THE HIGH COURT
COMMERCIAL

[2017 No. 821 S]

BETWEEN

PROMONTORIA (ARROW) LIMITED

PLAINTIFF

AND

PAT BURKE, JOHN DONNELLY AND JOHN FLEMING TRADING AS BRIDGEFORD PARTNERSHIP

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 19th day of December, 2018

Introduction

1. The plaintiff, Promontoria (Arrow) Limited ("Promontoria"), seeks summary judgment against the defendants pursuant to O. 37 RSC in the sum of €9,687,433.70 together with further sums by way of interest. The defendants, Pat Burke, John Donnelly and John Fleming, have resisted Promontoria's application and have sought to have the proceedings adjourned to plenary hearing.

2. Promontoria claims to be entitled to summary judgment in the amount claimed having acquired a loan facility (and related security) granted to the defendants by EBS Building Society ("EBS") in February 2009 from National Asset Loan Management Limited ("NALM") which had itself acquired the facility (and other rights connected with it) from EBS pursuant to the National Asset Management Agency Act, 2009 (the "2009 Act"). Promontoria asserts that it acquired all of the relevant rights, entitlements and interests in the loan facility from NALM pursuant to legal documentation executed in November and December 2015 and, principally, pursuant to a Global Assignment Deed dated 11th December, 2015 made between NALM and Promontoria. In addition to other defences raised, the defendants have raised an issue as to Promontoria's entitlement to maintain these proceedings against them.

3. For reasons which I outline in greater detail in this judgment, I have concluded that the defendants have raised an arguable case that Promontoria's claim is statute barred and that that issue should go to a further or plenary hearing (possibly with a trial of a preliminary issue on the statute point). Accordingly, I grant the defendants leave to defend the proceedings pursuant to O. 37, rr. 7 and 10 RSC confined to the issue as to whether Promontoria's claim is statute barred. I am not satisfied that the defendants have raised an arguable defence on the other issues they have raised. In particular, I am not satisfied that the defendants have made out an arguable case that the loan advanced to them by EBS in February 2009 was advanced on foot of a non-recourse joint venture between EBS and the defendants. That defence, and the averments made on behalf of the defendants in support of it, flies in the face of the loan documentation signed by the defendants. I am not satisfied that the defendants have met the low threshold of establishing an arguable defence in relation to that issue. Nor am I satisfied that the defendants have raised an arguable defence in relation to the admissibility of the evidence adduced by Promontoria on this application or in relation to the entitlement of Promontoria to maintain the proceedings in respect of the loan to the defendants.

Procedural background

4. The proceedings were commenced by Promontoria by a summary summons which was issued on 10th May, 2017. The summary summons asserts (at para. 5 of the special indorsement of claim) that the liabilities the subject of the proceedings concern a loan facility advanced to the defendants, trading as the "Bridgeford Partnership", by EBS pursuant to a facility letter dated 6th February, 2009 (as amended by amendment letter dated 17th February, 2009) (the "facility letter of 6th February, 2009 (as amended)") (at para. 5). The summons further pleads (also at para. 5) that as security for the facility, EBS was entitled to rely on its existing mortgage dated 5th January, 2007 over the defendants' property known as the Bridgeford Bar and Restaurant in Drogheda, County Louth and the adjoining land and site (the "mortgage"). Paragraph 6 then sets out the various legal agreements on foot of which it is alleged by Promontoria that it became entitled to the benefit of the loan facility and the related security. Paragraphs 7 to 13 of the special indorsement of claim outline the facility letter of 6th February, 2009 (as amended) under which EBS offered, and the defendants accepted, the loan facility of €9,400,000 to restructure an existing loan facility and to provide a capitalised loan facility. The summons pleads that the facility was repayable on or before 17th February, 2011. It is further pleaded that the defendants failed to pay the principal and interest when due and owing and that Promontoria sent a letter of demand to the defendants dated 18th January, 2017, in respect of the facility letter demanding payment of the total sum of €9,687,433.70 which it alleged was then due and owing in respect of principal and interest under the facility. It is pleaded that despite demand, no payment has been made by the defendants in respect of sums allegedly due and owing under the relevant facility letter.

5. Paragraphs 14 to 16 of the special indorsement of claim then refer to the fact that Promontoria appointed a receiver over certain of the defendants' assets under the mortgage in April 2017 and that, as of the date of the commencement of the proceedings, no amounts had been received pursuant to the receivership or applied by the receiver against the defendants' alleged indebtedness to Promontoria. Paragraph 17 then asserts the amount allegedly due and owing by the defendants to Promontoria as of 8th May, 2017, including accrued interest pursuant to the facility, as being €9,687,433.70. Paragraph 18 pleads that that sum is a sum which has fallen due and owing by the defendants to Promontoria within a period of six years prior to the commencement of the proceedings. The plaintiff then claims judgment in that amount together with further interest.

6. I have recited in some detail the terms of the summary summons as the basis on which Promontoria has brought these proceedings is relied upon by the defendants in support of their contention that the claim is statute barred. I will return to that issue later.

7. An appearance was initially entered on behalf of all defendants by Miley & Miley Solicitors. That firm continues to represent Mr. Donnelly and Mr. Fleming, the second and third named defendants. Shanley Solicitors now represent Mr. Burke, the first named defendant.

8. Promontoria applied to enter these proceedings in the Commercial List and sought summary judgment by a notice of motion which was issued on 6th June, 2017. That application was grounded on an affidavit sworn by Lisa Burns on 7th June, 2017. Ms. Burns purported to swear the affidavit on behalf of Promontoria in her capacity as an associate director employed by Capita Asset Services (Ireland) Limited ("Capita")(now Link ASI Limited). Ms. Burns stated in her affidavit that Capita was appointed as "servicer" on foot of a servicing agreement to provide loan administration services to, *inter alia*, Promontoria, including such services in respect of the loan facility granted to the defendants which was allegedly transferred to Promontoria and that, at the relevant time, Capita provided services as agent of Promontoria. At paragraph 1 of her first affidavit, Ms. Burns explained that she was authorised to swear the affidavit on behalf of Promontoria and that she had access to the computer records and other books and records of Promontoria relating to the accounts and the alleged liability of the defendants. The basis on which Ms. Burns has sworn her first affidavit and the three further affidavits she swore in connection with Promontoria's application for summary judgment has been challenged by the

defendants. I consider that challenge later in this judgment.

9. In her first affidavit, Ms. Burns sets out the factual background to the claim as well as the basis on which it is contended that Promontoria is entitled to judgment against the defendants. Ms. Burns exhibited certain documents to her affidavit. She referred to the loan facility advanced to the defendants and exhibited a copy of the facility letter of 6th February, 2009 (as amended). She also referred to and exhibited a copy of the mortgage. She described the purchase by Promontoria of the defendants' loan and related security and exhibited a redacted copy of the Global Assignment Deed dated 11th December, 2015, under which it is alleged NALM transferred the rights and title in the facility to Promontoria. Ms. Burns then referred to and exhibited the letter of demand to the defendants dated 18th January, 2017 and referred to the appointment of the receiver in April 2017.

10. Ms. Burns then outlined the engagement by the defendants with Capita on behalf of Promontoria and, in particular, the appointment by the defendants of a financial advisor, Jim Deeney of AJS Financial Advice Limited ("AJS"), to represent their interests. Ms. Burns referred to the fact that a number of without prejudice proposals were made to Capita by Mr. Deeney on the defendants' behalf which were rejected by Capita on behalf of Promontoria in the period between February/March 2016 and March 2017.

11. Including Ms. Burns' first affidavit, some fourteen affidavits were sworn in connection with Promontoria's application for summary judgment. Of those, nine were sworn by and on behalf of the defendants. I will consider those affidavits shortly but for present purposes, in summary, the defendants contend that they have established an arguable defence to the claim on the following grounds:-

12. First, the defendants dispute the authority of Ms. Burns (and Peter Murphy, another representative of Capita who swore one of the affidavits on behalf of Promontoria) to swear affidavits grounding Promontoria's application for judgment. Second, the defendants contend that Promontoria has failed to put forward adequate evidence establishing its title to maintain the proceedings. Third, the defendants claim that Promontoria's action is statute barred in that the cause of action accrued on the expiry of the loan facility on 18th February, 2011, but the proceedings were not commenced for more than six years later, on 10th May, 2017. Fourth, the defendants contend that the loan was advanced to them on the basis of a non-recourse joint venture arrangement with EBS as a result of which the defendants have no personal liability on foot of the loan facility and Promontoria's recourse is only to the property secured by the mortgage .

13. Before considering the evidence put forward on behalf of the defendants in respect of each of these alleged grounds of defence, it is appropriate that I summarise the legal principles applicable to summary judgment applications.

Summary judgment: legal principles

14. The legal principles governing the exercise of the court's jurisdiction to grant summary judgment are "*well settled*" (per Clarke J. in the Supreme Court in *IBRC Limited v. McCaughey* [2014] 1 I.R. 749 ("*McCaughey*")). They have been set out, discussed and applied in numerous judgments of the Superior Courts in recent years. I think it is fair to say that there was no real dispute between the parties as to the test to be applied.

15. The essence of the test was succinctly stated by Hardiman J. in the Supreme Court in *Aer Rianta CPT v. Ryanair Ltd* [2001] 4 I.R. 607 ("*Aer Rianta*") as follows:-

> *"…the fundamental questions to be posed on an application such as this remain: 'Is it very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?" (per Hardiman J. at 623).*

16. Having noted that earlier cases such as *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 ("*Anglin*") focused on the issue of the credibility of the defence raised by the defendant in ascertaining whether there was a "*fair or reasonable probability*" of the defendants having a "*real or bona fide defence*", Hardiman J. noted that the issue of credibility arose very starkly in the cases referred to in *Anglin* and that ultimately the fundamental questions to be determined on an application for summary judgment were as set out by him. In the Supreme Court in *McCaughey*, Clarke J. reemphasised what is meant by the "*credibility*" of a defence. He stated:-

> *"[22] A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta…, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath v. O'Driscoll [2006] IEHC 195 , [2007] 1 I.L.R.M. 203 , the court may come to a final resolution of such issues. That the court is not obliged to resolve such issues is also clear from Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes [2010] IESC 22…" (Per Clarke J. at para. 22, p. 759).*

17. Clarke J. continued:-

> *"[23] Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta... It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant." (Per Clarke J. at para. 23, p. 759).*

18. This approach, derived from well-established authority, has been regularly and consistently applied by the Superior Courts.

19. In a judgment which predated *McCaughey* but which is entirely consistent with it, namely, *Harrisrange v. Duncan* [2003] 4 I.R 1, McKechnie J. in the High Court provided a very useful summary of the approach to be taken on a summary judgment application. He summarised the position as follows:-

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*

(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be." (per McKechnie J. pp.7-8)

20. Finally, in this context, MacMenamin J. in the Supreme Court in *Ulster Bank Ireland Limited v. O'Brien* [2015] 2 I.R. 656 ("*O'Brien*") noted that where there is "*real conflict on the facts or law, the matter must be remitted for plenary hearing*." He went on to state:-

"I would point out that a simple, bald denial of indebtedness, whether in correspondence or on affidavit, will not be sufficient to discharge the burden, so far as a defendant is concerned. A defendant's evidence must set out in a clear way why the sum claimed is said not to be due and owing to a plaintiff." (per MacMenamin J. at para. 3, p. 659)

21. He then summarised the summary judgment test as follows:-

"The fundamental question is whether there is a fair and reasonable probability of a defendant having a real or bona fide defence, either in law, or on the facts, or both? It is not necessary to show that the defence will succeed, or even will probably succeed. The questions, therefore, can be reduced to the following: First, is it very clear that a defendant has no case? Second, are the issues simple and easily determined? Third, has a defendant disclosed even an arguable defence? Fourth, where there is no notice to cross-examine, can a court be confident, on the affidavit evidence alone, where the justice of the case lies? These tests are set out in more detail in the three leading authorities…Anglin… , Aer Rianta…Harrisrange…. As emphasised in each of these decisions, in exercising this jurisdiction, a court should proceed with care and caution." (per MacMenamin J. at para. 7, p.660).

22. That is the test and those are the principles which I will apply in determining this summary judgment application. It will be necessary later in my judgment to consider further the quality of evidence which the courts have required a defendant to adduce in order to show an arguable defence in circumstances where the defence sought to be raised appears to be inconsistent with the terms of a document said to contain the relevant agreement between the parties.

23. It is well established that the court has a jurisdiction pursuant to O. 37, rr. 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 test referred to earlier. See: *GE Capital Woodchester Limited & Anor. v. Aktiv Kapital Asset Investment Limited & Ors* [2009] IEHC 512 ("*Aktiv Kapital*"); *Bussoleno Limited v. Kelly & Ors* [2012] ILRM 81 ("*Bussoleno*") and *National Asset Loan Management v. Kelleher* [2016] 3 I.R. 568 ("*Kelleher*"). I do not understand there to be any disagreement between the parties to this case on the existence of such a jurisdiction. Therefore, if I were to find that the defendant had satisfied the threshold of a *bona fide* or arguable defence in respect of one or more of the defences which it has sought to raise but not in respect of others, it would be open to me to remit the proceedings to plenary hearing on that defence only or those defences and to preclude the defendants from raising any of the other defences which they have sought to raise.

The loan facility at issue

24. Before outlining the defences sought to be raised by the defendants and considering the evidence put forward in respect of those defences, I set out below the loan facility on foot of which Promontoria has brought these proceedings and this application for summary judgment. I will consider further what the defendants say about the facility and the circumstances in which it came about when considering the defences which they have sought to raise since the defendants have contended that the relevant facility letter does not reflect the full terms of their agreement with EBS.

25. The loan facility on foot of which Promontoria seeks summary judgment is contained in a letter from EBS to each of the defendants, trading as the Bridgeford Partnership, dated 6th February, 2009. That letter contained the loan offer. The offer was amended by further letter from EBS to the defendants dated 17th February, 2009. Copies of both letters were exhibited by Ms. Burns to her first affidavit. Mr. Donnelly also exhibited a copy of the letters to the first affidavit which he swore on 18th June, 2017. The loan facility as contained in those letters is not disputed by the defendants although they maintain (as one of the defences which

they seek to raise) that the letters do not record the true nature of the agreement which they reached with EBS and that a collateral agreement was reached with EBS which provided for a non-recourse joint venture arrangement between them. The defendants maintain that the facility must be assessed in that context. Nonetheless, the facility letter of 6th February, 2009 (as amended) is not in dispute. Nor is it in dispute that EBS provided the monies referred to in those letters to the defendants and that the monies have not been repaid.

