a new exception to the rule against hearsay in the case before the court. That, I think, was the context in which Charleton J. concluded that it was not necessary to address the pre-existing authorities to which I have referred.

41. Instead, Charleton J. focussed on the proposition that, as a matter of law, in certain circumstances, an inference could be drawn that the failure of a person to respond by way of denial to an allegation made against them could amount to an admission against interest – itself an established exception to the hearsay rule. Referring to the decisions in *Bessela v. Stern* (1877) 2 CPD 265 (CA), *Wiedemann v. Walpole* [1891] 2 QB 534, *R. v. Christie* [1914] AC 545, and to leading texts, Charleton J. stated the applicable principle thus (at para. 17):

> *'Depending upon the particular circumstances, an inference can be drawn, where a reasonable person would feel compelled to issue some form of denial, whereby the absence of contradiction can amount to the acceptance of the contrary case; it other words, an admission against interest'*.

42. The factors to be taken into account in determining whether a failure to respond to an assertion constituted such an admission were sketched out as follows (at para. 21):

> *'an analysis of the nature of the relationship between the parties is essential; the circumstances under which an allegation is made must be taken into account, what is solemn, being different from what is social and from what is jocular or mischievous; the nature of what is claimed may amount, on the one hand, to a bare allegation or, on the other, to an apparently definitive statement backed-up by documentary proof; but finally, the test must be that a failure to*

respond, in circumstances when a denial would clearly be required, would amount in terms of the conduct of reasonable people to an admission.'

43. Those criteria were found by Charleton J. to have been made out in the case before the court. The swearing of an affidavit and its service in court proceedings which makes allegations that a sum is due can be accepted in the absence of denial, where the form and the content of what is deposed to and the exhibits supporting it carry sufficient indications of reliability (at para. 23). Those indications of reliability were present because of the means of knowledge of the deponent, the documents she had exhibited and the letter of demand (at para. 17). As a matter of law, Charleton J. said, where circumstances indicate that a reasonable person would have responded to an allegation in the context of an appropriate commercial relationship where money is due, but does not so respond, an admission may be set up. The court, he said, may act in that situation.

44. While Laffoy J. agreed with the judgment of Charleton J., she was also prepared to root her conclusion in the provisions of Order 37 Rule 1. She was of the view that the position of the official was such, in the light of the documents exhibited in her affidavit, that she could swear positively to the facts showing that the plaintiff was entitled to judgment in the sum claimed (at para. 21). It was for that reason that both that case and *Stapleton* – which were said to have been decided by reference to their own particular facts - fell to be distinguished. Laffoy J. proceeded to refer to *Keehan*, which she felt was closer on the facts, and the judgment in which she evidently approved (see paras. 25 to 29), as she did that of Clarke J. in *Moorview*. MacMenamin J. agreed with both the judgments of Charlton J. and of Laffoy J., stressing that the evidence of the bank official as to the letter she had sent to the defendants was not hearsay.

(e) <u>Heaphy, Beades 2 and Fergus 2</u>

45. It is clear that the decision in *O'Brien* continues to define the position where evidence of debt is tendered by a senior bank official having familiarity with the relevant accounts and who has analysed the records associated with those accounts: the judgments of Laffoy J. and MacMenamin J. were cited and followed by Finlay Geoghegan J. (with whom MacMenamin and O'Donnell JJ. agreed) in another such case – *Heaphy* (at paras. 19 to 29). There, as in *O'Brien,* the deponent was an official of the plaintiff bank giving evidence in that capacity. The same principles were applied by Barniville J. in *Burke* to the assignee of a bank debt where the deponent averred that that she had had access to computer records and other records of the plaintiff relating to the accounts and alleged liabilities, where the relevant documents (including account statements) were exhibited by her, and where the defendants did not deny the facility letters or drawdown of the loans.

46. That decision of Barniville J. was cited with apparent approval by O'Donnell J. (as he then was, and with whose judgment Dunne J. and O'Malley J. agreed) in *Beades 2* (at para. 26). There, two affidavits were sworn grounding an application for summary judgment on foot of loans alleged to have been made by the plaintiff to the defendant. One of these was sworn by an employee of Certus (the servicing company used by the plaintiff) who had been an employee of the plaintiff and who, in that capacity, had dealt with the affairs of the defendant. She averred to the debt based *inter alia* on her perusal of the plaintiff's books and records. The other affidavit was sworn by an employee of the plaintiff (who did not aver to perusing the plaintiff's records). The defence raised by the defendant made clear, at least by inference, that he had entered into the

agreements and received the monies in question. In those circumstances – and referring with approval to the judgment of Laffoy J. in *O'Brien* – O'Donnell J. held that the plaintiff was entitled to rely on the evidence of the Certus employee to ground the application, as that evidence fell within the terms of Order 37 Rule.1 RSC. He explained this conclusion, as follows (at para. 25):

> *'In this case, of course, Ms. Tracey, at the time she swore her affidavit, was not an employee of the bank, but rather of Certus. Nevertheless, the function of Certus was to manage the credit recovery business of the bank in Ireland,* ***she had perused the books and records of the bank in respect of Mr. Beades, and, moreover, was personally involved in the events set out in her affidavit. Order 37, r. 1 is itself authority that a person other than the plaintiff can give evidence sufficient to establish the plaintiff's claim so long as that person can, in the words of the order, "swear positively to the facts showing that the plaintiff is entitled to the relief claimed".*** *On the evidence set out in Ms. Tracey's affidavit, I am satisfied that she was a person in a position to do so under O. 37, r. 1 and, accordingly, there was no valid objection to the sufficiency of evidence in this regard. The parallels between Ulster Bank Ireland Ltd. v. O'Brien [2015] IESC 96, [2015] 2 I.R. 656 and this case are clear.'*
>
> (Emphasis added).

47. O'Donnell J. also concluded that there was a parallel with *Burke* insofar as the defendant's defence assumed that the loans had been advanced. He said that the contention that there was no admissible evidence of the arrangements between the bank, its predecessor, and the defendant, or of indebtedness by the defendant to the bank was

misconceived. The positions of the witnesses and the evidence they gave of their involvement and knowledge of the dealings between the bank and Mr. Beades, meant that their evidence was consistent with what was outlined in *O'Brien* and allowed them to record of their own knowledge the fact of the indebtedness of Mr. Beades and the amount of that indebtedness. In those circumstances and where there was no denial or contest as to the facts, he said, this was sufficient evidence to justify judgment (at para. 28).

48. *Fergus 2* was the appeal against the decision of Finlay Geoghegan J. to which I have earlier referred. A majority of the court (Charleton J., with whom McGovern J. agreed) upheld the conclusion of the High Court admitting the evidence of a senior manager of Certus who had full access to the books and records of the plaintiff and who had previously been employed by the plaintiff as manager of its customer debt division. That evidence was given in accordance with the statements of the relevant accounts as contained in the bank's discovery. The focus of Charleton J.'s analysis in *Fergus 2* differed slightly from that of his judgment in *O'Brien.* He stressed his view that the hearsay rule was not breached where the relationship between a bank and a customer of that bank was *'evidenced by the free exchange of records of their relationship, through bank statements and statutory notification of charges, and which involves the flow of correspondence, one to the other'* (at para. 1). He elaborated upon this as follows (at para. 12 to 13), making clear that in *Fergus* (unlike *O'Brien*), it was unnecessary to resort to any inference from the failure of the defendant to respond to assertions of the bank's representatives (the highlighted passages show the difference between that case and *O'Brien* insofar as it was based upon the failure of the defendant to respond to the demand and affidavit of the bank official):

'these loans and these guarantees did not emerge out of nothing but were instead affected in consequence of an ongoing and close relationship between the company and the bank and Charles Fergus. As good banking practice now dictates, and as has been the expectation of bank customers over generations, periodic letters were sent to the company, with which Charles Fergus was involved, indicating the indebtedness of the company, the rate of interest applicable and the manner in which loans were being drawn down on an immediate or periodic basis together with any repayments. This vast bulk of correspondence shows a deep relationship between the parties of mutual trust whereby large sums of money were advanced on the basis of carefully drafted documentation, all of which is exhibited, and which preceded by the assent of the company and the willing entry into guarantee of the debts by Charles Fergus. Whether that relationship was wise, involving huge loans for property that can rise or fall dramatically in value, is another matter.

It is unnecessary, in those circumstances, to look for an exception to the rule against hearsay *because all of these documents, in terms of their acceptance by the company, the involvement of Charles Fergus with that company, his entry into guarantees for the purpose of furthering the business enterprise of the company, and the periodic statements of the ongoing financial situation, together with the relevant letters of demand, constitute a course of dealing between the parties which in other circumstances would be called admissions.* ***There is therefore no reason to have resort to any principle, of very limited application in any event, that an inference can be drawn from the failure of a person to answer a statement of fact in circumstances where a reasonable person who knew the opposite to be the case would issue a form of denial.*** *In*

other words, admission by silence, through failure to deny, is not a necessary avenue for this case to take since there is nothing to suggest anything other than the parties' understanding is engaged by the multiplicity of documents exchanged between them as to the true state of affairs.'

49. McKechnie J., in an emphatic dissent on this aspect of the case, conducted an analysis of some of the cases concluding – in summary – as follows:

(i) It has been traditionally understood and accepted that evidence of entries in bankers' books would constitute hearsay unless saved from its reach by some exception created either at common law, or by statute (at para. 76). Business records, he stressed, do not create an exception to the hearsay rule (at paras. 85 and 97).

(ii) The comments in *Moorview* (and in *Fergus 1* and *Keehan*) were based on the thesis that *'external to the Bankers' Books Evidence Act and without having to rely on any exception to the hearsay rule, a bank can establish its debt claim if it produces a witness, who can give evidence like Mr. Collison did in Moorview'* (at para. 68).

(iii) However, in the view of McKechnie J., this was not consistent with the decision in *Hunt*, which established that documents such as those in issue in that case (records of financial transactions contained in bank statements) cannot be adduced in evidence unless via compliance with some statutory provision enacted for that purpose (at para. 78).

Therefore, he could not accept that decision or those following or based upon it (at para. 86).

(iv) Insofar as *O'Brien* was concerned, McKechnie J. strongly disagreed with what he perceived as the suggestion in the judgment of MacMenamin J. that the failure of the defendant to respond to the letter of demand in that case proved the plaintiff's claim (at para. 93). He interpreted the judgment of Laffoy J. as preferring the approach of Clarke J. in *Moorview* and the cases which followed it (at para. 96).

(v) As to the judgment of Charleton J. in *O'Brien,* McKechnie J. could find no support in the authorities for the proposition that a failure to respond to correspondence could be taken as an admission of a debt due, and would not therefore permit a bank to establish its debt by relying upon an inference drawn from non-response or silence of a customer (at para. 104).

(vi) Insofar as Charleton J.'s judgment in *Fergus 2* itself was concerned, McKechnie J. interpreted this as being based upon the proposition that where a course of business dealing is established, that in itself constitutes an admission. If that was a correct reading of the judgment, McKechnie J. expressed himself as being unable to agree with it (at para. 105). A course of dealing or lengthy business relationship, he said, did

not have any bearing on whether the evidence of the bank official was admissible (at para. 106).