26. The loan offer contained in the facility letter of 6th February, 2009 (which bears reference 53325311/AB) recorded that EBS had approved loan facilities in favour of the defendants on the terms and conditions detailed in the letter and in an attached schedule of "*Standard Commercial Loan Conditions*". The amount of the loan was €9,400,000. The term and nature of the loan was initially to be stated to be a "*one year interest only loan*". The purpose of the loan was stated to be to:-

> *"Restructure existing loan account number 51473021 and to provide a capitalised interest facility in the amount of circa €283,000."*

The rate of interest was then set out as being a variable rate based on three month EURIBOR plus 0.25% per annum (which was stated here to be 2.289% per annum as of the date of that letter).

27. The required repayments were then set out as follows:-

> *"Quarterly repayments shall comprise interest only and shall be based on the above variable rate. As of today's rate, payments would be €53,791.50 per quarter".*

The letter then stated:-

> *"Upon expiry of the loan term, the principal balance shall be repaid in full".*

28. The security for the loan was stated to comprise an existing first legal mortgage held by EBS over the defendants' property at Bridgeford Bar and Restaurant, Newfoundwell Road, Drogheda and the adjoining land and site at 32 Bredin Street, Drogheda, Co. Louth (ie, the mortgage referred to earlier in my judgment).

29. Paragraph 7 of the loan offer comprised in the facility letter of 6th February, 2009, then referred to an undertaking required from the defendants' solicitor in relation an insurance claim made by the defendants following a fire which damaged the secured property in August 2008. EBS required a letter of undertaking from the defendants' solicitors to remit €700,000 out of the proceeds of the insurance claim which was made arising from the fire. Mr. Donnelly explained (at para. 71 of his affidavit of 7th July, 2017) that the insurance claim was ultimately agreed at €1.35 million which was paid "*in or about February/March 2009*".

30. Paragraph 8 of the loan offer comprised in the facility letter of 6th February, 2009 referred to drawdown and stated that on receipt of the insurance proceeds EBS would utilise the €700,000 proceeds to discharge the arrears of €538,000 which then existed on account no. 51473021 with the remainder being used to reduce the loan balance. The letter then provided that the net balance remaining on that account (which was then estimated at €9,150,000) would be discharged by the drawdown of circa €9,150,000 on the new loan with the undrawn portion (which was estimated at €283,000) being a capitalised interest facility. I observe here that the existing facility 51473021 was provided by way of amended loan offer from EBS to the defendants dated 7th November, 2006 (which was referred to and exhibited by Mr. Donnelly in his second affidavit).

31. Paragraph 11 of the loan offer provided that EBS was to be satisfied with an independent confirmation that the tax affairs of each of the defendants were up to date.

32. Paragraph 13 provided for "*events of default*" and stated as follows:-

> *"13.1 Any events of default referred to in paragraph 12 of the general terms and conditions of EBS are committed or permitted to exist then, and in any such case and at any time thereafter, EBS may by written notice to the borrowers:*
>
> *(a) declare any advances made to be immediately due and payable … or declare the Advances to be due and payable on demand of EBS; and/or*
>
> *(b) exercise the rights and remedies of a mortgagee or secured party under the Security Documents.*
>
> *13.2 If, pursuant to clause 13.1, EBS declares advances to be due and payable on demand of EBS, then, and at any time thereafter, EBS may by written notice to the Borrowers*
>
> *(a) call for repayment of all advances made howsoever arising on such date as it may specify in such notice (whereupon the same shall become due and payable on such date together with accrued interest thereon and any other sums then owed by the borrowers); and/or*
>
> *(b) exercise the rights and remedies of a mortgagee or secured party under the Security Documents".*

33. The "*Standard Commercial Loan Conditions*" were attached to the facility letter (and are referred to in para. 13.1). Paragraph 12 of the "*Standard Commercial Loan Conditions*" (the "standard conditions") contained provisions on "*events of default*". The relevant part of para. 12 provided that:-

> *"EBS reserves the right to terminate its commitment to lend hereunder and to call for immediate repayment of all moneys outstanding including accrued interest should any of the following events occur:*
>
> *(i) If the Borrower fails to pay on the due date any monies payable or due by it from time to time to EBS or fails to discharge or perform any obligation or liability to EBS;…"*

34. Paragraph 14 of the facility letter of 6th February, 2009 referred to the liability of the borrowers (i.e., the defendants). It states:-

> *"The liability of the individuals named as the Borrower shall be joint and several".*

35. Paragraph 19 provided that to accept the offer letter the defendants had to sign an acceptance section of an attached duplicate

copy of the letter and return it to EBS. The letter then provided that on receipt of the offer signed by the defendants, EBS would instruct its solicitors to proceed with the security arrangements outlined in the offer and would advise the defendants' solicitors, Miley & Miley, as to the remaining drawdown requirements. The copy facility letter exhibited both by Ms. Burns and by Mr. Donnelly includes the acceptance section. Each of the defendants signed the acceptance section on 10th February, 2009. That section noted that the anticipated drawdown date of the loan facility was "*a.s.a.p.*". Both Ms. Burns and Mr. Donnelly also exhibited a copy of the certificate for the purposes of the Consumer Credit Act,1995 and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 which was also signed by each of the defendants on 10th February, 2009. Paragraph 5 of that certificate stated that the defendants:-

> *"…understand the effect and importance of this Certificate and have been advised to take and have been given due opportunity to take separate independent legal advice on the effect of this Certificate and have taken/declined to take such legal advice."*

36. As noted earlier, the loan offer contained in the facility letter of 6th February, 2009, was amended by an amended loan offer set out in a letter from EBS to the defendants dated 17th February, 2009. That letter recorded that, at the defendants' request, EBS had agreed to extend the loan term and interest only period by a further twelve months and then stated "*at which time the loan balance will be payable in full*". The letter then stated that in effect the loan term would therefore be two years. The parties have all proceeded on the basis that the two-year term expired on 17th February, 2011 (i.e., two years dating from the letter of 17th February, 2009, rather than the earlier facility letter of 6th February, 2009). The amended letter then reproduced the provisions of the original letter in relation to the required security and the required solicitor's undertaking. In relation to loan repayment the letter reproduced the provisions of para. 12 of the facility letter of 26th February, 2009 in relation to "*capitalised interest*". An additional condition was included requiring the defendants to provide a complete direct debit mandate for the new loan. The letter then noted that all of the other terms and conditions of the loan offer of 6th February, 2009 remained unchanged.

37. The defendants signed a fresh acceptance of the amended loan offer on 18th February, 2009 and also signed a certificate for the purpose of the consumer legislation on the same date. That certificate contained the same statement in relation to the defendants having been given due opportunity to take separate independent legal advice on the effect of the certificate. Ms. Burns and Mr. Donnelly each exhibited a copy of the amended loan offer, acceptance and certificate.

38. There is no dispute between the parties that the new loan facility was in fact drawn down and that it was used in the manner specified in the loan offer, namely, to restructure an existing loan and to provide a capitalised interest facility.

The Demand by Promontoria

39. While a number of contentious matters occurred in the period between the date of the advance of the loan facilities in February 2009 and January 2017 when Promontoria sent a letter of demand to the defendants dated 18th January, 2017, I will address those contentious issues in the context of the defences advanced by the defendants later in my judgment. Those contentious issues include the ultimate transfer of the defendants' loan to Promontoria in December 2015 or, more particularly, the proof advanced on behalf of Promontoria on this summary judgment application in respect of that transfer; they also include the contents of a business plan provided by the defendants to NAMA in 2011 and the various proposals made on behalf of the defendants to Capita/Promontoria in the period between February/March 2016 and March 2017. I address these issues separately later in my judgment.

40. For present purposes, I now turn to the letter of demand issued by Promontoria to the defendants on 18th January, 2017. The demand is not disputed on this application although it is said by the defendants that for various reasons they do not have any personal liability on foot of the loan facility or on foot of the demand purportedly issued pursuant to it. The demand is expressly stated to have been issued under the facility letter of 6th February, 2009 (as amended). The demand also referred to the fact that EBS's standard conditions were incorporated by the facility letter. The demand stated that pursuant to the facility letter as amended the facilities were repayable on or before 17th February, 2011 and that the defendants' failure to repay the loan on or before that date constituted an "*event of default*" under the terms of the facility letter. The demand then requested immediate repayment of the sum of €9,687,433.70 in respect of principal and interest up to 18th January, 2017 and gave notice that if the full amount was not paid by 5.00 p.m. on 25th January, 2017, Promontoria would exercise its right to enforce its security and appoint a receiver without further notice.

41. As indicated earlier, Promontoria did appoint a receiver over the property secured by the mortgage on 11th April, 2017.

42. In the absence of payment by the defendants on foot of the letter of demand, proceedings were issued by Promontoria on 10th May, 2017. I have already referred to the fact that the summons issued by Promontoria on that date seeks payment of the sum of €9,687,433.70, which is stated to be a sum which has fallen due and owing by the defendants to Promontoria within a period of six years prior to the commencement of the proceedings (para. 18 of the special indorsement of claim).

43. I will now identify the various defences sought to be raised by the defendants in response to Promontoria's claim to be entitled to summary judgment.

Defences raised by the defendants

44. The defendants have sought to raise four defences to Promontoria's claim to be entitled to summary judgment in the amount claimed. The defendants contend that each of these defences is sufficient to have Promontoria's claim adjourned to plenary hearing. In summary, the four defences sought to be raised by the defendants are as follows:-

> (1) The inadmissibility defence:- the defendants contend that Promontoria has failed to put before the court admissible evidence in support of its claim. In particular, the defendants contend that Ms. Burns and Mr. Murphy, as representatives of Capita, are not in a position to provide admissible evidence on this application on behalf of Promontoria.
>
> (2) The inadequate proof of transfer to Promontoria defence:- the defendants contend that Promontoria has not put before the court sufficient evidence of its entitlement to obtain judgment on foot of the loan facility granted by EBS to the defendants in 2009. In particular, the defendants challenge the documentation exhibited to the affidavits sworn in support of Promontoria's application for summary judgment. They challenge the failure to exhibit certain of the documents in connection with the transfer of a portfolio of loans from NALM to Promontoria and also challenge the extent of the redactions made to the Global Assignment Deed, various versions of which were exhibited by Ms. Burns to her affidavits.
>
> (3) The statute of limitations defence:- the defendants contend that Promontoria's claim is statute barred. They contend, without prejudice to their other defences, that the loan advanced on foot of the facility letter of 6th February, 2009 (as amended) fell due when the facility expired on 18th February, 2011 and that the failure to commence proceedings within a

period of six years from that date means that Promontoria's claim was statute barred by 18th February, 2017. They assert, therefore, that the proceedings were statute barred by the time they were commenced by Promontoria on 10th May, 2017. Promontoria has put forward a number of potential answers to the statute of limitations defence.

(4) The joint venture/non-recourse defence:- the defendants claim that the loan facility was advanced to them on foot of a joint venture arrangement with EBS under which it was agreed and represented by EBS that there would be no recourse to the defendants personally to recover the loans advanced and that EBS would only be entitled to have recourse to the property secured by the mortgage referred to in the facility letter of 6th February, 2009 (as amended). The defendants have referred on affidavit to various discussions with representatives of EBS and have exhibited various documents which they say support their defence that EBS agreed a joint venture arrangement with them in which there would be no recourse to the defendants personally to recover the loan advanced. While not being in a position to dispute the conversations and alleged oral agreements advanced by the defendants in support of their defence, Promontoria criticises the quality of evidence advanced by the defendants in support of this proposed defence and relies on the express terms of the facility letter of 6th February, 2009 (as amended). It also contends that none of the documentation advanced by the defendants or the other matters put forward by them in support of this defence in fact support the defence at all. Promontoria claims that the facility letter on which it relies clearly demonstrates that the defendants were to be jointly and severally liable in respect of the loan.

45. I consider each of these defences in turn below.

(1) The Inadmissibility Defence

46. The defendants challenge the admissibility of the evidence in relation to the loan facilities put before the court by Promontoria. Counsel for Mr. Burke and counsel for Mr. Donnelly and Mr. Fleming separately submitted that Promontoria failed to put admissible evidence before the court to entitle Promontoria to obtain summary judgment against the defendants. The defendants draw attention to the fact that all but one of the affidavits sworn on behalf of Promontoria were sworn by Ms. Burns of Capita who, at the relevant time, performed loan administration services for Promontoria under a servicing agreement with it. Ms. Burns swore four affidavits on behalf of Promontoria in support of its application for summary judgment. Another affidavit was sworn on behalf of Promontoria by Paul Murphy, a senior manager employed by Link ASI Limited (formerly known as Capita). The defendants make the point that neither Ms. Burns nor Mr. Murphy is in a position to give any admissible evidence in support of Promontoria's application. They contend that neither is a "*person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed*" and that in the belief of the deponent there is no defence to the action as required under O. 37, r. 1 RSC. They assert that Ms. Burns is not in a position to "*swear positively*" in relation to the loan facilities advanced to the defendants and the basis on which the loan sought to be recovered in the proceedings was made. They point out that none of the relevant personnel in EBS at the time of the loan has sworn an affidavit in support of Promontoria's application. The defendants identified several employees of EBS with whom they had dealings, including Ms. Martha Widger. None of them have sworn an affidavit in support of Promontoria's application. Indeed, it was accepted on behalf of Promontoria in the course of the summary judgment application that Ms. Burns was not in a position to swear positively in relation to any of the matters sought to be raised by the defendants by way of defence. The same goes for Mr. Murphy. Further, the defendants contend that in contrast with some of the case law, this is a case in which the defendants have disputed their liability on foot of the loan facility having regard to the basis upon which they assert the loan was advanced and have done so at all stages. They contend, therefore, that this is not a case where the defendants failed to dispute the debt or have stayed silent and then raised the alleged inadmissibility of the plaintiff's evidence as a technical defence to the claim (as in *Ulster Bank v. O'Brien* [2015] 2 I.R. 656 ("*O'Brien*")). The defendants further seek to distinguish the facts of *O'Brien* from the present case in a number of respects.

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

48. In my view, the defendants have failed to raise an arguable defence under this heading. Before setting out briefly my reasons for so concluding, I consider the decision of the Supreme Court in *O'Brien*. In that case, the plaintiff bank sought summary judgment from the defendants. The plaintiff's application was grounded on an affidavit sworn by one of its employees. The employee averred that she had responsibility for the daily management of the defendants' loan facilities with the plaintiff bank. Her affidavit set out the terms of the agreements and exhibited copies of the plaintiff bank's computer records as well as a letter of demand of which she was one of the signatories in her capacity as "*relationship manager*". The plaintiff did not seek to avail of the provisions of the 1879 Act. The defendants did not deny the debt and did not file any affidavit in order to the defend the claim. They maintained that the plaintiff had failed to comply with the provisions of the 1879 Act, that the plaintiff's affidavit consisted of hearsay evidence and that it was inadmissible in order to prove the debt. The averments made by the plaintiff's deponent were not contradicted by the defendants. Summary judgment was granted by the High Court. Two of the defendants appealed to the Supreme Court. The Supreme Court dismissed the appeal. All three members of the Supreme Court delivered a judgment on the appeal. Each found that the plaintiff's evidence was admissible albeit on somewhat different grounds.

49. In his judgment in *O'Brien*, MacMenamin J. noted that no affidavit had been filed by the defendants and there was, therefore, no conflict whatsoever on the facts. The deponent on behalf of the plaintiff bank was one of the signatories of the letter of demand. He stated that the deponent's testimony was primary evidence of her own actions and could not be characterised as hearsay. It was, he held, "*first-hand evidence*" adduced by the deponent as a signatory of the letter which contained details of the defendant's indebtedness. He stated that the deponent was in a position to swear that there was no response to that letter and there was no suggestion that it had not been received. He stated that, like Charleton J., there were assertions in the letter of demand which, under the rules of evidence, called for a denial and in the absence of such denial the court would be entitled to act on the evidence and grant summary judgment.

50. In his judgment, Charleton J. stated that the documents exhibited to the affidavits sworn by the deponent carried "*indications of reliability*" and were bolstered by the deponent's sworn evidence in circumstances where the deponent had the means of knowledge to support what she said. He noted that the most important of the documents was the letter of demand sent to the defendants which had not been replied to. He further noted that the plaintiff's affidavit was not replied to either. Charleton J. held that the sworn and unsworn documents amounted to the same thing, namely, the plaintiff was making an allegation that money had been borrowed and that a debt had not been repaid and was due for payment. He continued:-

> *"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; in other words, an admission against interest. This principle is based on sound authority. It is also one of the primary exceptions to the rule against hearsay." (per Charleton J. at para. 57, pp. 683-684).*

51. Later in his judgment, Charleton J. provided an "*indicative*" analysis of the consequences of a failure to respond to an accusation which could, in certain circumstances, amount to a declaration against interest. That would depend upon a "myriad of factors" including the nature of the relationship, the circumstances in which the allegation was made, such as whether it occurred in a solemn or social situation, the nature of what was being claimed together with the information backing up that claim. He concluded that:-

> *"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 be an admission." (per Charleton J. at para. 61, p. 686).*

52. Finally, he stated:-

> *"As a matter of law, 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 may act in that situation." (per Charleton J. at para. 63, p. 687).*

53. In her judgment, Laffoy J. considered the deponent's affidavit in light of the requirement of O. 37, r. 1 RSC. She held that the deponent could and did swear positively to the relevant facts to establish the plaintiff's claim and did so in her capacity as a "*senior relationship manager*" within the plaintiff bank who had responsibility for the daily management of the defendants' loan facilities with the plaintiff. The deponent averred that she made the affidavit with the authority and consent of the plaintiff in order to ground its application for liberty to enter final judgment and that she made the affidavit from facts within her own knowledge and from a perusal of the plaintiff's books and records which she believed to be true and accurate. Laffoy J. noted that those averments were uncontroverted and were sufficient to comply with the requirement in O. 37, r. 1 that the deponent had to swear positively to the relevant facts to establish the plaintiff's claim. Laffoy J. then went on to consider in more detail the terms of the affidavit relied on and, in doing so, also stressed that the deponent was one of the signatories of the letter of demand. Noting again that the averments in the deponent's affidavit were uncontradicted, Laffoy J. found that the plaintiff had made out a *prima facie* case that the defendants were liable to the plaintiff in the sum claimed. She held that the High Court had been entitled to conclude that, on the basis of the deponent's affidavit, there was a sufficient evidential basis for granting judgment to the plaintiff.

54. O'Brien was recently approved of and applied by the Supreme Court in *Bank of Ireland v. Heaphy* [2018] IESC 46 (see, in particular, the comments of Finlay Geoghegan J. at paras. 19-29).

55. The defendants contend that there are a number of distinguishing factors between the present case and *O'Brien*. They are clearly correct in so contending. Among the distinguishing factors are the following:- First, neither Ms. Burns nor Mr. Murphy is an officer or employee of Promontoria or NALM or EBS. Rather, both are employees of ASI (formerly Capita), the servicing agent for Promontoria. Neither Ms. Burns nor Mr. Murphy are therefore in a position equivalent to that of the deponent in *O'Brien* who was the relationship manager within the plaintiff bank dealing with the defendants' loan facilities. Second, unlike the deponent in *O'Brien*, neither Ms. Burns nor Mr. Murphy signed the letter of demand in this case. The letter of demand dated 18th January, 2017, was signed by a person representing Promontoria (whose name is not clear from the signature contained on the letter of demand exhibited to Ms. Burn's first affidavit). Third, unlike in *O'Brien*, the defendants were not silent in response to the request or demand for payment by Promontoria. Although it predated the letter of demand of 18th January, 2017, in a letter sent on their behalf by Mr. Deeney of AJS, on 26th May, 2016, the defendants maintained that they were not personally liable for the shortfall on the loan and referred to the alleged joint venture agreement which they claim to have entered into with EBS. Further, numerous affidavits have been sworn by and on behalf of the defendants in response to Promontoria's claim in which the defendants have denied their personal liability to Promontoria by reason of the existence of the alleged joint venture arrangement with EBS which the defendants claim provided for non-recourse to them. This is in sharp contrast to the position in *O'Brien* where the relevant defendants did not deny the debt and did not contradict the affidavit evidence put forward by the plaintiff bank. Finally, neither Ms. Burns nor Mr. Murphy are in a position to dispute the assertions made on behalf of the defendants in relation to the alleged dealings which they had with representatives of EBS, such as Ms. Widger, prior to the facility letter of 6th February, 2009 (as amended).

56. While the defendants are clearly correct in distinguishing the facts of this case from those in *O'Brien* and despite the fact that the defendants have protested their personal liability in correspondence and in the affidavits sworn in response to the summary judgment application, nonetheless, I am satisfied that Promontoria has adduced admissible evidence of the debt claimed by it from the defendants on foot of the facility letter of 6th February, 2009 (as amended). I have reached that conclusion for a number of reasons.

57. First, Ms. Burns explained in each of the affidavits which she swore on behalf of Promontoria the basis on which she was authorised to swear the affidavit, namely, in her capacity as an employee of Capita (now ASI) which in turn at the relevant time was the servicing agent for Promontoria in respect of the administration of loans, including the loan made by EBS to the defendants. In each of the affidavits she explained that she was making the affidavit with the authority of Promontoria. She further stated that she had access to the computer records and other books and records of Promontoria relating to the accounts and alleged liability of the defendants. While it is arguable that that, in itself, would not amount to sufficient compliance with O. 37, r. 1 RSC which, as noted earlier, requires the affidavit grounding the application for summary judgment to be sworn by a person who can "*swear positively to the facts showing that the plaintiff is entitled to the relief claimed…*", it does make clear that Ms. Burns (and similar averments were made by Mr. Murphy in his affidavit) has had access to Promontoria's computer records and other books and records relating to the defendants' accounts and their alleged liability to Promontoria. As I say, in itself this may not be sufficient to demonstrate compliance with O. 37, r. 1 RSC. However, the second reason combined with the first is, I believe, sufficient to defeat the defendants' objection to the admissibility of the evidence adduced by Promontoria on its application for summary judgment. The second reason is as follows. Ms. Burns exhibited to her first affidavit the facility letter of 6th February, 2009 (as amended). She also exhibited the letter of demand of 18th January, 2017 (issued by Promontoria and signed by a representative of Promontoria) as well as correspondence evidencing the contacts and communications made on behalf of the defendants with Capita on behalf of Promontoria in the period between February/March 2016 and March 2017. Finally, she exhibited copies of the account statements dated 31st May, 2017, in respect of the three accounts referred to in the letter of demand of 18th January, 2017. Significantly, the defendants do not dispute any of those documents. On the contrary, the defendants accept and admit the facility letter of 6th February, 2009 (as amended) and the letter of demand of 18th January, 2017. Mr. Donnelly, the second named defendant, referred to and exhibited the facility letters of 6th February, 2009 and 17th February, 2009, at exhibits "*JD1*" and "*JD2*" to his affidavit of 18th June, 2017. He did so for the purpose of contending that if he and Mr. Fleming are indebted to Promontoria in the sum claimed, Promontoria's proceedings are statute barred. To make that point he exhibited the two facility letters to his affidavit. Mr. Burke made it clear in the affidavit which he swore on 22nd June, 2017, that he was supportive of and was also relying upon that affidavit sworn by Mr. Donnelly. Mr. Donnelly

also referred to and exhibited to his affidavit (at exhibit "*JD3*") the letter of demand issued by Promontoria on 18th January, 2017. While exhibiting these documents and not disputing their existence or validity as documents, the defendants maintain that the facility letter of 6th February, 2009 (as amended) does not reflect the full agreement which they reached with the defendants. However, in my view, the fact that the defendants seek to contend that the facility letter of 6th February, 2009 (as amended), did not reflect the full agreement between the parties does not undermine the admissibility of those letters and other documents in circumstances where they have been referred to, described and exhibited in an affidavit sworn by one of the defendants on his behalf and on behalf of another defendant and concurred in and supported by the remaining defendant. Nor do the defendants deny that they received the loan from EBS. What is in issue is the basis on which the loan was advanced (which is a separate ground of defence which the defendants seek to raise). The defendants' acknowledgement that they received the monies is clear from the affidavits sworn by Mr. Burke and by Mr. Donnelly in response to Promontoria's application.

58. I conclude, therefore, that notwithstanding the distinction between the facts of the present case and those in *O'Brien*, the evidence adduced on behalf of Promontoria of the fact of the loan advanced to the defendants in February 2009, the terms of that loan, the non-repayment of the loan and the demand issued on behalf of Promontoria for repayment is admissible to prove the loan and the defendants' non-repayment. However, it is clear that neither Ms. Burns nor Mr. Murphy can dispute many of the factual assertions made by the defendants in their replying affidavits in relation to the extent of their dealings with EBS prior to the drawdown of the loan and as to what they say were the full terms of their arrangement with EBS. Whether that assists the defendants in establishing a *bona fide* defence will be considered when I address later in my judgment the joint venture-non recourse defence asserted by the defendants.

59. In summary, therefore, I do not accept that the defendants have raised a *bona fide* ground of defence to Promontoria's application for summary judgment based on the alleged inadmissibility of Promontoria's evidence.

(2) The Inadequate Proof of Transfer to Promontoria Defence

60. The next defence sought to be advanced by the defendants concerns the proof put before the court by Promontoria of the transfer to Promontoria of the loan made by EBS to the defendants. Ms. Burns has exhibited two versions of the Global Assignment Deed of 11th December, 2015 in redacted form. The version exhibited to her most recent affidavit contains fewer redactions than the earlier version.

61. In her first affidavit, Ms. Burns outlined the circumstances in which the defendants' loan and the related security were purchased by Promontoria. She explained that pursuant to the powers provided to NAMA under the 2009 Act, NALM became legally and beneficially entitled to the defendants' loan facility and all other rights connected with that facility. She then explained that by a mortgage sale deed dated 27th October, 2015, made between NALM and Promontoria Holding 176 B.V. ("Holding"), NALM agreed to sell and Holding agreed to buy (*inter alia*) all rights, title, interest and benefit of NALM in and under the defendants' loan facility and the related security. She then explained that by a deed of novation dated 20th November, 2015, made between Holding and Promontoria and a deed of transfer dated 11th December, 2015, made between NALM and Promontoria (i.e., the "Global Assignment Deed"), NALM transferred all remaining rights, title, interest and benefit held by NALM in or pursuant to the defendants' loan facility to Promontoria. Ms. Burns exhibited a redacted copy of the Global Assignment Deed to her first affidavit. She explained that portions of the document were redacted for reasons of commercial sensitivity and bank or client confidentiality and on the grounds that some of the redacted details were irrelevant as being not related to the subject matter of these proceedings. Following a challenge to the extent of the redactions made to the document, Ms. Burns exhibited a further redacted version to her final affidavit sworn (sworn on 7th December, 2017). There were fewer redactions to the version of the Global Assignment Deed exhibited to that affidavit. Ms. Burns did not exhibit a copy of the mortgage sale deed dated 27th October, 2015 between NALM and Holding. Nor did she exhibit a copy of the deed of novation dated 20th November, 2015. The defendants take issue with the failure to exhibit those documents.

62. However, I am satisfied that the redacted copy of the Global Assignment Deed exhibited by Ms. Burns to her final affidavit does, adequately evidence the transfer of the defendants' loan from NALM to Promontoria.

63. Before coming to the detail of the redacted version of the Global Assignment Deed exhibited by Ms. Burns to that affidavit, I should first record what was said by the defendants on affidavit in relation to the earlier steps in the transfer process. The acquisition by NALM of the defendants' loan from EBS is not contested by the defendants. At para. 26 of his affidavit of 7th July, 2017, Mr. Burke stated that by way of background NALM acquired the defendants' "*loan portfolio*" from EBS. Mr. Donnelly stated at para. 85 of his affidavit of 7th July, 2017, that the defendants' loans were transferred or sold by EBS to NAMA on 22nd March, 2010, after which, he stated, that the defendants, as partners in the Bridgeford Partnership, dealt with EBS/NAMA and AIB/NAMA "*until the loans were further sold to Promontoria in or about October 2015*". In subsequent paragraphs of that affidavit, Mr. Donnelly outlined the steps taken by EBS/NAMA and subsequently by AIB/NAMA in relation to the defendants' loan. Mr. Donnelly relies on those transfers and on the alleged failure during that period to seek repayment of the entire debt, to support the defendants' substantive defence that they had entered into a joint venture arrangement with EBS under which there was to be no personal recourse to them. I deal with that issue separately below. For present purposes however it is clear from the defendants' affidavits that not only did the defendants not dispute the acquisition by NAMA/NALM of their loan from EBS but they also accepted that the loan was further sold on to Promontoria in or about October 2015. While Mr. Burke did not swear any further affidavit following Mr. Donnelly's affidavit of 7th July, 2017, if Mr. Burke was not in agreement with what Mr. Donnelly had stated at para. 85 of that affidavit, I have no doubt that he would have sworn a further affidavit addressing that issue. There was no suggestion at the hearing of this application that the defendants were adopting different positions amongst themselves in relation to the transfer of their loan, or otherwise.