(f) Analysis

50. In the course of his separate judgment in *Burns*, Collins J. described the law governing the admission of evidence of the kind in issue in these proceedings as being '*in a most unsatisfactory state'* (at para. 2), while Baker J. referred to the issue of admissibility as bringing to bear *'a number of somewhat inconsistent and discordant judgments of the superior courts and more especially the Supreme Court, concerning the hearsay rule of evidence and the reach of the various statutory and common law exceptions to the strictness of its application'* (at para. 5). She described the decision in *Moorview* as leading to *'a rather convoluted line of case law concerning the means by which a bank could prove its debt'* (at para. 75). The specific difficulties that arise in the context of business records have now been addressed via the 2020 Act by statutory provisions which do not expressly (and therefore, necessarily) exclude from their application cases pending at the time of its enactment. However, it was not contended that that legislation was relevant to this appeal, and one can conceive many objections to the application now to an appeal of provisions which were not in force when the High Court decided the matter.

51. That being so, it may not be as relevant to many other cases but is nonetheless to be noted in resolving this appeal, that across the various judgments in four decisions of the Supreme Court in the past seven years there appear six (arguably) different legal justifications for the admission into evidence of oral or affidavit evidence of records of this kind. These span from the proposition that a failure to deny demands and/or such

evidence of debt may establish liability to a *prima facie* standard, to the suggestion of an exception to the hearsay rule for such business records, to the implication that the matter can be resolved simply by looking to the language of Order 37 Rule 1 RSC as applied to any given set of facts, to the proposition that in certain circumstances the failure to controvert such evidence may render it admissible as an admission against interest, or that in such situations the documentary trail may disclose evidence of a course of dealing itself giving rise to an admission.

52. It is clear, however, that the courts in this jurisdiction have (as Collins J. put it in the course of his judgment in *Burns* at para. 8) '*endeavoured to mitigate the strict application of the hearsay rule in this context'.* In that regard, what the cases - at least - establish is the following:

(i) That there will be circumstances in which evidence of indebtedness may be given by a witness on behalf of a financial institution by reference to copy bank accounts and other records of that institution in the production of which they have had no personal role, without complying with the provisions of the Bankers' Books Evidence Acts. This conclusion must follow from each of the four Supreme Court decisions.

(ii) To that end, such evidence has been permitted from present bank officials, from former employees of the plaintiff bank and (as *Egan* shows), from employees of legal entities related to the bank. In each of these cases it was clear that the relevant witnesses had full access to the

books and records of the bank, and in all of them the bank was the plaintiff in the case.

(iii) What was relevant in these cases – and this is particularly so having regard to the judgments of Laffoy J. in *O'Brien* and of O'Donnell J. in *Beades 2* – was that the witnesses in question were by reason of their position, of the access they had to documentation of the bank (in some case by reason of their prior experience of the specific account) and of their consequent ability to confirm the reliability of that documentation, enabled to swear positively to the facts showing that the plaintiff was entitled to judgment. The judgment of Laffoy J. in *O'Brien,* and the decisions of the court in *Heaphy* and *Beades 2* proceed on the basis that the review of the documents alone, combined with their access to all relevant records of the bank, was suffient to put them in that position.

(iv) In the circumstances I have just described, the critical point is that evidence of this kind – from a person whose relationship to the plaintiff and having access to all documentation relevant to the alleged indebtedness of the defendant is such that they can swear positively to the facts required to establish the indebtedness – is sufficient to render the defendant *prima facie* liable. If the defendant in this situation does not tender evidence denying the liability judgment may issue.

(v) While the evidence adduced by a plaintiff is either admissible or is not, it seems clear from the decision of Barniville J. in *Burke* and from the approval of that decision in *Beades 2* that where a defendant in an application of this kind chooses not to simply stand on the failure to adduce admissible evidence but to advance himself a case which is consistent only with a loan having been agreed, drawn down and/or guaranteed (as the case may be), the court in determining whether to grant judgment may have regard to the defendant's own affidavits in determining whether there is sufficient evidence to conclude that some or all of the plaintiff's case has been made out. The same assumption appears in the judgment of this court in *Havbell DAC v. Flynn* [2020] IECA 303 (at para. 37 to 39).

(vi) In none of the cases was evidence from a witness of this kind alone found sufficient to generate a *prima facie* case. In all of the cases properly verified copy documents comprising loan facilities, guarantees and bank statements were adduced in support of the witness' sworn testimony.

53. The critical conclusion - by which this court is clearly bound - is the first. Once that is fixed and (while noting the force of the dissent of McKechnie J. in *Fergus 2*, it *is* fixed insofar as this court is concerned) the rationale for what might be viewed as either a new exception to, or a narrowing of the scope of, the hearsay rule is less relevant. That said, while it is the case the various Supreme Court judgments to which I have referred do not reflect a consensus on the reason for the conclusion they have reached,

they uniformly resolve the tension between one version of commercial commonsense and what are now arguably antique rules of evidence by enabling admission of what the court in *Hunt* clearly viewed as hearsay evidence. The conditions for that admission are similar – that in all the circumstances the witness is giving evidence from his or her personal knowledge, including the knowledge obtained from dealing with the defendant and reviewing the records of the bank (Laffoy J. in *O'Brien* and O'Donnell J. in *Beades 2*), or that the documentary evidence exhibited by the deponent is sufficiently cogent to demand a response, the absence of which constitutes an admission (Charleton J. in *O'Brien*) or the evidence discloses a course of dealing such as in itself to constitute an admission (Charleton J. in *Fergus 2*). The common thread is *reliability,* and the end point the same: *provided* the court is satisfied that a witness is in a position to properly aver that he or she can tender evidence of a liability from his or her own knowledge (including knowledge derived from correspondence between a financial institution and the alleged debtor), and provided the deponent discloses in the ordinary way the source of that knowledge, the court may conclude from that evidence that a *prima facie* case that the defendant is liable to repay the monies alleged to be due and owing.

54. On either view, the inquiry is very much dependent on the nature of the evidence advanced and the particular status and means of knowledge of the deponent. The court is looking for one of two things (and arguably both) – evidence that the witness has obtained reliable personal knowledge of the indebtedness from a review of the relevant records of the lending bank, or evidence from exhibited documents that disclose an ongoing course of dealing (including the sending of periodic bank statements the contents of which are never disputed by the debtor) from which the court can reliably conclude that the monies recorded in those documents as being due, are in fact due.

55. The issue in this case depends on the proof required where – unlike in the four cases that have previously been considered by the Supreme Court – the plaintiff did not advance the loan, merely acquiring it after the fact, and the witness tendered by the plaintiff had no personal engagement with the defendant or his affairs until after the acquisition (if then). While *Burke* was such a case, it was also a case in which (a) the court raised doubts as to whether the evidence adduced by the plaintiff was sufficient to come within the principles applied in *O'Brien*, and (b) in which judgement was granted because of the position adopted by the defendant himself.

56. One final point arises. By and large these decisions do not distinguish between the evidence required to prove the different components of a claim in debt – the loan agreement, conditions of loan, advance, non-payment, interest and quantum at the time of the application for judgment. However the instant case shows that in establishing that a sum is due and owing by reference to a documentary record, the production of some documents to which the deponent is a stranger need not necessarily involve the adduction of hearsay at all. Everything depends on the document, and the purpose for which it is adduced. So, in proving the existence of a loan, the exhibiting of a document purporting to be a loan agreement purporting to be signed by the defendant may – if the deponent can either produce the original or verify that a copy is the original – constitute *prima facie* evidence of the agreement. Strictly speaking, some evidence that the signature on the document is that of the defendant might be said to be necessary to that end, but the decisions I have addressed above show that the law has moved passed the futile formality of such a requirement *provided* the reliability of the document can be otherwise credibly shown.

57. However, proving that monies are due is another matter. Strictly, the production of bank statements, in particular, is only proof that statements were created by the bank recording the transactions referred to on them. Such statements do not prove the fact of advance, they do not prove what the defendant repaid, they do not prove the propriety of the addition of interest and – perhaps most critically of all – they do not prove that the defendant has *not* repaid some or all of the monies said to be due. If the plaintiff produces such statements and can verify that they were sent to the defendant periodically throughout the currency of the banking relationship, the case law I have considered shows that the consistent failure of the defendant to reply to same when sent may allow the court to conclude that their contents are at least *prima facie* true.

(g) Burns

58. In *Burns*[3] – as in this case – the provisions of the Bankers' Books Evidence Acts could not be relied upon by the plaintiff, which had acquired certain loans from Ulster Bank Ireland Limited including – it said – debts owing to that bank by the defendants. Prior to the assignment, the bank had demanded payment of monies said to be due to it by the defendants, and instituted proceedings seeking recovery of same. Those proceedings were reconstituted, the plaintiff being substituted for the bank in the title thereto. Thereafter, the plaintiff proceeded to seek summary judgment, relying upon an affidavit from a senior asset manager employed by a service company administering debts on behalf of the plaintiff. That affidavit exhibited facility letters, guarantees and letters of demand. The defendant delivered a short affidavit, the effect of which was to

[3] The decision of this Court in *Burns* post dated the judgment of the High Court in the instant case: however Noonan J. also heard *Burns* in the High Court, ruling that the evidence there was hearsay.

dispute the admission of what was said to be hearsay evidence, and to put the plaintiff on full proof of the debt. Following the commencement of the application before the High Court, the plaintiff furnished further affidavit evidence from the asset manager stating that at all material times he had had access to the books and records of the plaintiff *'having relevance to these proceedings',* together with an affidavit from a director of the plaintiff confirming the role of the service company and the fact that the asset manager was authorised to swear the affidavit. Noonan J. having found that that director was not in a position to swear affirmatively to the facts, refused summary judgment. This court affirmed. The principal judgment was delivered by Baker J., with whom Collins J. agreed in a short concurring judgment. Whelan J. agreed with the judgement of Baker J.

59. Baker J. viewed the case as involving the application of what she described as *'a common law exception to the hearsay rule, namely that the witness for Promontoria has inspected and analysed its books and records and it is argued could give positive evidence of the debt from those records'* (at para. 56). That, I should say, appears to me to be an accurate summary of the decisions in *Mooreview, Heaphy* and *Beades 2*, as well as of the judgment of Laffoy J. in *O'Brien.* Following a detailed analysis of the authorities, Baker J. expressed the legal position as follows (at para. 86):

> *'I conclude that the present state of the law is that in order to rely on evidence which does not come within the Act of 1879 because the plaintiff is not a bank, a claim in debt can be established by credible evidence emanating from a course of dealing, from the nature of business records that show that dealing and which carry indications of reliability, especially if those records are in the form of statements of account sent from time to time in the course of a lending*

transaction, which, taken together with evidence from an authorised person of an analysis and inspection of books and records, whether documentary or electronic, can in the absence of a denial or challenge which is more than a mere bald assertion, be sufficient to establish a claim.'

60. Referring to the judgment of Edwards J. in *The Leopardstown Club Limited v. Templeville Developments Limited* [2010] IEHC 152 at para. 5.13, Baker J. found that the exhibiting of the guarantees and of the deed of assignment established the fact of both documents and were not hearsay. She explained this as follows (at para. 93):

'I am prepared to accept, at least on a prima facie basis, the argument that the guarantees are evidence of the creation of a guarantee, as the guarantees were created by deed and carry therefore the solemnity of that process, and the guarantee is made, not merely evidenced, by deed.'

61. It is clear that Baker J. was of the view that had the documents exhibited by the plaintiff had a particular legal effect or contained a statement having a legal effect, these would be admissible to prove a contractual arrangement (at para. 96). However, this was not the case in the application before the court. The documents of loan offer, she held, could not be said to be anything other than part of the chain of activity leading to the completion of a contract by acceptance of its terms, and she stressed that on the evidence before her, there was '*no statement in the letters of offer which have a legal effect without proof of acceptance'* (at para. 96). The content of the letters of demand, she continued, was relevant to show that demand was made, but not whether the debt was due, or by whom or in what amount.