64. In reality, the defendants' objection to the proof put forward by Promontoria in respect of the transfer of the defendants' loan to it centered on the transfer of the loan from NALM to Promontoria. The defendants' objection to the material put forward by Promontoria in respect of this transfer is twofold. First, the defendants object to the fact that the only document exhibited by Promontoria (in redacted form) is the Global Assignment Deed. The defendants object to the failure by Promontoria to exhibit the deed dated 27th October, 2015, between NALM and Holding as amended pursuant to the deed of novation entered into between Holding, NALM and Promontoria dated 20th November, 2015 (the "Loan Sale Deed"). The defendants rely on the fact that clause 1.4 of the Global Assignment Deed provides that that deed is subject to the terms of the Loan Sale Deed save to the extent otherwise expressly set out in the Global Assignment Deed and that at clause 1.5 it is stated that if there is any inconsistency between the terms of that deed and the terms of the Loan Sale Deed, the terms of the Loan Sale Deed should prevail. The defendants submit that without sight of the Loan Sale Deed it is impossible to know what is contained in it and whether there is any inconsistency between the terms of the Global Assignment Deed and the terms of the Loan Sale Deed. Second, the defendants object to the extent of the redactions made to the Global Assignment Deed.

65. A number of authorities were relied on by the defendants and by Promontoria in respect of this proposed defence. They include:-

Promontoria (Aran) Limited v. Wallace [2016] IEHC 50 (McGovern, J.), *English v. Promontoria (Aran) Limited (No. 2)* [2017] IEHC 322

(Murphy J.) ("*English*") and *Vitgeson Limited & Anor. v. O'Brien and Promontoria (Arrow) Limited* (Unreported, High Court, 7th November, 2017) (transcript of judgment) (Haughton J.) ("*Vitgeson*").

66. However, none of those cases are directly on point and each dealt with the extent of documentation put before the court in respect of the relevant loan transfers at issue. While I accept that the extent of the documentation exhibited to the affidavits in English was greater than that exhibited by Promontoria in this case, I do not regard that distinction to be decisive. As noted by Haughton J. in *Vitgeson* the decision of Murphy J. in English is authority for the proposition that copy documents which are redacted are admissible in evidence and are not hearsay (see *Vitgeson* transcript pp. 15, 19 and 22 and *English*, paras. 55-58). I am satisfied, therefore, that in principle it was open to Promontoria to exhibit a copy of a deed in redacted form and to rely on that document as prima facie evidence of the transfer of the defendants' loan to Promontoria. Whether or not the redacted version of the Global Assignment Deed is sufficient to provide such *prima facie* evidence will depend on what can be discerned from the unredacted portions of the copy deed available to the court. It is necessary therefore for me to consider the terms of the redacted Global Assignment Deed (being the redacted copy exhibited to Ms. Burns' final affidavit sworn on 7th December, 2017).

67. The Global Assignment Deed was made on 11th December, 2015, between NALM and Promontoria. Under the heading "*Background*" there are three recitals (in error that there are two recitals A). In the second recital A, reference is made to the Loan Sale Deed. In recital B, it is stated that in consideration for the parties accepting their rights and obligations pursuant to the Loan Sale Deed the parties agreed to enter into the Global Assignment Deed "*pursuant to the terms and conditions of the Loan Sale Deed*". I have referred earlier to the provisions of clauses 1.4 and 1.5.

68. Clause 3 is headed "*Transfer*". At clause 3.1, the Deed provides as follows:-

> *"The Assignor [i.e. NALM] unconditionally, irrevocably and absolutely transfers, conveys, assigns and delivers to the Assignee [i.e. Promontoria] with effect from the Completion Date (to the extent that it has any right, title, interest or benefit in and to the relevant GAD Loan Asset [defined] and to the extent capable of transfer, conveyance, assignment and/or delivery) all its rights, title, interest and benefit in and to each of the GAD Loan Assets [defined] (subject to the subsisting rights of redemption of the Obligors) including…"*

69. Clause 3.1 then goes on to refer to the rights and benefits being transferred and does so with reference to the facilities and related security which are stated to include the "*Scheduled Documents*". The term "*GAD Loan Assets*" is defined in clause 1.3 as meaning the "*the Loan Assets (as defined in the Loan Sale Deed), the Scheduled Documents…*" Clause 1.3 also defines the term "*Scheduled Documents*" as meaning:-

> *"the GAD Loan Assets identified in Schedule One and the documents set out in Schedule Two to this Deed (including all schedules and appendices to any such documents and any supplemental, amendment, variation or restatement agreements, assignment agreements or accession agreements relating to those documents)."*

70. Clause 3.2 provides that Promontoria agrees that it will accept the transfer, conveyance and assignment referred to in clause 3.1.

71. The "*Scheduled Documents*" which are defined as meaning "*the GAD Loan Assets*" and documents are then set out in Schedules One and Two of the Global Assignment Deed. Schedule One specifically identifies the loan made by EBS to the defendants trading as the Bridgeford Partnership on foot of the loan facility letter dated 6th February, 2009 and the letter of amendment dated 17th February, 2009. Schedule Two refers to the security documents and expressly includes the charge dated 15th January, 2007, between the defendants and EBS (i.e. the mortgage referred to earlier).

72. In light of the fact that it is open to Promontoria to rely on a redacted copy of a deed in order to provide *prima facie* evidence of the fact of transfer, having considered the unredacted parts of the copy of the Global Assignment Deed exhibited to Ms. Burns' affidavit of 7th December, 2017, it seems to me that Promontoria has provided sufficient proof of the transfer of the defendants' loan facility with EBS and of the mortgage from NALM to Promontoria. I acknowledge that the Global Assignment Deed does make reference on a number of occasions to the Loan Sale Deed and to the fact that in the event of any inconsistency between the terms of the Global Assignment Deed and the terms of the Loan Sale Deed, the terms of the latter deed shall prevail. However, it seems to me that the copy Global Assignment Deed exhibited by Ms. Burns does clearly demonstrate the transfer of the defendants' facility from NALM to Promontoria. The defendants have not been in a position to point to any actual or potential inconsistency between that deed and the Loan Sale Deed. While it is understandable that they cannot point to an actual inconsistency in circumstances where they have not had sight of the Loan Sale Deed, they have not been in a position to suggest even potential inconsistencies which might undermine the clear and unambiguous transfer provisions in relation to their loan contained in the Global Assignment Deed. In those circumstances, I do not believe that the failure to exhibit a copy of the Loan Sale Deed is fatal to Promontoria's ability to provide evidence of the transfer of the defendants' loan and related security from NALM to Promontoria by exhibiting the redacted copy of the Global Assignment Deed.

73. In any event, it seems to me that the objection taken by the defendants to the evidence adduced by Promontoria in respect of the transfer of the defendants' loan to it is without merit in circumstances where not only did Mr. Donnelly expressly state on affidavit (on his own behalf and on behalf of Mr. Fleming), and Mr. Burke did not dissent from this, that the defendants' loans were sold to Promontoria in or about October 2015 (para. 85 of Mr. Donnelly's affidavit of 7th July, 2017) but also that the defendants, through their advisor, Mr. Deeney of AJS, engaged in negotiations with Capita on behalf of Promontoria to settle the alleged debt between March 2016 and March 2017 (albeit that the defendants maintain that any negotiations were with a view to agreeing a development and workout plan for the Bridgeford site and did not relate to the residual debt or any alleged personal liability of the defendants). However, it is clear from the affidavit sworn by Declan Brooks, Mr. Burke's solicitor, on 2nd August, 2017 and from the affidavit sworn by Mr. Donnelly on 29th September, 2017, that the defendants retained Mr. Deeney of AJS to engage with Capita who were seeking financial information and proposals on behalf of Promontoria. It is difficult to see why the defendants would have done so in circumstances where they did not accept or were disputing that Promontoria had acquired their loan. Had they been genuinely disputing this, they would not have authorised Mr. Deeney to engage on their behalf with Capita/Promontoria.

74. For these reasons, I do not believe that the defendants have established an arguable defence in relation to the proof of transfer of their loan to Promontoria.

(3) The Statute of Limitations Defence

75. As noted earlier, the defendants maintain, without prejudice to the other defences which they sought to raise, that Promontoria's claim is statute barred on the grounds that the proceedings were not commenced until after the expiration of six years from the date on which its cause of action accrued. Consequently, they contend that the proceedings are statute barred having regard to s. 11(1)(a) of the Statute of Limitations 1957 (the "Statute"). The basis upon which the defendants contend that Promontoria's claim is

statute barred is that they say that Promontoria's cause of action to recover the debt created by the loan advanced on foot of the facility letter of 6th February, 2009 (as amended), accrued on 18th February, 2011. This is so, the defendants contend, as the amendment letter of 17th February, 2009, made clear that the term of the loan was two years from 17th February, 2009. The term of the loan, therefore, expired on 17th February, 2011. Clause 5 of the facility letter of 6th February, 2009, provided that upon expiry of the loan term, the principal balance was required to be repaid in full. Without prejudice to all of the other defences which the defendants have sought to raise, the defendants contend that in circumstances where the loan was not repaid on 17th February, 2011, Promontoria's cause of action accrued the following day, on 18th February, 2011. They claim that Promontoria's proceedings would have had to have been issued on or before 17th February, 2017, in order to comply with the six year period contained in s. 11(1)(a) of the Statute. While Promontoria issued a letter of demand on 18th January, 2017, demanding repayment of the sum of more than €9.687m by 5pm on 25th January, 2017, the proceedings were not commenced until the summary summons was issued on 10th May, 2017. The defendants claim that the summons was issued outside the six year period and that the proceedings are, therefore, statute barred.

76. Promontoria's initial response on affidavit to the defendants that the proceedings were statute barred was to contend that the defendants were incorrect in asserting that the cause of action accrued in February 2011. Promontoria asserted that the cause of action only accrued on 25th January, 2017, when the defendants failed to pay the amount requested in the letter of demand of 18th January, 2017. To support that assertion, Promontoria relied on Clauses 13.1 and 13.2 of the facility letter of 6th February, 2009 and para. 12 of the standard conditions. The basis for that assertion by Promontoria (which was made on affidavit) was that those contractual provisions required that Promontoria issue a notice in writing to the defendants demanding repayment and that such was done on 18th January, 2017, requiring payment by 25th January, 2017. It contended that the failure to pay within the time requesting the letter of demand gave rise to the cause of action which accrued on 25th January, 2017. Promontoria had a number of other answers to the Statute defence which I will address in a moment. However, it should be noted that Promontoria did not pursue this issue as to the date of accrual of the cause of action in its written submissions or in the oral submissions at the hearing. In fact, counsel for Promontoria made clear at the outset of his oral submissions that Promontoria was accepting, for the purposes of its application for summary judgment in this case only, that the cause of action accrued when the period of the loan expired and the loan was not repaid. In other words, Promontoria was accepting, for the purpose of this application only, that the cause of action accrued on 18th February, 2011. However, Promontoria had three answers to the defendants' contention that the proceedings were statute barred.

77. First, Promontoria contended that the defendants had acknowledged the debt on a number of occasions in the course of their contacts and communications with Promontoria's agents in 2016 – 2017. Promontoria contended that in those communications the defendants acknowledged the debt on a number of occasions and that the effect of such acknowledgments was, by virtue of s. 56(1) of the Statute, to reset the date of accrual of the cause of action to the date of the latest acknowledgment. Promontoria advanced this answer to the Statute claim in its written submissions. It was strenuously resisted by the defendants who objected to Promontoria's reliance on communications which had not been and could not have been exhibited on the grounds that they were without prejudice communications and in any event did not make any proposal in respect of the residual debt or the defendants' personal liability in respect of it. Promontoria did not pursue this purported answer to the Statute claim at the hearing. It was content to rely on the other two answers which it put forward to that claim.

78. Second, Promontoria contended that the defendants had made certain payments towards the debt after it fell due and that the effect of those payments was, by virtue of s. 65(1) of the Statute, to provide for a fresh accrual of the right of action to recover the debt as of the date of the payment. In other words, Promontoria contended that on the date of the last payment relied upon, the limitation period was reset and started afresh. Promontoria relied on two payments allegedly made by the defendants in 2014. The first such alleged payment was a payment of €25,133, allegedly made by the defendants on 31st July, 2014 (the "first payment"). The second alleged payment relied on was a payment of €14,000 allegedly made by the defendants on 8th December, 2014 (the "second payment"). Ms. Burns referred to these alleged payments in her affidavit of 6th September, 2017. In that affidavit (at paras. 6 & 7) she asserted that the defendants made payments to NAMA under the loan facility following the expiration of the term of the loan on 18th February, 2011. She stated that Promontoria was provided with certain information from NAMA in relation to the facility which included a "*data tape*" which contained a history of payments made by the defendants to NAMA. She exhibited an extract from the data tape to her affidavit. The extract purported to show an "*interest only*" payment made in respect of the defendants' loan of €25,133, on 31st July, 2014, i.e. the first payment. Under the heading "*original repayment schedule/loan amortisation*", the extract from the data tape in respect of the first payment contained the words "*interest only*". The extract from the data tape referred to an alleged payment of €14,000 in respect of the defendants' loan on 8th December, 2014 and under the same heading contained the words "*bullet*". Promontoria seeks to rely on these alleged payments as part payments sufficient to reset the limitation period under s. 65(1) of the Statute.

79. The defendants strongly dispute the contention that any part payments were made for the purpose of s. 65(1) of the Statute. Mr. Donnelly (on his own behalf and on behalf of Mr. Fleming) swore (at paras. 23 – 29 of his affidavit of 29th September, 2017) that no payments were made by the defendants against the alleged debt. He further stated that he did not make any payments to any entity, to whose rights and entitlements Promontoria claimed to succeed during 2014. With regard to the so-called first payment, Mr. Donnelly stated that the sum recorded as being paid on 31st July, 2014 (i.e. the €25,133) was a portion of the proceeds of an insurance claim made by the defendants following the fire at the bar and restaurant premises on the Bridgeford site in August 2008 which destroyed the premises. Mr. Donnelly had stated (at para. 71 of his affidavit of 7th July, 2017) that an insurance claim had been lodged with the insurers and ultimately agreed with them after a long negotiation process at €1.35m. He further stated that while the amount of the claim was agreed, it was not paid out until "*in or about February/March 2009*" (para. 71 of Mr. Donnelly's affidavit of 7th July, 2017). At para. 15 of his affidavit of 29th September, 2017, Mr. Donnelly stated that the net insurance proceeds of €1.35m were divided between EBS and the defendants, with EBS receiving €700,000 "*towards interest*" and the defendants "*sharing the balance of €650,000 as partial payment for professional costs incurred by [them] up to that time*". At para. 26 of the same affidavit, Mr. Donnelly stated that the sum recorded on the data tape as having been paid on 31st July, 2014, was "*a portion of the proceeds of the fire insurance claim*" and again explained how the net proceeds of the insurance claim were divided between EBS and the defendants. He maintained that the manner in which the insurance proceeds were divided was in accordance with the alleged joint venture agreement which the defendants had reached with EBS. Promontoria relied on those averments by Mr. Donnelly in his affidavit as being supportive of its contention that the first payment amounted to a part payment of the debt and, in that context, it relied on the provisions of clause 7 and 8 of the facility letter of 6th February, 2009. Clause 7 referred to the requirement of the defendants to provide a solicitor's undertaking to remit €700,000 out of the insurance claim. Clause 8(ii) provided that on receipt of the insurance proceeds, EBS would "*utilise the €700,000 proceeds to discharge the arrears of €538,000 presently existing on account number 51473021 with remainder to reduce loan balance*". Promontoria contended that Mr. Donnelly had, therefore, admitted that the first payment was credited as having been paid on 31st July, 2014 and, therefore, amounted to part payment of the debt. However, the defendants have queried how, in circumstances where the undisputed evidence is that the insurance proceeds were received "*in or about February/March 2009*", the sum of €25,133 was only apparently credited to the defendants' account on 31st July, 2014 (more than six years later). They point out that Ms. Burns is not in a position to, and indeed does not purport to dispute

that assertion of fact or to give any evidence in relation to the manner in which EBS or NAMA dealt with the account or credited payments to it in the period prior to the acquisition of the loan by Promontoria. The defendants further contend that the issue as to the circumstances in which the first payment came to be credited on that date is an issue as to fact which is in dispute and cannot be resolved on this application.

80. As regards the second payment (i.e. the sum of €14,000) credited to the defendants' account, as appears from the data tape on 8th December, 2014, the defendants again dispute that this was a part payment in respect of their EBS loan. Mr. Donnelly stated (at para. 27 of his affidavit of 29th September, 2017) that neither he nor Mr. Fleming made a payment of €14,000 on 8th December, 2014. While there is no express averment from Mr. Burke in relation to that payment, it does not appear to be suggested by anyone (including Promontoria) that Mr. Burke himself made the payment. At para. 28 of the same affidavit, Mr. Donnelly stated that Mr. Fleming had another "*connection*" with NAMA in relation to a "*failed venture in the United States*" and that monthly payments in respect of that "*connection*" were made by Mr. Fleming in the period between 2011 – 2013. He further stated (at para. 29 of that affidavit) that it would be necessary for the defendants to obtain discovery in relation to the two payments credited to the defendants' account (as suggested by the data tape) in 2014.

81. The third answer offered by Promontoria to the defendants' contention that the proceedings are statute barred (and the second answer which it maintained at the hearing) is that it is entitled to the benefit of the provisions of s. 36(1)(a) of the Statute. Promontoria contends that a twelve year period arises in respect of its claim to recover the principal sum due under the facility having regard to the provisions of s. 36(1)(a) of the Statute. That provision states that:-

> *"No action shall be brought to recover any principal sum of money secured by a mortgage or a charge on land or personal property (other than a ship) after the expiration of twelve years from the date when the right to receive the money accrued."*

82. Promontoria argues that the loan facility was secured by the mortgage and that, therefore, s. 36(1)(a) applies in respect of the principal sum outstanding under the facility. In respect of the interest outstanding, Promontoria contends that while the limitation period was six years, the limitation period was reset by virtue of the part payments relied upon so that it is entitled to recover the outstanding interest also. It should be noted that this purported answer to the defendants' defence based on the Statute was raised for the first time in Mr. Murphy's affidavit of 14th November, 2017. The argument was made in Promontoria's written submissions and advanced on its behalf at the hearing.

83. The defendants strongly dispute Promontoria's entitlement to rely on s. 36 of the Statute. The defendants criticise Promontoria's belated attempt to rely on that provision. They contend that the proceedings have not been issued to recover the principal sum secured by the mortgage and submit that the proceedings were expressly issued to recover the debt allegedly due under the facility letter of 6th February, 2009 (as amended). They say that this is clear from the letter of demand issued by Promontoria on 18th January, 2017, from the summary summons itself and also from the various affidavits sworn by Ms. Burns on behalf of Promontoria, including her first affidavit of 7th June, 2017 and her second affidavit of 21st July, 2017. The defendants further rely on the decision of the High Court (Barron J.) in *First Southern Bank Limited v. Maher* [1990] 2 I.R. 477 ("*Maher*").

84. In response, Promontoria contends that it is entitled to rely on s. 36 and that that section merely requires the action to be brought to recover a principal sum of money secured by a mortgage or charge on land or personal property and does not require that the action be grounded upon the mortgage or charge. In any event, Promontoria contends that there are sufficient pleas in the summary summons to the mortgage to enable it to rely on the provisions of s. 36. It disputes the relevance of the *Maher* case which did not concern s. 36 at all.

85. Bearing in mind the relatively low threshold which a defendant must satisfy in order to demonstrate an arguable defence and having regard to the fact that the authorities make it plain that the essential question which I have to determine is, is it "*very clear*" that the defendants do not have a defence on a particular issue, I am satisfied that the defendants have demonstrated an arguable defence in relation to their contention that Promontoria's claim is statute barred. While Promontoria accepted solely for the purpose of its application for summary judgment in this case that the cause of action accrued following the expiry of the loan on 17th February, 2011 and that, for the purposes of this application only, time began to run at that point, it seems to me that that was, in any event, a reasonable and appropriate concession to make. I would, in any event, have decided that the defendants had raised an arguable case that time began to run on 18th February, 2011 so that *prima facie* the proceedings commenced on 10th May, 2017 would be statute barred. It is necessary however to address the two answers to the defendants' Statute defence which are now relied upon by Promontoria. I stress that in doing so I am not reaching any conclusions on those answers but I am merely considering whether the defendants have raised an arguable case in relation to them which would entitle the defendants to a further hearing on the Statute issue.

86. As regards Promontoria's contention that the defendants made part payments in respect of the debt the subject of the relevant loan facility such that time was reset and only began to run on the date of the last of those payments under s.65(1) of the Statute, I am satisfied that the defendants have done just about enough to establish an arguable case in relation to the two payments relied upon by Promontoria. As regards the first payment relied upon, I note the averments made by Mr. Donnelly (on his behalf and on the behalf of Mr. Fleming) that no payments were made in respect of the debt in 2014. He explained (at para. 26 of his affidavit of 29th September, 2017) that the first payment "*recorded as having been 'paid'*" on 31st July, 2014 was a portion of the proceeds of the insurance claim arising from the fire in 2008. However, it is not at all clear from the affidavits as to how that particular sum came to be credited against the loan on 31st July, 2014 in circumstances where the uncontested evidence of the defendants was that the proceeds of the insurance claim were paid in February or March 2009. While Mr. Donnelly stated that the first payment was "*recorded as being 'paid'*" on 31st July, 2014, there is no evidence as to how it came to be that a portion of the proceeds of the insurance claim came to be credited more than five years after the proceeds were paid. There is no evidence at all from Promontoria or its predecessors as to how, if the sum represented a portion of the insurance proceeds, it was only being credited as paid on 31st July, 2014.

87. Similarly, in relation to the second payment credited to the defendants' account on 8th December, 2014 there is no evidence from Promontoria or from its predecessors to rebut Mr. Donnelly's evidence. Mr. Donnelly queried that payment and suggested that it may have been in respect of another "*connection*" with NAMA which Mr. Fleming had in respect of a failed investment in the United States. Neither of the deponents on behalf of Promontoria on this application were in a position to clarify the positon in relation to that payment or to explain how it was that such a payment came to be credited by it (and described as a "bullet" payment) on 8th December 2014.

88. I do not believe that it would be safe to rely on the evidence of these payments being credited to the defendants' account in 2014 to support the resetting of the limitation period under s.65(1) of the statute at the summary judgment stage. On the contrary, I

have concluded that in relation to the issue of part payment, it is not very clear that the defendants will fail in their Statute defence based on these alleged part payments nor is it very clear that Promontoria will succeed in defeating the Statute defence by reason of those alleged payments. It seems to me that the defendants are correct in stating that this is an issue on which they have raised an arguable case by way of defence to the claim and in support of their contention that the proceedings are statute barred. I also accept that it is an issue on which the defendants may be entitled to seek discovery.

89. While the authorities make clear that it is open to a court hearing a summary judgment application to determine issues of law conclusively on that application (*McGrath v. O'Driscoll* [2007] 1 ILRM 203), the authorities also establish that that the court is not obliged to resolve such issues on a summary judgment application (*Danske Bank t/a National Irish Bank v Durkan New Homes* [2010] IESC 22). As noted earlier, these principles were recently reemphasised by Clarke J. in the Supreme Court in *McCaughey*. I do not feel that it would be appropriate or safe for me to resolve conclusively the alleged entitlement of Promontoria to rely on the part payments relied upon by it in this summary judgment application. In the first place the issue is one not only of law but also of fact. There are some disputed or at least uncertain facts in respect of which discovery may be necessary. The position in relation to the part payments relied upon may become more clear following discovery. Further, this summary judgment application is not a trial of a preliminary issue on the Statute. That is a different procedure and one in which, as the parties raising the Statute by way of defence, the defendants would be the plaintiff or moving party on the issue. In those circumstances, I do not feel that it would be appropriate for me to finally resolve the issue in relation to the alleged part payments on this summary judgment application. The question as to whether the issue on the Statute should go to plenary hearing will depend on my conclusions in relation to the second answer relied upon by Promontoria in response to the defendants' Statute defence. It is to that issue that I now turn.

90. As noted above, Promontoria seeks to rely on s.36(1)(a) of the Statute in order to argue for the existence of a twelve year limitation period insofar as its claim for payment of the outstanding principal sum is concerned. The defendants dispute Promontoria's entitlement to rely on that provision. I am satisfied that the defendants have raised an arguable case in relation to Promontoria's entitlement to rely on that provision. Again, having regard to the low threshold which a defendant must meet on a summary judgment application, I have not been persuaded that it is "*very clear*" that the defendants will fail on their arguments in relation to the non-applicability of s.36(1)(a) of the Statute in this case. Again, I refrain from expressing any views on the ultimate merits of the point as it would be inappropriate for me to do so. Nonetheless, it seems to me that the defendants have raised an arguable case that Promontoria at all times considered itself subject to a six year limitation period under s.11(1)(a) of the Statute. The letter of demand of 18th January, 2017 demanded immediate repayment from the defendant of the sum of €9,687,423.70 "*in accordance with [Promontoria's] rights under the terms of the facility letter*" and asserted that that sum was "*the full amount of principal and interest owed by [the defendants] pursuant to, and in accordance with, the Facility Letter…*". It is arguable that the special indorsement of claim on the summary summons made a claim for repayment of the debt allegedly due on foot of the facility letter of 6th February, 2009 (as amended) and proceeded on the basis that Promontoria was entitled to claim a sum which had fallen due by the defendants to it "*within a period of six years prior to the commencement of these proceedings*" (para. 18 of the special indorsement of claim). While it is true that the special indorsement of claim does refer to the mortgage (at para. 5) and to the appointment of a receiver pursuant to the mortgage (at paras. 14 – 16), however, it is arguable that there is no indication on the special indorsement of claim that Promontoria was claiming in the proceedings principal sums secured by a mortgage for the purposes of s.36(1)(a) of the Statute. On the contrary, it is arguable that by expressly stating that its claim was in respect of sums falling due within the preceding period of six years (para. 18) the proceedings were being brought in recognition that the six year limitation period applied to them. It is also arguable that it is consistent with the approach taken by Ms. Burns in the affidavits which she swore for the purpose of grounding the summary judgment application. Indeed, it is arguable that the entire thrust of Ms. Burn's affidavit of 21st July, 2017 was on the basis that the six year limitation period applied (see, for example, para. 7.4 of her affidavit of 21st July, 2017 and paras. 3 and 7 of her affidavit of 6th September, 2017).

91. It is, I believe, significant that the parties were unable to point to any authority on the scope of application of s.36(1)(a) of the Statute and the interplay between that provision and s.11(1)(a). The decision in *Maher* relied upon by the defendants does not consider s.36.

92. It is also of some relevance that the first mention by Promontoria of any alleged entitlement to rely on the provisions of s.36 of the Statute came in an affidavit sworn by Mr. Murphy on 14th November, 2017. This was the fourth affidavit sworn on behalf of Promontoria in respect of the summary judgment application and the third of its affidavits which dealt with the defendants' contention that the proceedings were statute barred.

93. In all these circumstances, I am satisfied that the defendants have raised an arguable case that Promontoria is not entitled to the benefit of the provisions of s.36(1)(a) of the Statute in respect of its claim to recover the alleged outstanding principal sum due by the defendants. While it may have been possible for me to have finally resolved this issue on the summary judgment application (in accordance with the authorities referred to earlier), I do not believe that it would be appropriate for me to do so as the issue would in my view merit more detailed and more extensive argument particularly in light of the absence of any direct authority on the point.

94. In light of these conclusions, I am satisfied that the defendants are entitled to have the issue of the Statute dealt with at trial, whether by way of a preliminary issue or otherwise and I express no final conclusions on that issue at this point. The defendants will bear the burden of proof on the Statute issue and, in the event that it is decided as a preliminary issue, the defendants will likely be the moving parties on that issue. As noted above, it is likely that the defendants will be entitled to seek discovery of documents relevant at least to the part payments issue. Whether or not this is the only issue which will proceed to plenary hearing or trial will depend on my conclusions on the final ground of defence raised by the defendants and I now turn to that ground of defence.

(4) Joint Venture/Non-Recourse Defence

95. The defendants contend that Promontoria is not entitled to judgment against them personally on the basis that the facility letter of 6th February, 2009 (as amended) did not reflect the true and complete agreement between the defendants and EBS. Essentially, it is contended (on affidavit and in submissions) that the defendants had reached an agreement with EBS in the nature of a joint venture or partnership agreement under which it was agreed that there would be no recourse to the defendants personally in the event of a default in the repayment of the loan and that the only recourse which EBS would have in the event of such default was to the property secured by the mortgage. This defence is fleshed out in greater detail in the affidavits sworn by and on behalf of the defendants in response to Promontoria's application. I will consider the evidence and other material put forward by the defendants in support of this defence below. The defendants contend that a collateral agreement was reached with EBS which was collateral or supplemental to the apparent agreement reflected in the facility letter (which they contend had to be read subject to that alleged collateral agreement) and that it was on the basis of that collateral agreement and only on that basis that the defendants agreed to enter into the various loan agreements with EBS including the loan agreement evidenced by the facility letter of 6th February, 2009 (as amended). The defendants seek to raise this alleged collateral agreement by way of defence to Promontoria's application for summary judgment and in support of their contention that the claim should be adjourned to plenary hearing and also to support a counterclaim which the defendants have indicated they would wish to bring.