62. From there, the court expressed concern at the absence of a specific averment in any of the plaintiff's affidavits that the originals of the various documents exhibited were held by, or on behalf of, the plaintiff and that the documents exhibited were true copies or that the deponents had examined the books and business records of Ulster Bank relating to the loans (at para. 103). She noted that there was no averment that the deponents had possession of the books and records of Ulster Bank, no explanation of where they were maintained and no statement that the witness had himself inspected and drawn conclusions from them (at para. 99). She focussed on the fact that the only averment was that the service company held all of the books and records *'of the plaintiff'* and that he had access to the records of the plaintiff *'relevant to the proceedings'.* This, she felt, was carefully chosen language (at para. 100). Moreover, she said that she could not ignore the omission of a simple averment in the plaintiff's affidavits that the originals of the various documents were held by or on behalf of the plaintiff and that the documents were true copies or that the deponents had examined the books and records of Ulster Bank relating to the loans (at para. 103).

63. However, Baker J. said that it was with the proof of the quantum of the claim that she had the greatest difficulty. Her conclusion that the evidence before the court did not meet the requirements articulated by Clarke J. in his judgment in *Moorview* and that there was insufficient evidence of a course of dealing between the parties or of statements or other correspondence supporting of the claim and shown to have been sent to the defendant, was based on the following:

(i) There were no bank statements of the type sent on a regular basis from a bank to a customer which carried indications of reliability and could be seen as part of a course of dealings or evidence of a contractual nexus from which

the court could draw an inference from a failure to respond. There were, Baker J. stressed, no statements from Ulster Bank, service of such statements had not been shown and *'because the affidavits sworn on behalf of the plaintiff are carefully crafted, service that might show a course of dealings cannot be presumed'* (at para. 105).

(ii) It had to be assumed that the deponent did not examine the books and accounts of the bank or whichever of the historic records were handed over to the plaintiff when the loans were sold as, notwithstanding that he swore three affidavits, the evidence commenced with the figure calculated after the sale. Baker J. said (at para. 109):

> *'At best the evidence of Mr. Harris is evidence of the amount Promontoria was told was due by the respondents on foot of the debt at the date the sale of the debt closed. It is classic hearsay, a statement of what the deponent was told by someone else'*.

(iii) The deponent relied on the letter of demand from the bank, and was careful not to say that his perusal of the books and records of the bank showed that the money was owed, but instead that the bank had made the demand and thereafter no payment was made to the plaintiff. Baker J. said (at para. 114):

> *'The link between the facility letters, the amount claimed in the letter of demand and the documents on which Mr. Harris relies is missing, as are some of the essential classes of documents which the Court had available to it in the judgments in the recent case law.'*

64. In summary, the judgment of Baker J. in *Burns* confirms that in those cases in which it is not possible to rely upon statutory exceptions to the hearsay rule, evidence can be given of debt by a person who had no personal knowledge of the underlying transactions where they can establish a course of dealings between the parties supportive of the claim, *and* that this requires proof of the sending of periodic statements from the original lender to the defendant or, possibly, clear evidence from the deponent that he has consulted the original documents of the lender and is in a position to aver on the basis thereof to a liability in the amount claimed. All of these requirements come back to a single criteria – that of reliability. She explained (at para. 102):

> *'The veracity or reliability of evidence is the key to the general objection to hearsay evidence, and the exceptions made have at their root the balancing of the inconvenience and onerous nature of a rigid application of the rule as against the requirement that the evidence be reliable and dependable.'*

65. While, as I have noted, the application of this principle depends on the facts and specific evidence in a particular case, in general, therefore, it appears that the assignee of a debt may seek to recover same on foot of the affidavit evidence of one of its officers or employees who had no personal involvement in the lending transactions, if that witness can (a) establish by reference to periodic statements, the contents of which were not disputed by the defendant, a course of dealing of the kind referred to by Baker J. (and by Charleton J. in *O'Brien*) and (b) establish the reliability of his evidence by deposing that he has perused the relevant books and records of the lender, confirming that and

why they demonstrate the liability. It is possible that there will be cases in which these are alternative, rather than cumulative, requirements. The judgment also assumes that the deponent will attest to the copy documents he has exhibited as being true copies of the originals (at para. 99).

(h) <u>The evidence in this case</u>

66. In his first affidavit, Mr. Burke records his authority to make the affidavit for the plaintiff, stating that he does so from facts within his own knowledge save where otherwise appears and that where so appearing that he believed same to be true and accurate. He does not state the source of his information, although clearly insofar as it relates to the contents of exhibited documents, that source is those documents. He refers to the personal facility letter, to the fact that the monies provided for therein were drawn down, to the vesting of BOSI's assets in BOS, and to the sale of the loans by BOS to the plaintiff. He avers to the company facility letters, the guarantee, the letters of demand, the amounts due and owing on foot of the personal facility and the company facility, the appointment of the recivers, and correspondence with the defendant. He concludes by identifying the sums due under each facility by way of principal and interest.

67. In that affidavit, Mr. Burke exhibited a copy of what purported to be the relevant personal facility letters signed by the defendant, the corporate facility letters signed in some cases by a Mr. Doran (described as a director of Lyngarth) and a Mr. Havel (described as director/secretary), by Mr. Doran and the defendant, by the defendant alone and by a Ms. O'Donnell and the defendant. What were said to be the applicable

terms and conditions were exhibited, as was the guarantee and indemnity, the demands, the deeds of appointment of the receivers and documentation relating to the transfer from BOSI to BOS and from BOS to the first plaintiff.

68. He also exhibited e-mails passing between the defendant and others from the Pepper group (of which the first plaintiff appears to be a member). These included mails in which the defendant stated that he did not *'recognise'* schedules furnished to him of monies alleged to be due, noting that these did not give account numbers for the sums of money listed, and that some of them dated back to the 1990s (as seen in the e-mail of 5 October 2017). That mail prompted a detailed letter of 19 October 2017 from the first plaintiff's solicitors (also exhibited by Mr. Burke in his first affidavit), in which the various facilities and the amounts said to be due and owing on foot of them were detailed. Also provided with this letter were various bank statements from BOS to the defendant and to Lyngarth (the latter being purportedly copied to the defendant). These are the only bank statements appearing in the papers, they were never seperately exhibited and at no point does the deponent aver as to their correctness, to their having in fact been sent to the defendant on the dates impressed upon them or to the statements being true and accurate records of the amounts outstanding on the accounts.

69. By e-mails of 17 and 22 October 2017 the defendant requested *'interest statements on my accounts for the year January 1st to 31st December 2016'*, and on 23 October these were provided. It seems clear that the documents were prepared in response to the request: they are dated October 23 and begin with the balance on each of the relevant accounts as of early 2016. All of these were also exhibited by Mr. Burke in his first affidavit.

70. As I have just noted, while the specific bank statements sent throughout the course of the relationship between ICC/BOS and the defendant/Lyngarth were not separately exhibited by Mr. Burns in this affidavit (and indeed were at no point referenced by him in the text of that document) at least some of those statements appear as attachments to the letter of 19 October 2017 from the first plaintiff's solicitors which, as I have noted, was exhibited. A separate folder was included in the papers furnished to the High Court entitled *'Enclosures to letter from McCann Fitzgerald to Eugene McCool dated 19 October 2017'*. The court was advised in the course of the hearing of this appeal that these were the papers exhibited before the High Court. The contents of this mirror eight attachments referred to in the letter referable to the personal facility, and nine regarding the liability on foot of the guarantee. Both are described in the text as *'Statement of Account … verifying the breakdown of principal and interest due and owing as at 2 October 2017'*.

71. The statements relating to the personal facility begin with a single document addressed to the defendant at his home, and covers the twelve year period from December 2003 to November 2015. It is on the headed paper of BOS. The second document in that bundle is a statement issued from Pepper and covering the period on the same account from 20 November 2015 to 2 October 2017.

72. The statements relating to the company accounts are addressed to Lyngarth care of the defendant at a business address of the defendant's in East Wall. The first of these is for account number 409975/101, is on the headed paper of BOS, and runs from 23 December 1999 to 20 November 2015. It is then followed by a statement for the period from 20 November 2015 to 2 October 2017. That statement is on the notepaper of Pepper. The statements for account number 409975/102 are similar, with a single BOS

statement from 16 September 2002 to 20 November 2015 and an updating statement issued from Pepper to 2 October 2017. Account number 409975/103 is evidenced by a single BOS statement covering the period from 2 February 2009 to 20 November 2015 and a single Pepper statement from 20 November 2015 to 2 October 2017.

73. The thrust of the first affidavit sworn by the defendant was directed to identifying various acts of alleged misfeasance by the original lenders which resulted in the failure of the Kinsale project (although he suggests that these or some of them are the responsibility of the plaintiff). While I will return to the detail of some of these later, and while in this affidavit the defendant was at pains to stress that he required further information to fully advance his evidence, his essential complaints were:

(i) Proper due diligence was not undertaken by the lender prior to advancing monies to Lyngarth for the project, with the result that the Kinsale property was acquired from a person described as a *'drug dealer'* who retained an interest in the ground floor of the building, and whose assets were seized by the Criminal Assets Bureau (this event is said to pre-date the defendant's involvement).

(ii) The lender then became a *de facto* partner of the investors as attempts were made to resolve the issues arising from the interest of the *'drug dealer'* and involvement of the Criminal Assets Bureau. It is said that the lender was totally responsible for the collapse of the potential for the project and the losses that arose.

(iii) The defendant invested in the project on the basis that the lender would increase facilities to enable the Criminal Assets Bureau and *'drug dealer'* to be dealt with, but then reneged on the agreement to advance these monies, resulting in further losses and loss of a sale of the property.

(iv) The defendant then proceeded with his own plan to develop the building, the lender became a partner in that project, agreed a budget for the required works, enabled the drawdown of the initial tranche of the agreed advance, but refused to provide the balance due on foot of the agreement.

(v) As a result of that breach, the project did not proceed and the property became derelict, thereby both depriving the defendant of the benefit of the development and reducing the value of the property.

(vi) The site was then sold negligently and carelessly at a rate well below market value.

(vii) The Dublin properties were also sold at an undervalue.

(viii) No account has been provided of how or for what amount the properties were sold or how these funds were allocated to the loan account.

(ix) BOS never became registered owner of the charge in issue and could not therefore transfer that charge.

(x) The defendant also averred that he was informed by BOS that in November 2013 they had written down the amount of the loan facility from €1,912,000 to €607,000.

74. The defendant further averred as follows:

> *'The Defendant denies this claim by the Plaintiff in its entirety'*
>
> *'It appears that the Plaintiff's demand is made of approved loan facilities, rather than the actual funds drawn down'*
>
> *'There is no comprehensive detail of how the Plaintiff's claim amount has been determined.'*
>
> *'The plaintiff's evidence does not comply with the relevant provisions of the Bankers' Books Evidence Act 1879 and is therefore inadmissible as a matter of law. The submission essentially is that the plaintiff has not proven its debt against the borrower and therefore there is no evidence before the court that the borrower has defaulted on the loans and that the guarantee can properly be called in.'*

75. It will be noted at the same time that the defendant admits, or at least does not deny, the fact of a guarantee, that he refers to *'the Plaintiff's loan that was taken out to purchase the property'*, and that he refers to drawing down *'the initial tranche of the approved funds'*. He exhibited a letter dated 27 January 2009 from William Fry solicitors (then acting for him) and Lennon Heather solicitors (then acting for BOSI) which purportedly enclosed an *'original guarantee and indemnity executed by Eugene McCool'*.

76. Mr. Burke in his second affidavit neither exhibited any original bank statements or averred as to his source of knowledge of the indebtedness. He accepted that one of the facility letters for Lyngarth (the first dated 21 July 1999) was not signed by the defendant, but averred that the others (corporate and personal) were. He stressed that those facility letters and the guarantee were signed by the defendant, that he had in his first affidavit evidenced the transfers from BOSI to BOS and from BOS to the first plaintiff, and that he had averred in that affidavit as to the detail of the amounts due (in point of fact, the averment was directed to the letter sent by the first plaintiff's solicitors of 19 October 2017). The irrelevance of the alleged conduct of the previous lenders was averred to, and Mr. Burke said that the allegations made in that regard were not supported by any evidence. Mr. Burke's third affidavit briefly clarified that this reference was to the absence of any documentation to support the claims made.

77. Most of the defendant's second affidavit is taken up with an elaboration of his claims of wrongdoing by the lending banks. However, he also repeated his denial of all claims of indebtedness to the first plaintiff by him or by companies to which he is connected. He says that he was not himself involved with ICC, and that his first contact was with BOSI. He says that the alleged borrowings from the plaintiff were in excess of the investors funds to the extent that the borrowings were approximately 250% of the investors funds. This, he said, required *'further investigation'*. He also averred that the personal guarantee claimed by the plaintiff was null and void. He protested that the plaintiff has not provided any information as to how the loans had progressed to the level of claim now made by the plaintiff, and he repeated his objection based on non-compliance with the Bankers Books Evidence Acts.

78. With that affidavit various documents were exhibited by the defendant which clearly acknowledge that there were loans to Lyngarth (although he expresses confusion as to the amounts thereof), loans to him (*'the Dublin loans'*) and a guarantee signed by him (*'while there was a document signed in Jan. 2009'*) – although he asserts that it was *'heavily qualified'* by his solicitors (in an undated e-mail headed *'Request for Particulars from Plaintiff 28-6-18'*). That same e-mail acknowledges that monies were released by BOSI to the company following the signing of that guarantee, and in his third affidavit he accepts that €70,000 was so advanced.

79. That third affidavit again reiterates his complaints against the lender and receiver, makes a number of legal submissions (including as to the inadmissibility of the evidence adduced by the first plaintiff), and asserts the invalidity (but does not deny the fact) of the personal guarantee: *'the Guarantee is null and void'*. He also acknowledges in this affidavit that the personal facility was granted: referring to *other* loans made to him (which he describes as accounts 102, 104, 107 and 114) , he says (at para. 8):

> *'These personal loans were for works in the Howth Road Clontarf and ran in tandem with the loan referred to as a 'personal facility' in paragraph 5 of the Plaintiff's affidavit of 21 November 2017 and exhibited at section 1 of that affidavit. All of these 'personal loans' were for the Clontarf projects and have been handled by the Plaintiff as such, from the outset of my facilities with the Plaintiff.'*

80. In his submission to this Court, the defendant contends that in fact he did not draw down €150,000 from the personal facility. He says – by reference to the statement for that account – that he did get funds of €20,655.09 via a *Swift* transfer to his property account, and that he repaid €26,249.87 on the 25 February 2004. He said that he made

a further lodgement of €2,215.52 on 15 November 2004. He says that there was no further activity on that account until 15 February 2006, when €17,225.19 was drawn. He notes that the account was for the purposes of paying tradesmen and suppliers for balances outstanding on redevelopment work at 159 Howth Road, but that that property was sold on 1 July 2004. He says that the balance due on that date should have been €9,414.89, and that the account should have stood at €24,500.00 not the €351,048.12 demanded by the plaintiff. At no point did the defendant depose to any of these matters in the course of his affidavits. He just asserts them in his submission.

(i) Application

81. The critical difficulty in this appeal (as indeed Baker J. felt to be the case in *Burns*) relates to the quantum of the alleged liabilities. Not only is the plaintiff in a position where it had no involvement in the original lending transactions until it purchased the loans in 2015, but (unlike the cases involving the Certus employees), its deponent had no connection with or knowledge of the lending relationship for most of its currency. Mr. Burke does not depose that the documents he has exhibited correspond to the originals, he does not confirm that his averments as to the defendant's liability are based upon a review of the books and records of the bank, he does not depose to his having any access to those books and records, and indeed does not even go as far as the deponent in *Burke* in averring that he has reviewed the books and records of the plaintiff (which evidence, it will be recalled, was in the view of Barniville J. in that case unlikely to be sufficient in itself).

82. It is to be stressed that no question of hearsay arises in relation to the vesting of the liabilities in BOS (this occurred as a matter of law), nor in the transfer of the loans to

the first plaintiff (these are proven by the exhibited agreements). Moreover, the fact is that the plaintiff has produced copies of the letters granting the personal facility (and amendments thereto) and the second and third company facilities (and amendments thereto), all of which purport to be signed by the defendant. While the defendant did not sign the facility letter for the first advance to the company, he did sign subsequent amending letters in respect of that facility all of which refer back to the original loan agreement. Given that the defendant has admitted both the third company facility and the guarantee, has not denied the fact or terms of the first and second company facility letters or the personal facility, and given that he has not disputed that the signature on all of these copy documents is his, it seems to me to follow from the various decisions to which I have referred (if not from basic commonsense) that these should be admitted in accordance with the principles identified in those cases. As I have explained, those cases make it clear that in determining whether a plaintiff has made out its case in an application for summary judgment, the court may have regard to the defendant's own evidence. In this respect the facts contrast with those in *Burns*. There, it will be recalled, the loan agreements themselves were not signed by the defendant, and that the defendant presented no affirmative case.

83. But this leaves the plaintiffs with three problems. First, save in one respect, the evidence of what was (and was not) advanced and repaid on those facilities is entirely hearsay, deriving only from the bank statements exhibited by Mr. Burke. Second, the defendant professes himself a stranger to at least some of the advances to Lyngarth, averring as he does that he had *'no connection whatsoever with the Plaintiff's loan that was taken out to purchase the property'.* Certainly, his evidence acknowledges that €70,000.00 was advanced to Lyngarth on foot of the third facility (the statements

suggest the sum was €70,200.00) but nothing else. Third, while the plaintiffs can prove the personal facility, and while (as I explain shortly) the defendant has accepted in his written submissions that €24,500.00 is outstanding on that facility, the plaintiff's evidence as to what else was advanced, or repaid on the personal facility is also hearsay being, again, derived entirely from the exhibited statements.

84. Had the first plaintiff adduced evidence of the sending of periodic statements to the defendant throughout the lifetime of the loans, the decisions of Charlton J. in *O'Brien* and *Fergus* 2 and of this court in *Burns* might afford a basis for establishing proof of the quantum of these debts. The plaintiffs' difficulty is that while in this case bank statements are exhibited (if only in the sense of being appended to a letter that is formally exhibited), those statements begin in 2015. The deponent has not confirmed that the statements were actually sent to the defendant, and no statements are exhibited from the point at which the relationship incepted (in 1999) until the transfer of the loans. While it is the case that demands were made on all facilities on 21 July 2014, and while there is one item of correspondence which refers to the defendant receiving statements of account from Pepper (the e-mail of 28 September 2017), there is no evidence of the sending of statements on an ongoing basis throughout the life of the loan transaction. This, it will be recalled, was viewed by Baker J. as an important aspect of the proofs where a witness in this position was seeking to establish a liability of this kind.

85. On its face, the evidence insofar as the question of the amounts said to be due on foot of these accounts is concerned brings this case four square within the decision of this court in *Burns.* In the course of her lucid and carefully structured oral submissions to this court, counsel for the plaintiffs contended that there were three relevant points of distinction between the cases. First, she observed, the affidavit grounding the

application in *Burns* was that of an employee of the relevant service provider, whereas in this case it was of a director of the first plaintiff. Second, she stressed that here statements were exhibited, whereas one of the important points in *Burns* was that there were no statements before the court. Third, she noted that in this case admissions were made by the defendant, whereas in *Burns* the defendant simply denied the debt.

86. However, I do not think any of these points of undoubted difference advance matters for the plaintiffs. The hearsay issue in *Burns* arose because the deponent had no involvement in the underlying transactions and no familiarity with the books and records of the bank. The deponent of the affidavits relied upon here is in the same position. The fact that he is employed by a party that itself was not involved in those transactions and which, if it has a familiarity with the bank's documents, does not say so, does not ameliorate the difficulty (in point of fact evidence was eventually tendered in *Burns* from a director of the plaintiff in that case). While statements were not exhibited in *Burns* and are here, the reason the absence of statements in *Burns* was important was because it meant that there was no evidence of the course of dealing referred to in *Moorview* and by Charleton J. in *O'Brien.* Here, there is no evidence of the sending of periodic statements throughout the duration of the banking relationship. The judgment of Baker J. makes it clear that statements were relevant to proof of a course of dealing and thus she was concerned to identify statements *'sent from time to time in the course of a lending transaction'* (at para. 86). Indeed, having regard to the fact that the statements that were exhibited were co-incident with the transfer of the loans, the core objection articulated by Baker J. in *Burns* that the evidence was of the amount the plaintiff was told by the bank was due by the defendant, applies with equal force.

87. Finally, while the defendant here does make admissions, he does not admit the quantum of the liability (save for the initial advance under third company facility) making it clear from his first exhibited commnications with the first plaintiff that he disputed the debt following the demand from the first plaintiff in 2017. This occurs in a context in which in relation to the company accounts, he has averred to his non-involvement in the original lending transactions, and in which there can be no doubt but that the overall context in which the advances were made were of some complexity. In this specific context, I do not think it would be in compliance with the authorities to impose liability on the defendant in a summary application for amounts which he has made clear he disputes from a point prior to the institution of the proceedings, and the only proof of which is hearsay evidence presenting the features I have earlier described. I think that in this respect the plaintiffs are in the precise position prefigured by Clarke J. in the course of his judgment in *Moorview* at para. 6.3. To repeat:

> *'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'.*

88. Whether the plaintiffs will eventually be in a position at trial to rely upon the provisions of the 2020 Act to overcome this difficulty is an issue on which I express no view. The plaintiffs have not contended that they can do so for the purposes of this appeal, and given that the High Court hearing occurred before that legislation took effect, there was an obvious sense to this.

89. The conclusion that the evidence of the quantum of the claim here (save in respect of the amounts originally advanced on foot of the third company facility) is inadmissible

hearsay, matches the outcomes in all of the Supreme Court authorities. The court cannot conclude that Mr. Burke had reliable and probative *personal knowledge* of the amount of the outstanding liabilities as required by *Beades 2* in the absence of clear evidence of a train of undisputed bank statements sent by the lender to the borrowers throughout the history of the loans and/or without a clear confirmation from the deponent that he has been in a position to consult the original records of the bank, and thus aver to the accuracy of the figures upon which he relies. It is clear from all of the cases, that it is an irreducible requirement where a witness does not give evidence of events in which he or she was personally involved and is testifying by reference to copy documents that they relate their knowledge of the contents of these documents to the originals and/or the records of the bank. For this reason, the central point made by the first plaintiff in its submissions to this court – that *O'Brien* establishes that the test is simply whether a deponent can and does swear positively to the relevant facts to establish the plaintiff's claim – does not advance its case: Mr. Burke has failed to establish in evidence that he can so swear. By reason of the absence of evidence of statements being sent throughout the course of the relationship, it is not a case that engages the rationale of *Fergus 2*.

90. Nor is this a case in which the defendant failed to respond to an assertion of liability either in the form of ongoing statements or a letter of demand, as found by Charleton J. in *O'Brien.* As I have explained earlier, while there is no evidence that the defendant disputed the amounts said to be due when demands were issued in July 2014, he immediately responded to letters of demand from the first plaintiff stating that he did not recognise the sums due, sought full details of the schedules, protested at the absence of account numbers and noted that some of the loans dated back to 1999 of which he had no knowledge.