96. Promontoria contends that the material put forward by the defendants does not support the existence of any agreement whereby EBS agreed that the loan advanced to the defendants was being provided on a non-recourse basis. While constrained by the absence of any representative of EBS who dealt with the defendants to provide evidence of any contemporary dealings between EBS and the defendants leading up to and at the time of the facility letter of 6th February, 2009 (as amended), Promontoria argues that the defendants cannot avoid the consequences of that facility letter which provided for the defendants' joint and several liability to repay the loan. Promontoria contends that the evidence adduced by the defendants in support of the alleged collateral contract or other arrangement falls far short of what the authorities have required in order to establish an arguable case for a defence based on collateral contract such that the proceedings should be adjourned to plenary hearing.

97. Having briefly set out in very broad terms, the respective contentions of the parties on this proposed defence, I will now examine some of the leading cases which have considered the sort of evidence required to be adduced by a defendant who seeks to rely on the existence of a collateral contract by way of defence to avoid judgment for a debt said to arise on foot of a written agreement which, on the face of it, provides for the personal liability of the defendant. Having done so, I will then examine the evidence adduced by the defendants in support of this intended defence and assess that evidence in light of the legal principles which can be derived from the authorities considered below. I will then set out my conclusions. Having done so, I will consider the particular issues which, depending on my conclusions may arise by reason of the defendants' stated intention to mount a counterclaim against Promontoria.

(a) Legal Principles and Case Law on Collateral Contracts

98. There have been numerous decisions of the Irish Courts which have considered the sort of evidence required to be adduced in order to resist summary judgment in reliance on the existence of an alleged collateral contract. Many of those decisions were provided in the books of authorities relied upon by the parties on this application (2 folders containing 43 authorities).

99. The parties were agreed that the most relevant case is *AIB v. Galvin Developments (Killarney) Limited & Ors* [2011] IEHC 314 ("*Galvin*"). Before turning to consideration of Galvin and to put the issue in its proper legal context, it is necessary first to consider what is meant by a "*collateral contract*". That question was conveniently addressed by Kelly J. in the High Court in *IBRC v. McCaughey* [2014] IEHC 230. Kelly J. referred to an extract from Chitty on Contracts, Vol. 1 (General Principles), 13th Ed., at para. 12-103. There, the authors stated:-

> *"Even though the parties intended to express the whole of the agreement in a particular document, extrinsic evidence will nevertheless be admitted to prove a contract or warranty, collateral to that agreement. The reason is that 'the parol agreement neither alters nor adds to the written one, but is an independent agreement'.*
>
> *Such evidence is certainly admissible in respect of a matter on which the written contract is silent. In a number of older cases it was stated that evidence of such a contract or warranty must not contradict the express terms of the written contract. However, more recently the courts have admitted evidence to prove an overriding oral warranty or to prove an oral promise that the written contact (sic) will not be enforced in accordance with its terms. Thus, in City Westminster Properties (1934) Limited v. Mudd, the draft of a new lease presented to a tenant contained a covenant that he would use the premises for business purposes only and not a sleeping quarters. The tenant objected to this covenant and the landlords gave him an oral assurance that if he signed the lease, they would not enforce it against him. The tenant signed the lease, but later the landlord sought to forfeit the lease for breach of this covenant. Harman J. held that the oral assurance constituted a separate collateral contract from which the landlords would not be permitted to resile. The collateral contract or warranty may be formal or informal even though the main contract is one which is required by law to be in or evidenced by writing." (Quoted by Kelly J. in McCaughey at paragraph 18)*

100. In *Galvin*, following a full oral hearing, Finlay Geoghegan J., in the High Court, held that the relevant defendants were entitled to succeed in the defence they raised, to AIB's claim for judgment on foot of a debt, that there was a collateral contract with AIB under which it agreed to limit its right of recourse to 50% of the debt. Finlay Geoghegan J. used the term "*collateral contract*" in the sense explained by Cooke J. in the Supreme Court of New Zealand in *Industrial Steel Plant Limited v. Smith* [1980] 1 NZLR 545, where, at p. 555, the judge quoted with approval Cheshire and Fifoot on Contracts , 5th N.Z. Ed., 1979, (at pages 53-54), namely that it was a means "*to enforce a promise given prior to the main contract and but for which this main contract would not have been made*" (per Finlay Geoghegan J. at para. 97, pages 44 – 45). That is the sense in which the defendants in the present case seek to raise the existence of an alleged collateral contract.

101. In *Galvin*, although the letters of sanction for the loan issued by AIB did not contain any express term limiting AIB's right of recourse to 50% of the drawn debt, nonetheless the court held that a collateral contract arose in the sense of a prior representation by AIB which became a binding collateral contract under which AIB agreed to limit its recourse to the relevant defendants to 50%. Critical to the court's finding of such a collateral contract was the fact that AIB had produced "heads of terms" which expressly provided that AIB would have recourse to the relevant defendants for 50% of the drawn debt. The court held that those "heads of terms" amounted to a representation by AIB which was intended to induce the relevant defendants to continue in negotiations with AIB in order to obtain the facilities referred to. The court further found on the evidence that if AIB had not so represented in the "heads of terms", the relevant defendants would have sought facilities for the loan elsewhere. On that basis, notwithstanding the fact that the letters of sanction did not contain the relevant term in relation to recourse which had been contained in the "heads of terms" and, indeed, did not contain any express terms in relation to recourse to the relevant borrowers, the court held that AIB was bound by a collateral contract which limited its right of recourse to 50% of the relevant drawn debt.

102. The defendants strongly rely on the decision in Galvin in support of their defence of collateral contract. On the other hand, Promontoria contends that the facts of the present case are significantly different in that in Galvin there were "heads of terms" which predated the letters of sanction and which expressly provided for the limited recourse which the court ultimately found arose by way of the collateral contract. When I come to consider the evidence in this case on this issue, I will have to decide on which side of the line in *Galvin*, this case falls.

103. A case which falls on the other side of the line is *Ulster Bank v. Deane* [2012] IEHC 248 ("*Deane*"). In that case, the defendants sought to raise a defence to an application for summary judgment that they had reached a collateral or side agreement with the plaintiff bank to the effect that the loans on foot of which judgment was sought were only repayable on the sale of certain properties. The loan facility letters in that case made clear that they were demand loan facilities. However, the defendants contended that the loans were not repayable on demand but were long term loans to be paid for out of the proceeds of sale of various properties. The defendants stated on affidavit that they had been told by the bank's representatives that this was the case prior to signing the relevant facility letters. However, the High Court (McGovern J.) observed that the defendants had not produced any documentation to support that claim. He stated that it appeared, therefore, that the defendants were "*seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence*" and that such was not permissible. He continued:-

> *"For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the 'parol evidence' rule. See Macklin v. Graecen & Co . [1983] I.R. 61, and O'Neill v. Ryan [1992] 1 I.R. 166. In short, a party is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement." (per McGovern J. at para. 6, pages 3 – 4)*

104. McGovern J. went on to consider the argument made by the defendants that they were entitled to rely on a collateral or side agreement. The defendants had relied in that regard on *Galvin* and on the *Mudd case (City and Westminster Properties (1934) Limited v. Mudd* [1958] 2 All ER.733 ("*Mudd*")). Having set out the facts of *Mudd*, the court found that the facts of that case were quite different to the case at issue, as there had been detailed discussions between the parties on the specific issue of the user of the premises including on the issue as to whether the tenant could continue to reside on the premises but when the tenant's solicitors sought to delete a covenant against residing on the premises, the landlords objected to the deletion but represented to the tenant that they would not object to the tenant residing on the premises if he signed the lease in the original form. McGovern J. in Deane held that the facts in that case were a long way short of what was held to constitute a collateral agreement in *Mudd* and that the evidence of verbal discussions which the defendants sought to adduce in order to alter the terms of the facility letters was inadmissible as being in breach of the parol evidence rule. The court then proceeded to distinguish the *Galvin* case on the basis that the facts in that case were also very different to the facts in *Deane*. McGovern J. held that the defendants had been unable to point to any document which purported to vary the terms of the facility letters or on foot of which they agreed to sign the facility letters in contrast to the existence of the "heads of terms" in *Galvin*. McGovern J. concluded that the facts of Galvin "*bear no resemblance to the case which I have to decide, and the defendants have simply not been able to point to any written document or any facts which go any way near to establishing a collateral agreement*" (per McGovern J. at para. 12, p.7). McGovern J. reached a similar conclusion in *AIB v. Taylor* [2016] IEHC 121, in which he found that the defendants could not rely on oral evidence of an alleged waiver to contradict the terms of the written agreement between the parties as that would offend the parol evidence rule (per McGovern J., para. 19, p. 6).

105. The same judge reached a similar conclusion in *Promontoria (Arrow) Limited v. Mallon* [2018] IEHC 145 ("*Mallon*"). Mallon was decided after I reserved judgment in the present case and I refer to it only for completeness. Having referred to a number of the earlier cases including *Deane*, and having reviewed the particular facts of that case, McGovern J. found that the defence sought to be raised by the defendant, to the effect that the written loan agreements did not contain the entire agreement and that the court had to read into the agreement oral representations made prior to the signing of the relevant facility letters, lacked credibility and flew in the face of the written documents signed and accepted by the defendant. He further stated:-

> *"For reasons of public policy, the courts will not permit oral evidence to be admissible if it [was] introduced for the purpose of contradicting the terms of a written agreement between the parties. The defence based on an alleged oral agreement made on 30th June, 2006, cannot succeed because it would be in breach of the parol evidence rule." (per McGovern J. at para. 33, page 16)*

106. The two lines of authority represented, on the one hand, by *Galvin* and, on the other, by the strict application of the parol evidence rule by McGovern J. in *Deane* and in other cases were considered by Hogan J. in the High Court in *Tennants Building Products Limited v. O'Connell* [2013] IEHC 197 ("*Tennants*"). Like *Galvin*, that case was decided following a full oral hearing. The defence raised by the defendant in the case in response to a claim on foot of a personal guarantee was that the defendant had executed the guarantee following an assurance or representation that it would not be unilaterally enforced without his consent. Having referred to what he described as "*traditional argument against a defence of this kind*", being the parol evidence rule, and having then referred to the decision of Finlay Geoghegan J. in *Galvin* and that of McGovern J. in *Deane*, Hogan J. concisely drew the threads of these authorities together. He stated:-

> *"The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in Mudd and in Galvin) written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in Deane." (per Hogan J. at para. 27, page 13)*

107. A similar defence to that raised in the present case was considered by Kelly J. in the High Court in *McCaughey.* In that case, the court adjourned part of the claim to plenary hearing as it was satisfied that a triable issue had been raised as to the possible existence of a collateral agreement. The evidence relied upon by the court to support that conclusion was the sworn testimony of the defendant bolstered by the evidence of an employee of the bank and material which predated the signing of the formal contracts which had been presented to the bank's credit committee. A similar conclusion was reached (although this time following a plenary hearing) by Baker J. in *AIB Mortgage Bank v. Hayes* [2016] IEHC 280 ("*Hayes*"). Having referred in that case, to several of the earlier authorities including *Galvin*, *Deane* and *Tennants*, Baker J. accepted that certain assurances were given by the bank in the course of negotiations to the effect that the interest only facility would be reviewed after an initial five year period. She held that the formal loan document was not intended to comprise all of the elements of the agreement for the loan and that, at least, two elements were omitted from the written document although both elements found "*clear expression*" in other written documents which were adduced in evidence. In those circumstances, following the analysis of Finlay Geoghegan J. in Galvin, Baker J. held that there was "*sufficient written evidence of a collateral agreement between the parties and that the evidence points me to a conclusion that the formal offer of mortgage loan dated the 5th May, 2005, did not contain the entire of the agreement between the parties*". (per Baker J. at para. 47, page 18) In those circumstances, Baker J. held that the parol evidence rule had no application as the parties did not commit the entirety of their agreement to writing. Ultimately, however, the court held that the bank had not breached its contract with the defendant.

108. Another case in which the court held that an arguable defence had been raised on the basis of an alleged collateral contract was *IBRC v. Kelly* [2014] IEHC 160 ("*Kelly*"). In that case, the defendant sought to resist summary judgment on the grounds that the loan at issue had been provided on a non-recourse basis. The defendant contended that it was represented to him by an agent of the bank that there would be no personal recourse to him in respect of the loan. The facility letter provided that the loan was to be repayable on demand but in any event to be repaid by a particular date. It was not. The High Court (Birmingham J.), having set out the principles governing the grant of summary judgment, held that "*only if it is very clear that Mr. Kelly has no defence will judgment be granted at this stage…*". The court then referred to a number of cases in which a non-recourse defence had been raised. The court stated that the language of the loan facility letter meant that the defendant faced "*formidable obstacles*" as it specifically and without equivocation stated that the facility was repayable on demand and, in any event, by a particular date (para. 12, p. 5 of the judgment). The defendant had contended that oral and written representations were made. The written representations consisted of a "*structure diagram*" which referred to non-recourse funding (although the court held that an interpretation of that document for

which the defendant contended was not the only one available). Notwithstanding the formidable obstacles which faced the defendant and having regard to the low threshold which had to be met, the court concluded that it could not be said that it was "*very clear*" that the defendant had no defence and accordingly, it remitted the matter to plenary hearing. The defendants placed considerable reliance on this case. Promontoria contends that the case can be distinguished by reason of the existence of written representations in the form of the "*structure diagram*", the equivalent of which it says does not exist in the present case.