(j) <u>Outcome</u>

91. In the course of his judgment in *Burke*, Barniville J. observed that it was *'well established'* that the court has jurisdiction pursuant to Order 37 Rules 7 and 10 RSC where the defendant seeks to raise a number of defences, to adjourn to plenary hearing only that defence or those defences which meet the threshold of a *bona fide* or arguable defence in accordance with the well established test (at para. 23). This is clearly correct, and indeed the defendant in his High Court submissions referred to a decision of this court in which two specific issues were remitted to plenary hearing (*ACC Loan Management DAC v. O'Toole* [2017] IECA 316). The same approach has been adopted in a number of decisions of the High Court and of this court (see *GE Capital Woodchester Ltd. and anor. v. Aktiv Kapital Asset Investment and ors* [2009] IEHC 512; *Bussoleno Ltd. v. Kelly and ors.*[2011] IEHC 220, [2012] 1 ILRM 81, *National Asset Loan Management v. Kelleher* [2016] IECA 118, [2016] 3 IR 568; *ACC Bank plc v. Walsh* [2017] IECA 166, *Bank of Ireland v. Dunne* [2018] IECA 271 and *Allied Irish Banks plc v. Cuddy* [2020] IECA 211). As evident from the decision of Finlay Geoghegan J. in *Bussoleno Ltd. v. Kelly and ors* (whose decision in this regard was approved and applied in *National Asset Loan Management Ltd. v. Kelleher*), that jurisdiction will in some cases be appropriate in the interests of justice and of a fair and efficient hearing for all parties (at para. 54), and this is particularly the case where the defendant has sought to unsuccessfully agitate a large number of issues in the course of an application for summary judgment. That jurisdiction, this court held in *National Asset Loan Management Ltd. v. Kelleher,* extends to cases in which claims by way of counterclaim were found in an application for summary judgment not to present a defence to the plaintiff's claim (at para. 31). Permitting the defendant to raise issues

that were or could have been addressed in the course of such an application and have been considered and rejected by the court as not being stateable, credible or serious would be a waste of court time and the resources of the parties. Where the court is satisfied that the limiting of a defendant to one or more issues when remitting to plenary hearing will not result in any injustice, this is the appropriate course of action to adopt and this is particularly the case in an application (such as the present) in which the defendant has presented a wide range of defences, all but two of which (one of which is an issue of proof) has been rejected.

92. In this case, the defendant has established that the evidence adduced by the plaintiff to establish the quantum of the sums now due on foot of the company facilities and personal facilities is not admitted by the defendant and is hearsay, and the proof of these will accordingly have to be adjourned to plenary hearing. The fact of the guarantee and of the personal facility is not denied and I see no reason to remit any issue regarding proof of these. The corporate facilities are evidenced by documents signed by the defendant himself, and while he says he had no involvement in the first corporate facility, amendments to that facility signed by him are also in evidence. He has never denied signing any of the exhibited documentation regarding any of the corporate facilities that purport to bear his signature. It follows that the only issue on which proper and admissible evidence will be required is the quantum of the debts.

93. When I refer to the *'quantum'* of the personal facility and of the corporate facilities, it is important to be clear as to what this does, and does not, mean. The plaintiffs must prove that the monies said to be advanced were advanced (a matter not denied in relation to the third company facility) that they were not repaid and are otherwise

recoverable in the sums sought having regard to the applicable terms and conditions. Clearly, the defendant (save and insofar as he has accepted that advances were made) must be entitled to challenge the claim that monies were advanced in the amounts alleged by the plaintiffs, and if he wishes to contend that they were in fact repaid, must be entitled to adduce evidence to that effect. So, to the extent that the defendant sought to advance the case suggested in submissions (but not averred to) that the sum owing on his personal account is only €24,500.00, he is entitled to make that case. For the same reason, he will be entitled to require proof of the amounts credited to the company accounts by reason of the receivership sales – the evidence of which, I should say, is less than clear from the materials before the court.

94. In his second affidavit, the defendant asserted that BOS had issued documents to him to show that on the 22 November 2013 it had written down the amount of the loan facility in Kinsale (that is the loan to Lyngarth) from €1,912,000 to €607,000, and in Dublin (that is the personal facility) from €4,212,000 to €2,260,000. He says that on this basis the plaintiff's claim against him is limited to this amount. He adduces no evidence of this.

95. The defendant also makes the case that what the plaintiff describes as loan account 105 with BOS was an overdraft account called a Business Electronic Overdraft and that the bank erroneously left an incorrect balance of €179,766.74 on that account on 15 February 2006, which was allowed to accumulate to €315,071.91 nine years later on 31 March 2015. He moreover says that BOSI had sought a lien on a deposit account he had with that bank with account number 115. He says that this deposit account was set up when his solicitor issued a cheque for €150,000 to BOSI from the proceeds of sale

of a property at 145 Howth Road, which was the bank's security for his overdraft account. In his notice of appeal, he says:

> *'The current plaintiff alleges that I have defaulted on loan account 105 for the Dublin properties, now increased to €351048.12. This is incorrect as there was no loan account 105, perhaps this is mixed up with my deposit account 115 and if so this amount should be credited to my account'.*

96. Both of these arguments are directed to the quantum of the liability, and the defendant should be permitted to make them in response to whatever evidence the plaintiff chooses to advance of the amounts now said to be outstanding on the relevant accounts.

97. However, this is the extent of the issues that are remitted. The defendant has had a full opportunity to identify the affirmative defences he wishes to advance to the claim. I explain in the course of this judgment why all but one of these lack any foundation. The defendant is not entitled to resurrect those I have rejected or any other defence he could have but failed to raise in this application, in the course of the plenary trial.

IV The enforceability of the guarantee

(a) <u>The facts</u>

98. By letter dated 28 January 2009 BOS agreed to make available to Lyngarth a third facility of *'up to'* €466,000.00. That letter replaced two earlier letters of loan offer of 8 April and 5 December 2008, both of which had been signed by the defendant. Each of these three letters recorded the purpose of the loan as the cost of conversion to

apartments, and all required that drawdowns would take place on foot of architects' certificates, valid invoices or expenditure certified by Lyngarth's accountant. Each letter envisaged drawdown occurring within three months of the date of the letter (although the availability period could be extended by the bank). The first letter was for a facility of €450,000.00, while the second two were for €466,000.00 (the additional €16,000.00 was by way of interest roll up). The letter of 5 December 2008 introduced a new security requirement that was not provided for in the letter of 8 April, as follows:

> *'The security for the Loan, which shall extend to cover the Borrower's general liabilities to the Bank shall be ….*
>
> *… The Guarantee and Indemnity of Eugene McCool for all sums including accrued interest thereon'*

99. At the point of the signing of this letter by the defendant, the amounts said to be already due by Lyngarth to BOS were in the case of the first facility €1,353,492.64, and in the case of the second facility €240,605.37. Indeed, by letters dated 4 December 2008 amending each of these first two facilities the defendant was required to give a guarantee to cover all of Lyngath's liabilities to the bank. Both of those letters were signed by the defendant. Both letters increased the sums loaned on the respective facilities – the first facility was for £1,000,000.00 and the second for €224,000.00.

100. The defendant asserts in the supplemental submissions requested of each party by the court that this did not involve any benefit for him as the bank was merely increasing the loans to reflect the addition of capitalised interest and current arrears to the loan

amount and there was no increase in funding. However, each letter also extended the time for repayment of principal and interest to 1 May 2010; forbearance is good consideration (*Bank of Ireland v. Quinn* [2016] IECA 30 at para. 9).

101. It is clear that there were discussions between the plaintiff and the defendant and his advisors[4] regarding the proposed third facility between December 2008 and late January 2009. On 27 January 2009, William Fry wrote to the bank's solicitors describing Lyngarth as their client, and referring to the loan facility of 5 December 2008. That letter records itself as sending a number of documents to the bank, including (at no. 4) an *'Original Guarantee and Indemnity executed by Eugene McCool'.* The letter concluded:

> *'Please note that the enclosed are being furnished to you strictly subject to your client advancing funds to our client pursuant to the Loan Facility. If funds are not advanced to our client, the documents at 1-6 above should be returned to us'.*

102. Two days later, on 29 January, the defendant signed the letter of loan facility dated 28 January 2009. That letter expressed itself as replacing the earlier offers and included a requirement for a guarantee similar to that provided for in the letter of 5 December. It provided that the full amount of the loan was to be drawn down by 28 April 2009, and that any undrawn balance would thereafter be cancelled and unavailable for drawdown unless the bank extended the availability period. As with the other letters, drawdown

[4] The documentation discloses that the defendant was represented by AT Diamond, Solicitors, at the time of the April facility letter, and by William Fry from the time of the December offer.

was to occur on foot of architect's certificates, valid invoices or expenditure certified by the borrower's architect.

103. Both letters of 4 December and the letter of 28 January 2009 (but not, it seems, the letter of December 5) contained a separate sheet headed *'Guarantor/Third Party Security'*. This was signed by the defendant and confirmed that he had read and understood the letter and had an opportunity to take legal advice on it, and that the guarantee referred to in the letter *'shall secure all sums due or owing to the Bank by the Borrower from time to time including without limitation, amounts owing by the Borrower under the facility letter and all amendments thereto'*.

104. It is agreed by the parties that the guarantee was signed by the defendant (the document in the court's papers is dated 30 January, although presumably having regard to the contents of the letter from Wiliam Fry it was signed by the defendant on or before 27 January; the signature is witnessed but not dated). The bank statements indicate that €70,200.00 was drawn down on the account on 2 February 2009. Loan advance fees totalling €4,558.50 were debited to the account on the same day. No further drawdowns occured on foot of the facility. The guarantee was for all sums due and owing by Lyngarth to BOS and, to that extent, met not merely the obligation provided for in the letter of 28 January 2009, but also that provided for in the two letters of 5 December 2008.

(b) <u>The argument as to consideration</u>

105. The defendant claims that the guarantee is unenforceable for want of consideration. This argument was not advanced before the High Court, it was not referenced in the notice of appeal, it was not identified in the replying affidavit evidence delivered by the defendant as required by Order 37 Rule 3 and I can see no basis on which the defendant should be permitted to make it now. No good reason has been advanced as to why the defendant did not make this argument originally, and the reason that was suggested in the course of oral submissions (that the defendant is a lay litigant) is not in itself sufficient.

106. The point is, in any event, devoid of merit. As presented in oral argument the essential objection articulated by the defendant was based on the lack of proportion between the benefit of the guarantee and the burdens it imposed. This is not, in law, a valid objection. Consideration must be sufficient, but need not be adequate. The consideration was certainly sufficient in law – the defendant (a director of and shareholder in Lyngarth) obtained across the three accounts an increase in the loan facilities provided to the company. Under the the third facility, new funds were being advanced, while the other two facilities were being restructured. That was sufficient, and moreover was not 'past'. Extra performance – however small – rendered by the promisee over and above the initial duty is sufficient consideration. All of this, it should be said, is aside from the fact that the document purports to be under seal: the law is that where a document is stated to have been *'Signed, Sealed and Delivered'* a person signing it may be estoped from denying that it was sealed (see *McDonnell v. Ring* [2016] IECA 16 at paras. 30 to 31).