109. Other cases on the other side of the line to Galvin include *NALM v. Barker & Ors* [2014] IEHC 216 ("*Barker*"), *NALM v. Barden* [2013] 2 I.R. 28 ("*Barden*"), and *ACC Loan Management Ltd. v. Dolan* [2016] IEHC 69 ("*Dolan*"). In Barker, the defendants sought to resist summary judgment on the grounds that the facilities were advanced by the bank for the purpose of funding a development of land and that repayment was only due when the lands were developed. The defendant contended that this was evident from a bank memo and that the bank was participating in the venture to the extent that the ultimate repayment of the facilities were tied to the success of the venture. The High Court (Charleton J.) rejected that defence and granted summary judgment. The court pointed out that the relevant memo to the credit committee of the bank postdated the contract and that a "*written contract which incorporates all the relevant terms and conditions is hard to quarrel with and is even more difficult to challenge on the basis of subsequent conduct*" (per Charleton J. at page 4). In any event, the court found that there was nothing in the document to establish a defence. As regards the defence that the bank had agreed a joint venture with the defendant, the court noted that there was no indication that such was the case on the terms of the relevant letter of sanction. Having noted that it was a normal letter of sanction, Charleton J. stated: -

> *"It may be that in some circumstances a bank might be foolish enough to become involved, through perhaps negligent misrepresentations that might be strong enough to overcome the written terms of a contract, in a business venture. The bald assertion made is not supported by details of conversations or written memoranda passing between the borrower and the bank." (per Charleton J. at page 4)*

110. The same judge dealt with a similar defence with a similar outcome in Barden, as did Baker J. in *Dolan*. One of the proposed defences which the defendant sought to raise in *Dolan*, was that the bank and the defendants had entered into a joint venture to develop particular lands, and in the alternative, that an oral collateral agreement had been reached whereby the loans in question would only be repaid from the sale of units to be developed. In *Dolan*, Baker J. held that, having regard to the dicta of Charleton J. in *Barden* that consideration of an assertion on affidavit which flies in the face of written documents must be exercised with care, the correspondence and the formal bank documents did not bear out even an arguable case that the bank and the company in question were engaged in a joint venture. She found that the assertion of a joint venture or special relationship was inconsistent with the documentary evidence and pointed to the absence of specific evidence in relation to that relationship. She found the assertion of such a relationship to be incredible. She held that all of the documentation pointed against the existence of such a relationship (per Baker J. at para. 63, page 20).

111. Promontoria places considerable reliance on the decision of the High Court (Ryan J.) in *Irish Life & Permanent Plc (t/a Permanent TSB) v. Hudson* [2012] IEHC 11. In that case, the defendants argued that it was represented to them by a representative of the financial institution that the loans in question were to be, *inter alia*, non-recourse. This purported defence was inconsistent with the contractual documentation which had been signed by the defendants. The High Court (Ryan J.) held that if the defendants were correct in their defence "*every single document would have to be torn up*" (per Ryan J. at para. 24, page 9). In that case, as in many of the other cases referred to above, the defendants' affidavits were responded to by affidavits sworn by and on behalf of the relevant financial institution. On the basis of the affidavits, the court found that the defendants' evidence was not credible, was farfetched and inconsistent. Ryan J. stated:-

> *"In circumstances of formality and solemnity in the execution of a series of agreements, it is more difficult for a contracting party to claim that it was negated by previous wholly inconsistent verbal statements. If the defendants are correct then all the loan documents have to be torn up and the correspondence has to be ignored." (per Ryan J. at para. 42, pages 17 – 18)*

112. The court then set out a series of relevant considerations on which Promontoria relies in the present case. Among those considerations were the fact that the defendants had signed a loan document which contained terms and conditions including those relating to repayment in circumstances where the defendants had professional advice and the opportunity of obtaining legal advice and that there was nothing on paper by way of notes or memoranda to corroborate any of the terms which the defendants asserted. While accepting that there were some distinguishing features between that case and the present case, Promontoria did place reliance on those considerations in an attempt to defeat the defendants' proposed defences on this issue.

113. It is evident from this survey of some of the relevant authorities that courts are sceptical of defences sought to be raised on the basis of oral representations which are not supported by contemporaneous documents and which are inconsistent with the express terms of a written contract signed by the parties. The courts are also reluctant to find support for the defence of a collateral contract in the absence of documentation or where the document relied upon postdates the date of the written contract. The courts will require "*cogent evidence*" of any alleged collateral agreement often requiring documents which predate the written contract. General assertions in relation to verbal assurances provided in the course of contractual negotiations will normally not be sufficient to support a defence of collateral contract and will often be held to offend the parol evidence rule. Ultimately, the present case, like the others discussed above, must be decided on the basis of its own facts but in light of these principles which can be discerned from the authorities, bearing in mind at all times, the need to exercise caution in considering a summary judgment application and the need to ensure that before such a defence is rejected, it must be very clear that the defendant does not have an arguable defence.

114. Perhaps the best way of summarising the approach which the court must take in assessing the arguability or otherwise of a defence advanced by a defendant is that summarised by Clarke J. in the Supreme Court in *McCaughey*, where he stated at para. 23:-

> *"Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in [Aer Rianta]. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant." (per Clarke J. at para. 23, page 759)*

(b) The Defendants' Evidence

115. What then is the "*cogent evidence*" put forward by the defendants in support of this proposed line of defence? It is necessary to start with and consider the affidavit evidence relied upon by the defendants.

116. The alleged joint venture agreement with EBS which it is asserted provided for non-recourse to the defendants is described in the various affidavits sworn by Mr. Burke and by Mr. Donnelly. Reliance is also placed by them on affidavits sworn by Mr. Burke's solicitor, Mr. Brooks, and by Mr. Deeney of AJS who was engaged by the defendants to negotiate with Promontoria following its acquisition of the loan. Both Mr. Burke and Mr. Donnelly in their affidavits explained that Mr. Burke was a builder and property developer, Mr. Donnelly was a property developer and Mr. Fleming was an architect. Mr. Burke and Mr. Donnelly and another individual had successfully developed and launched a development at Academy Square in Navan in October/November 2005. Mr. Fleming was the architect for that development and had worked with Mr. Donnelly in other developments over the years. Mr. Donnelly explained that Mr. Fleming had expressed an interest in getting involved in another property development by way of a partnership with his (i.e. Mr. Fleming's) input being the provision of architectural and planning services. Mr. Burke and Mr. Donnelly explained that in early 2006 they were approached by Ms. Widger, who had recently joined EBS, and who wished to "*join forces*" with the defendants to enable EBS to "*establish and develop a significant foothold in the building development side of the business [of EBS]*" (per Mr. Burke at para. 5 of his affidavit of 7th July, 2017). Mr. Burke stated that EBS wanted to create "*joint ventures between us on terms whereby finance would be provided and then drawdowns would then be serviced as loans until full planning permission was obtained for any specific site*" and that on realising full planning permission "*the loans in question would then formally convert into joint venture non-recourse loans*". He stated that "*the nature of the arrangement being suggested was that a joint venture would be created as between [the defendants] and the Building Society which would be characterised by an initial transitional loan facility followed by formal non-recourse joint venture agreements*" (again per Mr. Burke at para. 5 of that affidavit).

117. Mr. Donnelly explained that the sole reason for the Bridgeford Partnership (comprising the defendants) purchasing the site at Bridgeford, Drogheda, Co. Louth, was as a direct result of the approach made to them by Ms. Widger and her representations of "*a joint venture wherein in return for the Bridgeford partners' expertise and work in developing the Bridgeford site EBS would provide the necessary capital on a non-recourse basis*" (per Mr. Donnelly at para. 10 of his affidavit of 7th July, 2017).

118. Mr. Burke stated that on 31st May, 2006, Mr. Donnelly advised Ms. Widger of the site at Bridgeford and that there were various discussions between the defendants and Ms. Widger in relation to the alleged joint venture. Mr. Burke stated that he would not have entered into any transaction with EBS which provided for personal exposure as he was, at that time, already aware of "*a considerable softening and price resistance with the property market at or about that time*". He stated that "*the assurances and representations*" by Ms. Widger were "*the catalyst for the creation of drawdown facilities as part of a non-recourse joint venture*" and that "*it was agreed orally between EBS… [and the defendants] …that up and until such time as planning permission was obtained for the development… [the defendants] ...would service the loan*" and that "*once planning permission was obtained the loan facility would be formalised into a non-recourse joint venture…*" Mr. Burke stated that that reflected the terms on which he entered into a business arrangement with EBS (see para. 7 of Mr. Burke's affidavit of 7th July, 2017). Earlier he stated that he would not have entered into any formal loan on any other basis and that EBS "*misrepresented the position in a very significant and material way*" and sought to "*renege [on] the agreement reached between [EBS and the Defendants] prior to the drawdown of any monies for a non-recourse joint venture between the parties*" (para. 5 of that same affidavit).

119. Mr. Donnelly referred to several interactions which he had with Ms. Widger during the course of 2006 in which Ms. Widger pursued EBS's interest in looking for "*experienced developer clients with a view to partnering with them on a joint venture basis*" whereby EBS would provide 100% of the finance for the transaction to buy and develop a site while the developer clients would source the site and provide planning and development expertise (per para. 16 of Mr. Donnelly's affidavit of 7th July, 2017). It was in the context of those representations by Ms. Widger, Mr. Donnelly explained, that the defendants identified the site at Bridgeford which was then known as the Bridgeford Bar and Restaurant which had substantial grounds and by virtue of its planning zoning had development potential in the short-term. Mr. Donnelly explained that having approached Ms. Widger in relation to the site, Ms. Widger confirmed that EBS were satisfied for the Bridgeford partners (i.e. the defendants) to agree to purchase the property.

120. Mr. Donnelly identified three documents on which the defendants rely in support of their defence of an alleged joint venture non-recourse agreement. Those documents were a "*deal sheet*" or funding proposal from EBS dated 26th August, 2006 (the "August 2006 funding proposal"), a loan offer letter dated 17th October, 2006 (the "October 2006 loan offer") and a further loan offer dated 7th November, 2006 (the "November 2006 loan offer"). Funding was provided by EBS pursuant to the November 2006 loan offer initially and then restructured pursuant to the facility letter of 6th February, 2009 (as amended). I will consider these documents shortly as significant reliance is placed by the defendants on them in support of this proposed line of defence.

121. Both Mr. Burke and Mr. Donnelly stated on affidavit that EBS was precluded by its charter from including details of any joint venture agreement in the formal facility letter (including in the October 2006 loan offer and in subsequent loan offers). Despite its apparent significance, none of the parties put in evidence a copy of the EBS charter from the relevant time.

122. Both Mr. Burke and Mr. Donnelly stated that Ms. Widger represented and explained that the alleged joint venture agreement would be dealt with by way of a separate document after planning permission was obtained and a decision would be taken as to whether to continue jointly to develop the site or to sell it in order to realise a profit. It was further stated by Mr. Donnelly that if the Bridgeford site was sold after planning permission had been obtained, and prior to any further development, then EBS and the defendants would share the profits realised at that point. Mr. Donnelly explained that all of their dealings with EBS were on the basis that the parties had agreed a joint venture agreement and the defendants were introduced to others as partners of EBS at a lunch for developers hosted by EBS in November 2006. Mr. Donnelly explained that the acquisition of the Bridgeford site was completed on 5th January, 2007 and that planning permission was then sought and ultimately obtained in December 2007 for a development consisting of 175 units. He explained that after planning permission had been granted various options would then be reviewed by EBS and by the defendants with those options being to sell on the site with the benefit of planning permission or to complete the development by way of a joint venture with EBS in accordance with the "*previous discussions*" between the parties. In the interim period, Mr. Donnelly stated that the defendants were to service the interest on the loan and they had budgeted for one year's interest (see paras. 42-45 of Mr. Donnelly's affidavit of 7th July, 2017). Mr. Donnelly further stated in that affidavit that following the grant of planning permission, it was agreed with EBS that having regard to the state of the market at the time, the better option was to develop the site rather than to sell it on and that Ms. Widger agreed that EBS would finance the further development. Mr. Donnelly stated that EBS agreed to prepare a template for a joint venture agreement. However, Mr. Burke stated that the defendants were asked by Ms. Widger of EBS to provide a template of that agreement. Both stated that EBS agreed to review the interest rate "*going forward*".

123. During the course of early 2008, the defendants explained that EBS were experiencing difficulties in obtaining a satisfactory valuation and it was agreed that the defendants would make a revised planning application which would result in significant cost

savings and efficiencies during the construction phase. However, at around that time, the defendants apprehended that EBS was seeking to pull back from the joint venture. There were various meetings with EBS representatives and an exchange of emails in April and June 2008 on which the defendants rely in support of this proposed defence. I will consider those emails shortly. Following an email from Mark Kavanagh of EBS on 6th June, 2008, in which Mr. Donnelly describes Mr. Kavanagh "*purporting to resile from the original joint venture agreement*" (para. 63 of his affidavit of 7th July, 2017), the defendants by way of a "*goodwill gesture*" made an interest payment of €166,638.00 in respect of interest up to 10th April, 2008.

124. At around the same time, in June 2008, the defendants gave a detailed presentation of an amended development proposal which was rejected by EBS. Mr. Donnelly stated that the defendants were requested to prepare a scaled down development proposal which they did but it was rejected by EBS. At around that time (in August 2008) the premises at the Bridgeford site were destroyed by fire which led to the insurance claim referred to earlier which was paid in or about February/March 2009. By October 2008, Ms. Widger and Mr. Kavanagh were no longer involved with the defendants' loan and had been replaced by Conor Daly and Philip Butler. Mr. Donnelly referred to a meeting on 15th October 2008 which he described as a "difficult meeting" and stated that Mr. Daly made clear that he did not want the words "*joint venture*" used and stated that there would be no further discussion with EBS if reference to a joint venture was not "*taken off the table*" (para. 77 of Mr. Donnelly's affidavit of 7th July, 2017). Mr. Donnelly stated that Mr. Daly accepted that there was a "*profit share arrangement*" but there would be no further discussions with the defendants if they continued to refer to a joint venture. Mr. Fleming threatened to take legal action in connection with the alleged joint venture. That did not happen. There was an agreement in relation to the splitting of the insurance proceeds in a manner previously referred to. Mr. Donnelly then referred to the fact that the facility letter of 6th February, 2009, issued and was amended on 17th February, 2009.

125. That is broadly speaking the sequence of events which Mr. Donnelly outlined on behalf of all the defendants led to the issuing of the facility letter of 6th February, 2009 (as amended). The balance of Mr. Donnelly's affidavit of 7th July, 2017, dealt with what occurred thereafter including the transfer of the loan to NAMA in March 2010 after which the defendants dealt with EBS/NAMA and then AIB/NAMA until the loans were further sold to Promontoria in October 2015. The defendants contend that the manner in which their dealings with NAMA, and subsequently Promontoria, were conducted is also supportive of their contention of a joint venture non-recourse loan. The basis for this contention is that the defendants state that until the letter of demand of January 2017 no demand was made from the defendants to repay the debt and the discussions were always with a view to disposing of the Bridgeford site at the best possible price. A demand was not made of the defendants to repay the loan until January 2017.

126. It is the defendants' case that they would not have entered into the loan were it not for the agreement which they claimed was reached with EBS for a joint venture arrangement which provided for non-recourse to the defendants in respect of the loan.