(c) The alleged conditionality of the guarantee

107. The argument made by the defendant as to the conditionality of the guarantee is simple. The letter from William Fry of 27 January, he says, made the guarantee conditional on the drawdown of *'funds'* and this (he says) meant *'all funds'* provided for in the facility. The bank did not enable the drawdown of the full €466,000.00 provided for in the facility letter, instead allowing €70,000.00 to be withdrawn – thereby allowing the project to start – but then halting the facility, and causing the project to cease. This was, the defendant says, for him the worst of all worlds as he had retained tradesmen for the purposes of the project and work that had commenced had to be stopped. Once the work had commenced, the defendant says, the building could no longer be used as a hostel, and Lyngarth would never have exposed itself to a risk of accepting only partial payments when so much depended on obtaining the full budget amount agreed. He suggests that the reason that this stipulation was included in the letter from William Fry was precisely to ensure that he would not be in a position whereby he began the work, and then had to stop it because the remaining sums provided for in the facility letter were not forthcoming. The bank, as he also puts the matter, had accepted his offer of a guarantee on conditional terms, and having accepted the guarantee on that basis could not enforce it when it failed to comply with the contract by not advancing all of the monies. Although not put in these terms, the argument from there is that the plaintiffs cannot be in a better position than was the bank when it comes to enforcing the guarantee. For the purposes of an application for summary judgment – he contends – this is a sufficient *prima facie* defence to merit the remittal of the case to plenary hearing.

108. The plaintiffs contend that the letter from William Fry could not possibly record an intention by the parties that the security would become invalid unless the entirety of the

sums provided for were paid over. They stress the unqualified obligation undertaken by the defendant when he signed the guarantee. Noting the provisions of the facility letter providing that the full amount of the loan was to be drawn down by 28 April 2009, and the requirement that drawdown only occur on production of architect's certificates or invoices, they contend that the facility letter itself expressly envisaged that only part of the facility might be drawn down if the relevant conditions were to be met. To this might be added the related consideration that if the defendant were correct in the contention he advances, the effect would be that there might be no guarantee operative until well into the life of the facility letter as monies could be drawn down sparodically and in tranches (as they were) without the security taking effect, the security only crystalisating on the final drawdown. On that basis, the bank would have committed itself to potentially providing a substantial part of the loan finance without the required security that was clearly envisaged by the facility letters. Indeed, on one view the defendant's construction might have enabled him to avoid the guarantee by simply not drawing down all of the funds. Furthermore, it might be said, the defendant had already committed himself to providing a guarantee of all company liabilities when he signed the facility letters for the first two accounts on 4 December, repeating that commitment when he signed the facility letter and confirmation as to the guarantee the day after the letter was sent by Messrs. William Fry.

109. The trial judge addressed this argument as follows (at paras. 19 to 21):

> *'Mr. McCool says that the facility provided for an advance of €466,000 of which only the first tranche of €70,000 was actually advanced by BOSI. The wording of the Fry letter appears to suggest that if no funds were advanced, the documents would be returned but of course this is not what happened. Funds*

were in fact paid over to Lyngarth on foot of the security documents, including the guarantee, and the fact that further drawdowns were not made could have occurred for any number of reasons. It would be surprising if this letter were to be taken as recording an intention by the parties to the agreement that the security would become invalid unless the entirety of the sums provided for were paid over.

Such a construction of the Fry's letter is also inconsistent with the terms of the facility letter of the 28th January, 2009 itself. It provides at clause 10 dealing with "Drawdown" that the full amount of the Loan is to be drawn down by 28th April, 2009 and any undrawn balance will thereafter be cancelled. Clause 4 dealing with "Conditions Precedent to Drawdown" specifies at sub-clause (vii) that drawdowns are to take place on foot of architects' certificates, valid invoices or expenditure certified by the Borrower's Accountant. It is thus clear that the facility letter expressly envisages that part only of the facility might be drawn down if the relevant conditions precedent were not met.

Certainly the wording of the guarantee itself would be quite inconsistent with the construction of the agreement between the parties contended for by Mr. McCool …'

110. While the defendant is mistaken in suggesting (as he does) that the court is precluded in an application for summary judgment from resolving a dispute as to the construction of a document, it can only do so in the clearest of cases. The fact, and limitations, of

that power were explained by Clarke J. in *McGrath v. O'Driscoll*, as follows (at para. 3.5):

> *'So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment'.*

111. In this case, it is evident that – for the reasons urged by the plaintiffs and explained by the trial judge – the defendant faces some challenges in advancing the argument that he does. However, at least for the purposes of this application, I cannot be satisfied that, viewing the sequence of correspondence and contents of the agreements as a whole, that the argument advanced by the defendant is so weak that the court must proceed to dismiss it now, without receiving evidence as to the full factual matrix in which the facility letter and guarantee were agreed.

112. In that regard, it seems to me that this court must, for the purposes of this application, proceed on the basis that the very clear stipulation imposed by Messrs. Fry solicitors in their letter of January 27 had *some* meaning. Thus understood, there is *an* argument to be made that the contractual relationship between the parties *vis-á-vis* the guarantee was defined by an offer by the bank in the form of the facility letter and subject to a condition as to the provision of a guarantee, which was followed by a qualified acceptance of that offer in the form of the requirement expressed in the letter from

William Fry. On this argument, had that qualified acceptance – itself a counter offer – been accepted by the bank, the guarantee and letter of offer would have been qualified in accordance with the letter to the intent that unless the full amount provided for in the facility letter was advanced (or perhaps unless the reason it was not advanced was that the monies were not required by the borrower) the security would not take effect. So, I do not think that the terms of the facility letter or guarantee themselves necessarily resolve the issue. Everything depends upon the meaning and effect of the letter from William Fry, solicitors.

113. There are a number of possible end points to that exercise in construction. One is that urged by the plaintiffs – that viewing the letter in the light of the terms of the guarantee, the facility letter of 29 January *and* the earlier facility letters – the actions of the bank in proceeding to accept the guarantee and advance the funds are consistent with a construction whereby the agreement was that if *any* (or at least anything more than a *de minimis*) advance were made, the guarantee took effect. But, it is not inconceivable that a court of trial having heard relevant evidence as to the factual matrix might decide that in fact the letter meant that the guarantee kicked in only if and when all funds were advanced, and that the bank accepted this thereby by its actions qualifying the terms of the other documents. It may well be that it could be said that had the bank wished to dispute the condition thereby sought to be imposed, it was a matter for it to do so expressly upon receipt of the letter, or by refusing to allow any drawdown until the defendant clarified that the guarantee was not conditional. It may well be that the bank at the time of the agreements fully expected that the full sum would be drawn down and, accordingly, was indifferent to the terms provided for in the letter. Moreover, a trial court might attach some significance to competing versions of commercial commonsense as evidenced by the admissible factual matrix – on the one hand, why

would the bank have ever agreed to such a stipulation having regard to the earlier (and unqualified) commitments to give a guarantee, but on the other why would the defendant have agreed to give a guarantee for *all* the liabilities of the company without some assurance that he would be given the funds necessary to complete the project in question? I make no comment as to how likely it is, viewing the matter through the lense of commercial reality, that the plaintiffs' construction would ultimately prevail. However I cannot conclude that it is an argument that is so likely to fail that it should be disposed of here and now in a summary process. It is a matter that is properly addressed by a court receiving all evidence relevant to the transaction. Accordingly, it is appropriate to grant leave to defend on this ground also.

V The particulars of debt in the summons

114. The summary summons in this case was issued on 27 October 2017. As I have noted earlier, before the issue of that summons, the plaintiff sent a letter of demand to the defendant (2 October 2017), in response to which the defendant sent an e-mail to the plaintiff's agent in which he complained that he did not recognise the sums of money due, and sought *'full details of these schedules'*. He requested:

> *'full details of these loan accounts, complete with letters of offer, the signed acceptance documents ... and the contract documents in relation to these accounts and all relevant files and documents in relation to these accounts'*

115. As I have also noted earlier, under cover of a letter dated 19 October, the plaintiff's solicitors responded to this request providing a detailed account of the monies due,

identifying the relevant terms and conditions, and furnishing a set of the statements. These identified the amounts said to have been advanced, the amounts said to have been repaid, and the amounts said to have comprised interest, on each of the facilities. I cannot see from these documents that the defendant can reasonably say that he was not in a position to ascertain the reason the sums in question were alleged to be due and owing by him. He may not have agreed with some or all of the contents of the statements, but he could have been under no illusion as to *why* the first plaintiff said the amount it sought was due and owing.

116. The defendant in written and oral submissions seeks to make a point arising from the decision of the Supreme Court in *Bank of Ireland v. O'Malley* [2019] IESC 84. In *O'Malley*, the court in a judgment delivered by Clarke C.J. (with whom Charleton J. and Ní Raifeartaigh J. agreed) elaborated on the requirement imposed by Order 4 Rule 4 RSC that the indorsement on a summary summons and a special summons should *'state specifically and with all necessary particulars the relief claimed and the grounds thereof'* when applied to proceedings seeking recovery of a debt. The defendant to such a summons, he said, *'is entitled to have sufficient particulars to enable him to "satisfy his mind whether he ought to pay or to resist"'* (at para. 5.1). In assessing whether in a given case that requirement had been met, Clarke C.J. said:

(i) The court is entitled to take into account any documentation sent to the defendant in advance of the commencement of the proceedings (at para. 5.5).

(ii) However, if the plaintiff wishes to rely upon previously supplied details, it is necessary for it to '*at least make some reference to those details in its special indorsement of claim'* (at para. 5.5).

(iii) Thus, if the indorsement of claim specifies the liquidated sum due but says it is calculated in accordance with some identified document or documents already sent to the defendant, then the defendant has sufficient information provided those documents themselves provide the necessary detail (at para. 5.6).

(iv) Therefore, a summons which set out the terms of the loan, the fact that it was accepted, the fact that monies were drawn down and that the plaintiff had not been repaid the monies demanded was not sufficient where there was only *'bald reference'* to the amount said to be due and no details were given as to how that sum was said to be calculated (at para. 5.7)

(v) In that case a statement of account made some reference to these details, and this would have been sufficient to transfer the analysis of the sufficiency of the details given from the special summons to the statement of account ***if*** there had been *'some reference in the special indorsement of claim to the fact that the sum in question was calculated in accordance with the terms of the Statement of Account'* (at para. 5.7)

117. What *Bank of Ireland v. O'Malley* thus decides is that either on the face of the indorsement of claim or in a document furnished to the defendant and itself referenced in the indorsement of claim, the defendant must be told *'why the particular amount due should be sum claimed'* (at para. 5.8). The case did not introduce new law, instead restating the law as it had existed for over a century (*Promontoria (Arrow) Limited v. Mallon & Shanahan* [2021] IECA 130 at para. 18). Indeed, it is of importance that in *O'Malley* the defendant specifically raised the objection before the High Court that the plaintiff's pleadings were defective (see para. 2.4). Here, it might well be said that while (as I have already found) the papers served with the grounding affidavit provided full details of why the sums in question were said to be due, the summons did not comply with the requirement which it might be argued was imposed by the judgment of the court in *O'Malley* that where reliance is placed upon extraneous documentation to discharge the obligation to deliver full particulars of the debt, this must be stated on the face of the summons.

118. In this case, unlike in *O'Malley,* the point as to deficiency of the pleading was not raised in the court below. Had it been raised in the High Court, the deficiency could have been addressed by the amendment of the summons to include short reference to the bank statements in which these particulars were to be found. This court has consistently decided that it should not permit a party who could have raised a pleading issue as to the particularisation of a claim in the High Court to do so for the first time on appeal, not least of all because had such a point been made it would have been open to the trial judge to afford the plaintiff an opportunity to amend its claim (*Allied Irish Banks v. O'Callaghan* [2020] IECA 318 at para. 61 and *Promontoria (Arrow) Limited v. Mallon & Shanahan* at paras. 25 and 26). All of the cases addressing the power of the court to

permit a party to amend its pleadings stress the flexibility with which that jurisdiction should be exercised, and it is hard to my mind to see any exigency of justice that would, in the circumstances of this case, have required the refusal of an application to make a purely technical amendment to the summons. This ground of objection, accordingly, must fail.

VI The third party claims and cross-claims.

(a) Principles

119. Much of the evidence adduced by the defendant on this application is directed towards establishing that acts of alleged wrongdoing by ICC, BOS and the receivers caused losses to him and/or to Lyngarth, and supporting his contention that the damages to which he is in consequence entitled outweigh the alleged liabilities the subject of this application. The principles governing such claims in an application for summary judgement have been clearly and comprehensively explained by Clarke J. in his judgment in *Moohan and and ors. v. S&R Motors (Donegal) Ltd.* [2007] IEHC 435, [2008] 3 IR 650, at para. 13:

> *'(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set off;*

(b) If, and to the extent that, a prima facie case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);

(c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast v. Biddle'.

120. Central to this is the distinction between a cross claim relied upon by a defendant that is sufficiently connected to the plaintiff's claim that it can be said to amount to a defence (and thus a right of set off), or whether it merely gives rise to an independent claim which does not give an entitlement of set off but only a counterclaim (see *McGrath v. O'Driscoll* at pp. 214 to 215).

121. It does not need to be said that all of this assumes that there is a claim of some kind that can be raised as against the plaintiff in the suit. In this regard, the defendant in these proceedings laboured under a significant misapprehension, insofar as he appeared to be of the view that by acquiring the loans or guarantee, the first plaintiff was open to legal action at the instance of the defendant for all legal wrongs alleged to have been perpetrated by BOS or ICC in the course of their dealings with the plaintiff. As he puts the matter in his third affidavit *'Feniton, by its purchase of the bank's facilities, has stepped into the shoes of the bank/s and is now liable for my claims for loss and damages'.* So stated, that is not correct.

122. The law governing the type of obligations of an assignor assumed by the assignee of a debt is in parts complex, and it was not the subject of any real discussion in this case. However, the defendant can only mount as against the assignee an unliquidated claim in respect of which he would have been enabled to assert a set off in equity as against the assignor. While different courts have used different language to describe the elements of such a claim, essentially this requires that the claims of the plaintiff and of the defendant arise out of the same transaction, or be closely connected with them. Even if closely connected, the connection must be such that it would be *'manifestly unjust'* to allow a claim to be enforced without taking into account the cross claim. There are thus two requirements – the formal requirement of closeness of connection (which ensures that this is not simply a matter of discretion) and the functional requirement defined by the term *'manifestly unjust'* (see *Geldof Metaalconstructie NV v. Simon Carves Ltd.* [2010] EWCA Civ. 667, [2010] 4 All ER 847 at para. 43). Once one steps outside that type of claim, it is not possible to assert an equitable set off, and accordingly it is not possible to raise a claim against the assignee of the debt.

123. When it comes, in particular, to alleged wrongdoing by ICC or BOS in the sense of breach of alleged joint venture arrangements said to have been entered into by them with the defendant, there is no version of the rules of equitable set off whereby the defendant can seek to impose liability on the plaintiff for those actions of its predecessor. They do not affect in any way the obligation of the defendant to repay the loans, they are connected with the recovery of those loans not *'closely'* but only insofar as they arise from the same overall relationship between the parties, and they merely provide a ground on which (had BOS been plaintiff) the defendant could have sought to resist recovery by counterclaiming in respect of any award of damages made in his

favour, against the amounts outstanding. The governing principles do not enable a party owing a defined sum on foot of an identified loan agreement to maintain a claim by way of set off based on alleged partnerships, joint ventures or the like with the original lender: the connection is general, not particular to the individual loan transaction which stands on its own terms, it is remote, not close, and it seems to me to be manifestly unjust that a party who is found to have received monies on foot of an unfulfilled obligation to repay them can avoid immediate enforcement of that obligation by stepping outside the terms of the individual loan contract and seeking to deduce diffuse obligations of the kind alleged here. Subject to the operation of the Statute of Limitations, an alleged debtor in the position of the defendant here retains his right to pursue the asserted cause of action against the alleged wrongdoer, but he has to sue that wrongdoer and recover. He cannot attribute the wrongdoing of the original lender to the present owner of the loans and assert that by acquiring the loans, the plaintiffs also acquired liability for all of their predecessor's wrongdoing simply because the opportunity for that wrongdoing arose generally from the fact of the lending transaction.

124. In his legal submissions to this court, the defendant appears to ground his claims against the first plaintiff on the terms of the assignment of the facilities in question to it. He invoked various clauses which refer to the *'assumed obligations'*, to the buyer bearing *'the entire risk of loss, damage or destruction of the property collateral arising from any cause whatsoever'*, and to the *'economic risk'* and benefit in the purchased assets. Indeed he relies upon the fact that in the High Court counsel for the first plaintiff referred to the first plaintiff as acquiring *'all of the rights and liabilities under that loan'*. But that statement and the provisions to which the defendant refers do no more than acknowledge that the plaintiff was acquiring no greater an interest in the loans than

BOS had, and that having acquired those loans, it took the economic risk in recovering them and in the secured assets. None of it means that the first plaintiff was accepting liability for its predecessor's actions where these did not impact upon the legal entitlement to enforce the loan but, at most, would have provided a ground for an independent claim against the original lender.

(b) <u>The bank acts as a partner with Lyngarth</u>

125. In his second affidavit the defendant maps a series of related complaints against ICC and BOS. The theme is that these lenders so involved themselves in the Kinsale project that they assumed obligations to advance more monies to Lyngarth than they did and/or that they placed themselves in a position where they were partners and/or joint venturers with Lyngarth. The failures of ICC and BOS to comply with these obligations – the argument goes – caused the collapse of the project at different points, resulting in Lyngarth sustaining substantial losses. These, it is claimed, should be set off against the debts due.

126. The narrative has three parts. First, there is a suggestion that ICC failed to undertake proper due diligence prior to the first loan. Second, and as I have outlined in section II, the defendant says that at the time the hostel was purchased, the ground floor was leased to a third party. The defendant says that when he became involved in the matter, he entered into an agreement to sell the property for €2.9M but that this was contingent upon the buyout of the lessee on the ground floor. It is his case that the lender agreed with Lyngarth to advance €100,000 for this purpose, but that BOS breached its contract with Lyngarth by refusing to advance the money in consequence of which the sale fell

through. Essentially, the defendant says that this gives rise to a claim for damages against the plaintiff, which (as I have summarised his argument earlier) must be taken to have assumed the liabilities of BOS. This occurred in or around 2007 (the defendant says that a sale to a local buyer was lost: the relevant offer was made in October 2007).

127. Then, the defendant says that he proceeded with his own plan to develop the building, and that BOS became actively engaged in the proposals and became a partner in the project again. Here, the defendant comes back to the January 2009 facility, and says that the bank agreed to provide €466,000.00 by way of loan to complete the project providing, as explained, only €70,000.00 of that. It was, the defendant says, this breach of contract that led to the collapse of the project and brought all works to an immediate halt. In consequence, the defendant contends, Lyngarth suffered very significant losses. In support of this contention, the defendant refers to an e-mail to him from a solicitor in William Fry dated 15 December 2008. There, and referring to discussions between the bank and the defendant regarding further facilities, the solicitor said:

> *'It seems to me that the bank (as they are doing in many cases at the moment) are positioning themselves as, effectively, your joint venture partner'*

128. The defendant also relies upon the letter from William Fry of 27 January 2009 to the bank considered earlier in this judgment. This, the defendant says, was evidence of the assumption by the bank of an obligation to advance the full €466,000.00.

129. This claim faces four insurmountable difficulties, all of which were identified by the trial judge and none of which have been convincingly addressed by the defendant. First, it follows from the point I made in section VI(a) above, that even if all of this was true the defendant simply cannot impose liability on these plaintiffs for the alleged defaults.

None of the alleged acts of wrongdoing by ICC or BOS give rise to a situation in which the creditor is claiming payment for the very performance on which he has defaulted, none of them affect the title of the plaintiff to sue on foot of the loans, and none present the close connection between claims required by the law before such a claim could be set up against an assignee of a debt. Second, even if this were not so, any cause of action arising from these events is that of Lyngarth, not of the defendant here. It was the borrower under these agreements. The fact (if such it be) that the plaintiff has breached an obligation to Lyngarth alleged to sound in unliquidated damages does not without more exempt the defendant from the consequences of having guaranteed the liabilities. Third, any such claim is long since statute barred. Section 11(1)(a) of the Statute of Limitations requires that actions for simple contract debts be brought within six years of the accrual of the cause of action. The cause of action accured on the alleged breach of contract. All of the breaches of contract alleged were thus barred by the time of the institution of these proceedings, let alone the date of the application to the High Court.

130. But fourth, the argument is supported by mere assertion. The evidence to sustain the claim that BOSI moved from being a mere lender to Lyngarth to its being a joint venture partner with it is vague, and the indices of a joint venture have not been identified with any specificity (*ACC Loan Management Ltd v. Dolan* [2016] IEHC 69 (at para. 63)). Insofar as the earlier dealings are concerned, there is no evidence beyond the defendant's own uncorroborated assertion that there was any agreement to provide further loan capital. In relation to the agreements of late 2008/2009 – as the trial judge observed – the letter from William Fry to its own client could not be regarded as corroborative of the claim. And the argument that the facility letter of January 28 *bound* BOSI to advance to the defendants the sum of €466,000 is inconsistent with the express

terms of the facility letter itself: the agreement was to provide loan finance *'up to'* €466,000, not to unconditionally advance that sum. William Fry's letter of January 27 does not change this: it was addressed *only* to the conditionality of the security, not to the quantum of the funds to be provided in return for that security.

(c) Alleged mismanagement of the sale process

131. The defendant describes as a *'key element of [his] defence'* that had *'BOS/Feniton/Plaintiff'* handled his accounts properly and sold the properties through a professional sales process, then the value achieved through such a sale would have repaid the BOS loan in full and would have prevented the dispute. He contends that the plaintiff was *'a party to the campaign of its receiver to dispose of the property at any cost'*. He says that he offered to restore the Howth Road properties to a suitable state to maximise their potential during a sale process. He says that his team had the knowledge and experience to develop high quality property and to market those properties to achieve the best possible price. He argues that the clauses in the loan documentation providing that the receiver was the agent of the borrower is inserted in very fine print in the bank's loan documents, and that this is done because it is alien to the interests of the borrower to prevent the lender from being sued because of the receiver's defaults. He says that the bank was a party to what was a fire sale of the property, that the receivers allowed the property to deteriorate, and that the plaintiff was responsible for a delay in selling the properties.

132. The defendant faces numerous difficulties in seeking to present these propositions as disclosing arguable grounds of defence against the plaintiff's application for judgment.

Again, all of these were identified by the trial judge and, again, none have been convincingly addressed by the defendant in his submissions to this court.

133. First, a claim based on the sale at an undervalue of the properties is a claim against the receivers, not against the appointor. The effect of the security documentation was that the receivers were appointed as agents of the lender. While the defendant's submissions proceed on the basis that this is the result of – at best – a technicality in the loan agreements and – at worst – a sleight of hand by the lender, this misunderstands an invariable and fundamental feature of the relationship between lender, borrower and receiver in a secured lending transaction. As I explained in the course of my judgment in *Sheedy v. Jackson* [2020] IECA 167 at para. 45, the authorities repeatedly stress the unique position of a receiver appointed under the terms of such a transaction, and the exceptional agency of the person holding that position. In the course of her judgment in *Bula Ltd v. Crowley (No.3)* [2003] 1 IR 396, at p. 423 Denham J. underlined the *'duality'* in the receiver's agency: although agent of the mortgagee his concern is for the benefit of the mortgagor, who will be responsible for the appointment, and who will have the immediate interest in the scope and definition of the receiver's powers.

134. Clearly, the effect – and intent – of rendering the receiver the agent of the borrower is to immunise the lender from liability for the receiver's acts and defaults, but that is what the borrower agrees to. The consequence is that neither the bank nor the plaintiff in this action can face liability for those defaults of the receiver alleged by the defendant and, therefore, those defaults cannot generate a defence to this claim. The legal position is that explained in *Danske Bank v. Duggan* [2018] IECA 203 in the context of a similar defence raised to summary proceedings, this proposed defence concerns *'alleged*

wrongdoing on the part of the receiver who is not a party to the proceedings and for whose actions the bank cannot as a matter of law be held accountable' (at para. 38).

135. While the defendant in his third affidavit disputes this agency on the basis that the receivers were hostile to him, refused his instructions and conducted activities in a manner that damaged his properties, and while he seeks to suggest that the banks were themselves involved in the sales process, none of this affects matters; if the defendant believes that the receivers – the persons charged with the responsibility of realising the securities - acted in a manner that was in breach of duty to him, that is a claim he enjoys against the receivers not against the appointing bank. The proper forum for such a matter is in proceedings against the receiver who sold the property. The same stands in relation to the claim that the receivers had a conflict of interest.

136. In his submissions on this issue, the defendant makes some reference to the provisions of clauses 6.1 and 12.2 of a loan contract document of 27 September 2002. The allegation is, effectively, that the receivers and/or the bank were guilty of gross negligence and wilful misconduct. While the defendant complains that the trial judge did not address this issue, in truth this claim is no more than a bare assertion; it is an assertion which, even if substantiated by evidence, provides no defence to the enforcement of the loan contract and, even if it did, it provides no defence against this action by these plaintiffs.

VII Miscellaneous issues

(a) Surveillance by the bank

137. The protest by the defendant that he and his family were subject to 'surveillance' by BOS and the suggestion that he therefore enjoys a claim for damages arising from those actions does not give rise to any evident ground of defence to these proceedings. Here, there is no evidence that the defendant was the subject of any surveillance by these plaintiffs.

(b) Need for discovery

138. The defendant also alleges that discovery will be required in this instance as it is a complex case. Discovery is generally not appropriate in summary proceedings as the issues have not yet been defined or identified and will not be identified until such time as pleadings have closed between the parties if the case gets to that stage (*Irish Life and Permanent plc v. Hanrahan* [2015] IECA 125 at p. 3). The position was explained by Irvine J. in *Danske Bank v. Duggan* (at para. 29):

> *'discovery is not a procedure which is available in the context of summary summons proceedings. Indeed, the benefit of the summary procedure is that straightforward claims, where the amount claimed is readily ascertainable, can be dealt with in a relatively short timeframe and in a cost-effective manner. Because the sum claimed must be readily ascertainable, discovery of documents should not be required. If it is, the claim is not one suitable for disposal in a summary manner.'*

139. The court cannot adjourn the matter to plenary hearing on account of an argument that discovery may assist the parties, unless there is some rational basis on which it can be said that there is a real likelihood that there are in existence documents that will convert what are at present unsustainable contentions advanced only by reference to assertion, into stateable defences. The defendant has not come near discharging that burden. It is only when a court decides that a plaintiff is not entitled to summary judgment on the basis that a defence has passed the *prima facie* threshold, that the issue of discovery arises (*ACC Loan Management Ltd v. Kelly, Oliver and anor* [2017] IEHC 304 at para. 18). This threshold has not been met in this case.

(c) <u>The Statute of Limitations</u>

140. The defendant says (as indeed he asserts in his third affidavit) that the claim on foot of the guarantee is statute barred by virtue of the fact that it was entered into on the 30 January 2009, the summons issuing more than six years after this. This is mistaken. The cause of action on foot of a guarantee which (as does the guarantee in issue here) requires payment to be made *'on demand'* accrues when the demand is made and not before. This is firmly established by authority (*Bank of Ireland v. O'Keefe* [1987] IR 47 at p. 50, *Bank of Ireland v. Matthews* [2020] IECA 214 at para. 37). There is no obligation on the bank to enforce its rights at any time, and it is for the bank to choose when to act (*ACC Bank plc v. McEllin & ors* [2013] IEHC 454 at para. 32). The demand for payment of the sums guaranteed was made by the first plaintiff on 2 October 2017, and it is from that point that time runs.

141. The contention that the plaintiff's claim is on foot of the personal account is barred is similarly misconceived for the same reason. The defendant says that his last payment on this account was made on 15 November 2004, that the account went into default on that date and that, accordingly, proceedings to recover that loan became barred on 15 November 2010. Because the sums loaned under that agreement became payable on demand, time similarly runs from the date of the demand.

142. Third, the defendant at one point says that the deed is *'invalid'*: insofar as it his case that this is because it is more than six years ago that it was executed, this is misconceived. The Statute of Limitations – even if it did apply - does not result in the passing of time rendering an instrument of this kind *'invalid'*.

(d) Non-inclusion of other accounts

143. As evident from my earlier consideration of the facts, the defendant had other personal loan accounts with BOS. Some or all of these appear to now be owned by the plaintiffs or companies associated with them. He contends that it is unfair that the plaintiff proceeds in this action to seek recovery on foot of only some of these accounts. While he makes reference at one point to consolidation of proceedings, he refers to no other proceedings that have been brought against him.

144. As the first plaintiff said in its submissions to the High Court, the defendant is not entitled to direct how the plaintiff chooses to litigate to seek outstanding liabilities: if there is any unfairness or oppression in bringing these proceedings and subsequently seeking to enforce other liabilities, the time to raise this is in those subsequent proceedings, not now.

(e) Unfair conduct of proceedings in High Court

145. In the course of his submissions, the defendant suggests some dissatisfaction with the time allocated to the hearing of his High Court submissions, protesting that he had approximately 1.5 hours to put his case to the court which, he says, was *'totally inadequate'* given the level of detail and complexity involved and was *'very unfair to me as a lay litigant'*. This cannot be accepted. The management and allocation of time in a hearing is a matter for the discretion of the trial judge. That task must be undertaken by him or her having regard to all the circumstances of any particular case, and the entitlement of other litigants to avail of the resources of the court. The court's management of that time will not be interfered with by this court save in circumstances of demonstrable unfairness or irrationality. That hurdle is not met here. The papers were opened by counsel for the first plaintiff, and there is no evidence that the defendant was prevented from advancing any part of his case to the court or, for that matter, complained before the High Court that he was so prevented. The complaint is not referred to in the notice of appeal, and lacks specificity.

(f) Invalidity of assignment

146. In his notice of appeal, the defendant suggests that the assignment by BOS of the loans in issue to the plaintiff was invalid. This issue was not raised before the High Court, and no basis has been identified on which it can or should be agitated now for the first time on appeal. It is based on the proposition that there ought to have been a deed of novation and that he ought to have received notification of it (which he says in submissions, but not in evidence, that he did not receive).

(g) Validity of BOS transfer

147. The defendant states in the course of his affidavit evidence that he has a concern about the transfer of *'a charge on the property to Feniton, where Bank of Scotland UK was not registered as the owner of the charge, when the merger of BOSI took place'*. He says that because BOS never became registered as the owner of the charge in issue, it was not entitled to transfer or assign the charge to the plaintiff.

148. It is not clear to me what relevance this has to the instant claim, in which the plaintiff seeks to enforce a personal liability, and in which the charge is not in issue. If what is being suggested is some form of claim against the receivers, it follows from what I have said above that this is of no relevance here. In any event, the underlying argument has been determined against the defendant's contention in *Kavanagh and anor. v. McLaughlin and anor.* [2015] IESC 27.

(h) Identity of the plaintiff

149. The defendant had also raised an argument that he did not know who the plaintiff is, as he claimed Feniton was no longer in existence. In oral argument, counsel for the plaintiffs explained that Feniton was in voluntary liquidation, and that the co-respondent had been added to the proceedings by an order of Costello J. made on 2 July 2021. The plaintiffs referred to the judgment of Power J. in *ACC Loan Management DAC v. McCool* [2021] IECA 180. There, Power J. noted that there only needs to be *prima facie* evidence before the court that there has been a transfer of interest, and once this is established the threshold for making the order is met. In so determining, the court does not decide on the validity of the assignments in question but is only concerned

with the correct conduct of the proceedings (at para. 142). In that case, the court was satisfied this had occurred, even though ACC Loan Management DAC had left the Irish market and no longer existed as a legal entity here. The plaintiffs contrast this with the present case, in which Feniton still existed, albeit in voluntary liquidation, therefore the second plaintiff was joined as a valid co-respondent.

150. It follows that the present constitution of the proceedings gives rise to no ground of complaint or of appeal on the defendant's part. If the defendant wishes to maintain an independent claim of some kind against the first plaintiff (and it is to be noted that most if not all of his complaints appear to relate to the conduct of ICC or BOS) then it is necessary for him to proceed against that plaintiff by way of separate action. The fact that the first plaintiff is now in liquidation does not preclude him from doing so.

(i) Errors in the summons

151. Throughout the papers – in the summons, the grounding affidavit of Mr. Burke and the first plaintiff's solicitor's letter of 19 October 2017 - the guarantee is said to have been executed in January 1999. The signed guarantee exhibited is dated 30 January 2009. While a point is made about this by the defendant in his legal submissions to this court – he suggests at one point that this renders the instrument unenforceable – this is clearly misplaced. The correct date was recorded in Mr. Burke's first affidavit (at para. 14) and, in any event, what is clearly a typographical error in the first plaintiff's pleadings and correspondence does not vitiate the signed guarantee which is before the court and is clearly dated 30 January 2009. This, it is to be noted, is the date recorded by the trial judge in his judgment (at para. 5). In a related vein, the submission of the defendant

that the summons is in error in referring to a sum of €466,000 being advanced to Lyngarth because only €70,000 of that sum was drawn down does not advance his case. The summons was clear as to what the total sum due on the company accounts was, and the bank statements contained in the papers for the relevant account (no. 409975/103) record only €70,200 being drawn down in February 2008 (the remaining sums due on that account being recorded as comprising charges and interest).

VII Conclusion and orders

152. It follows from the foregoing that the defendant has established two issues to be remitted to plenary hearing, and in respect of which he will be granted leave to defend. The first is as to the quantum of the sums (if any) due and owing by him and by Lyngarth on foot of the loan agreements the subject of these proceedings. This matter is being remitted because the evidence adduced by the plaintiffs to establish the amounts outstanding on foot of the relevant loan agreements is hearsay evidence. I have explained in the course of this judgment that within this issue the defendant is entitled to challenge the plaintiff's calculation of the alleged liability. The second issue arises from the letter from William Fry of 27 January 2009, and the defendant's claim that the effect of this letter was to render the guarantee signed by him conditional on the entire sum of €466,000.00 provided for in the facility letter of the following day being drawn down or, at least, made available to him.

153. These are the only issues that are being remitted for plenary hearing. The defences that were (or that could have been) raised by the defendant in the course of this application

may not be relied upon by the defendant for that purpose. These have now been determined.

154. Both parties have been partly successful, and partly unsuccessful, in this appeal. In those circumstances I would propose reserving the costs of the application for summary judgment and this appeal to the trial judge. If either party disagrees with this proposal they should so indicate to the Court of Appeal office within fourteen days of the date of this judgment, whereupon the court will determine how to proceed to address costs. Woulfe J. and Haughton J. agree with this judgment and the orders I propose.