127. In themselves, the averments made by the defendants in the several affidavits sworn by them and on their behalf in connection with the proceedings are assertions of the position and, in my view, would fall into the category of "*mere assertions*" described in the authorities in the absence of supporting documentation and, in particular, documentation pre-dating the facility letter of 6th February 2009 (as amended). It is necessary, therefore, to consider the documentation relied upon by the defendants. Before doing so it should be emphasised that Promontoria has not been in a position to adduce any evidence to rebut the factual assertions put forward by the defendants in relation to their dealings with EBS. Promontoria has relied on what it says are the clear terms of the facility letters of 6th February, 2009 (as amended) and the improbability or implausibility of any joint venture agreement of the type relied upon by the defendants. It also points to the fact that there is not a single document in existence which refers to the loan being granted to the defendants on a non-recourse basis.

(i) August 2006 Funding Proposal

128. The first document relied on by the defendants is the August 2006 funding proposal. This was contained in a letter dated 26th August, 2006 from Ms. Widger (described in the letter as EBS's "Head of Construction Finance, Construction Funding") to the defendants. The proposal was stated to be subject to formal approval by EBS. The proposal offered the defendants (as the borrower) €9.4 million with up to €8.5 million to assist in the acquisition of the Bridgeford site at a purchase price of €9.6 million, up to €800,000 to assist with payment of stamp duty on the purchase of the site and up to €100,000 to finance EBS's engagement fee. The term was to be an eighteen-month period. The proposal contained what counsel for Promontoria accepted at the hearing was a profit share element in the form of an arrangement in respect of a fee for EBS. There was to be an "*exit/refinance fee*" of 5% of the uplift of the value of the site in excess of €10 million which would be payable on either the sale of the land or the sale of the residential and commercial units on development and an independent valuation would be required to determine that uplift. As regards repayment, the proposal stated that interest would be payable by the defendants monthly for the duration of the facility and that "*principal repayment will be due on expiry of the facility and will be subject to review*" and that "*facility will be on demand*". The security for the proposed loan was a first fixed charge over the site and joint and several guarantees of the defendants (a curious provision in circumstances where the defendants were themselves personally borrowing). There were then some conditions precedent including a requirement that EBS be satisfied with statements of affairs in respect of the defendants, certified confirmation from their accountant that the defendants' tax affairs were in order and an independent valuation confirming a minimum valuation of €9.6 million in relation to the site with potential site value and end values on development should planning permission for apartments be granted and the value of the site in the event that planning was not successful. It was then stated that "*in the event that planning is not achieved within a period of 18 months then the facility will be review (sic) thereafter in order to determine an agreed strategy*".

129. It is apparent that there was indeed a form of profit share element provided for in the proposal (as accepted by counsel for Promontoria at the hearing) as well as there being a reference to the need to determine an "*agreed strategy*" in the event that planning permission was not achieved within an eighteen-month period. However, the proposal did expressly state that the principal would be repayable on the expiry of the facility and would be subject to review and that there were to be joint and several guarantees from the defendants (curiously, as they were the personal borrowers). There is no reference in this proposal to non-recourse to the defendants.

(ii) October 2006 Loan Offer

130. The next document relied upon is the October 2006 loan offer. That offer was for an amount of €9.4 million. The term was stated to be a one-year interest only loan. The purpose was to purchase the Bridgeford site at a cost of €9.6 million. Repayments were stated to be quarterly payments comprising interest only based on the specified interest rate. The loan offer then stated "*upon expiry of the loan term, the principal balance shall be repaid in full*". The security was stated to be the mortgage. There were certain valuation requirements. Financial information required included the requirement that EBS be satisfied with an independent confirmation that the defendants' tax affairs were up to date and that it be satisfied with the accounts of Mr. Burke's construction company and Mr. Fleming's architect's practice. The offer then stated that "*the liability of the individuals named as the borrower shall be joint and several*". An arrangement fee of €150,000 was required. The offer further stated that in the event of additional planning permission issuing in respect of the site, a further fee of €3,000 per unit in respect of the total number of units provided for under that planning permission would be payable by the defendants to EBS subject to a minimum fee of €300,000 and that that further fee would be payable in equal amounts out of the sale of the completed individual units or the sale on of the site or the refinancing of the facility.

It further stated that if the planning application be withdrawn or refused then the minimum fee of €300,000 would be payable "*on the sale on of the site or a refinancing of the facility*". The various events of default were referred to at clause 18 of the offer.

131. It is significant that this offer required that on expiry of the term of the loan the principal would be repaid in full and that the liability of the defendants was to be joint and several. That was so notwithstanding the provision for an additional fee to EBS in the event of an improved planning permission issuing in respect of the site. Nowhere in this offer is there a reference to the loan being offered on a non-recourse basis.

(iii) November 2006 Loan Offer

132. The October 2006 loan offer was replaced by the November 2006 loan offer which was contained in a letter from EBS to the defendants of 7th November, 2006. That letter differed in a number of respects from the October 2006 offer. It provided for the term of the loan as being one year and six months (again on an interest only basis). The offer also contained a provision that upon expiry of the term the principal balance was to be repaid in full and that the liability of the defendants was to be joint and several. The requirement for EBS to be satisfied in relation to the defendants' tax affairs and the accounts of Mr. Burke's company and Mr. Fleming's architect's practice were also included. The initial arrangement fee was reduced to €100,000 and the further fee per unit in the event of additional planning permission being granted was reduced to €2,500 per unit while the minimum fee payable to EBS in the event of such additional permission being granted was kept at €300,000 which was to be payable in the same way as set out in the October 2006 offer. Apart from that, the November 2006 loan offer was identical.

133. The November 2006 loan offer was accepted by the defendants and the loan facility was drawn down on foot of that loan offer. It provided for repayment of the principal on expiry of the term and for the defendants' liability to be joint and several and did not provide for there to be non-recourse to the defendants.

(iv) 2008 Correspondence

134. As noted earlier, the defendants rely on an exchange of correspondence with EBS in the course of 2008 (arising in the context of the various discussions they were having during that period with representatives of the EBS). The first piece of correspondence relied on was a letter from Mr. Donnelly to Ms. Widger of 2nd April, 2008, which referred to an agreement by EBS to roll up the interest on the facility for the current year which was subject to the provision by the defendants of certain information and a specific development proposal for the Bridgeford site later in 2008. The letter also referred to an agreement in principle by EBS to reduce the interest rate effective from the grant of planning permission in December 2007. The letter contained the following paragraph:

> *"Once again, I confirm that we will meet with you later in the year to discuss and agree our development finance proposals for the site, included in same can be your previous suggestion of a joint venture. In the interim period, we will endeavour to enhance and refine the existing planning permission. We are confident that we can improve the scheme even further as well as increasing the number of units."*

135. It can be seen therefore that this letter did refer to a "previous suggestion of a joint venture" by Ms. Widger. It does not, however, say anything about the loan then in existence having been provided on a non-recourse basis.

136. Following a meeting in late May 2008, Mr. Kavanagh sent an email to Mr. Donnelly and Mr. Fleming on 4th June, 2008. Mr. Kavanagh stated that he was sending that email following a meeting with EBS's Head of Credit and a discussion in relation to the situation concerning the Bridgeford site and the various options. Mr. Kavanagh stated:-

> *"Our credit department are adamant that no new facility or JV can be considered while the loan is non performing and showing any arrears."*

He stated that it would be in direct contravention of EBS's credit policy to advance monies or to enter into any credit agreement with a customer who was in default. The email stated that a payment would have to be made to bring the account up to date. Mr. Kavanagh continued:-

> *"Once that is done, we will need the following information to progress a JV proposal/application ..."*

Certain information was then requested.

137. The defendants state that a sum of in excess of €166,000 was paid following this email as a goodwill gesture. It should be said, however, that notwithstanding the reference to a "JV" or joint venture, the email is phrased in terms of the future rather than the present. In other words, certain information was being required in order to "*progress*" a "*proposal*" or "*application*" for a joint venture in the future rather than recognising or supporting the existence of such a joint venture at the time. Even if it could be interpreted as referring to an existing joint venture arrangement (and that would not appear to me to be consistent with the terminology used), there was no suggestion anywhere in that email of any agreement by EBS that the current loan, still less any future loan, was or would be on a non-recourse basis.

(v) Facility Letter of 6th February 2009 (as amended)

138. The loan provided on foot of the November 2006 loan offer was replaced and restructured pursuant to the facility letter of 6th February, 2009 (as amended). The affidavits from the defendants are somewhat coy in how they describe the lead up to the provision of the facility letter of 6th February, 2009. They are almost entirely silent on the immediate lead up to that letter and to the circumstances in which they signed the letter with the apparent benefit of legal advice. I have referred in some detail earlier to the facility letter of 6th February, 2009 and it is unnecessary to repeat what I have already said in relation to it. Its purpose was to restructure the existing loan (which had been provided on foot of the November 2006 loan offer) and to provide a capitalised interest facility. It expressly provided for the repayment of the principal balance upon expiry of the loan term (which became two years on foot of the amendment effected by the letter of 17th February, 2009). It provided for the defendants' liability to be joint and several and the requirement for EBS to be satisfied that the defendants tax affairs were in order. It did not include any requirement to provide information in relation to Mr. Burke's company or Mr. Fleming's architect's practice. It did contain provision, as noted earlier, for a solicitors' undertaking in relation to the insurance proceeds arising from the fire and for the entitlement for EBS to use €700,000 of those proceeds to discharge arrears of €538,000 existing on the account with the remainder being used to reduce the loan balance. Again as noted earlier, it is evident from the facility letter that the defendants were legally represented. The defendants signed the facility letter of 6th February, 2009 and the amended letter of 17th February, 2009 and confirmed that they had had the opportunity of obtaining legal advice. These facility letters contained no reference to the restructured loan being provided on a non-recourse basis. In my view, they are consistent only with the loan being provided on the basis that the loan would be repayable on the expiry of the term and that the defendants would be jointly and severally liable to repay the loan.

139. Whatever may have been the arrangement between the defendants and EBS at the time of the November 2006 loan offer or during the course of the discussions and interactions with the EBS, either before or after that loan offer, (and there is nothing in any of the documents relied upon by the defendants to suggest that any loan was made to them on a non-recourse basis) it is inconceivable that the defendants would have signed and agreed to the terms of the facility letter of 6th February, 2009 (as amended) or that their solicitors would have permitted them to do so without expressly recording that there was in place a joint venture arrangement which provided for non-recourse to the defendants, if that were indeed the case. The terms of the facility letter of 6th February, 2009 (as amended) are entirely inconsistent with a joint venture agreement still less an agreement providing for non-recourse to the defendants. The terms are only consistent with an agreement whereby EBS would have recourse to the defendants on a joint and several liability basis. Again it seems to me that whatever agreement or arrangement may have been in place when the parties agreed the terms of the November 2006 loan offer (and it does not seem to me that the documentation supports any agreement that there was to be non-recourse to the defendants), any such alleged agreement did not survive the terms of the agreed facility letter of 6th February, 2009 (as amended).

(vi) Subsequent Dealings

140. Insofar as the defendants rely on subsequent dealings in support of their contention that the loan was provided on a non-recourse basis, it seems to me that the court has to be cautious in how it assesses any subsequent material and dealings between the parties. The authorities make clear that it is difficult to challenge or "*quarrel with*" the terms of a written contract on the basis of the subsequent behaviour of the parties or subsequent conduct (see, for example, per Charleton J. in *Barker*). Among the subsequent documents the defendants seek to rely on is a business plan submitted to NAMA in 2011. As it happens, Promontoria originally sought to rely on that business plan in support of an alleged acknowledgment of the debt by the defendants but in circumstances where it did not even have a copy of the business plan. In response to that contention, Mr. Donnelly exhibited a copy of the "*most advanced draft*" of that business plan in his possession. It did not make any proposal in relation to the defendants' payment of any residual debt but rather made various proposals in relation to the development of the site. It is true that s.1.1 of the draft of the business plan exhibited stated that "*finance was provided by EBS and the intention was to obtain maximum planning on the site in 2007 and develop it out as a joint venture with EBS over the following years*" and that "*a personal loan was provided to the partners on this basis". It also stated (at s.10) under the heading "Legal Considerations*" as follows:

> "*There are no legal issues in relation to the Bridgeford site ???? J.V. ??????".*

141. It seems to me that this falls far short of establishing either the existence of a joint venture arrangement with the EBS or more particularly any alleged agreement that there was to be no recourse to the defendants in respect of the loan.

142. The next document sought to be relied upon by the defendants is a letter from Mr. Deeney on behalf of the defendants to Capita dated 26th May, 2016 (in the course of his negotiations with Capita on behalf of Promontoria). Having referred to the decision by Capita/Promontoria to decline a debt settlement proposal made by Mr. Deeney on behalf of the defendants, Mr. Deeney made a complaint to Capita's Customer Appeals Board on 26th May, 2016. In that letter of complaint Mr. Deeney stated that:

> *"Regardless on the wording of the EBS Loan Agreement our Client's (sic) do not accept they are personally liability (sic) for the shortfall that exists on the Partnership loan" and that "this facility was 'sold' to our Client's (sic) by EBS on the basis of a joint venture and we do not believe that Capita/Promontoria (Arrow) Ltd has adequately investigate (sic) this aspect of the loan with the original loan provider, EBS".*

143. Mr. Deeney's letter then refers to the defendants' willingness to do what they could to maximise the value of the security with Capita/Promontoria and that they saw that as "*their responsibility as joint venture partners*". Mr. Deeney further stated that:

> *"In the event that any enforcement action is initiated against our Client's (sic) personally they will have no option but to subpoena the former EBS officials who 'sold' them this joint venture. We would also add that there is significant reference in correspondence between our Client's (sic) and EBS to the loan being a joint venture."*

144. Again it seems to me that it is necessary to be cautious and somewhat sceptical about the subsequent description of the nature of the relationship as put forward by Mr. Deeney in that letter. Mr. Deeney was making representations, in that letter, on behalf of his clients. While his apparent acceptance that the wording of the facility letter of 6th February, 2009 (as amended) would support an entitlement to pursue the defendants personally in respect of the loan, his assertion that the defendants are not personally liable on the basis of an alleged joint venture with EBS must be seen in the context of Mr. Deeney seeking to make the best case he could for his clients on the basis of his instructions. As I have indicated, the documentation does not support any agreement that there would be no recourse to the defendants in respect of the loan. Nor, insofar as I can ascertain, is there "*significant reference*" in the contemporaneous documentation which I have seen to the defendants and EBS being in a joint venture. I do not believe that Mr. Deeney's representations on behalf of his clients, the defendants, are sufficient to displace or negate the clear express terms of the facility letter of 6th February, 2009 (as amended on 17th February, 2009).

145. The next matter relied upon by the defendants in support of this proposed defence is the fact that at no stage up to 2017 was any demand for repayment made of the defendants personally. The defendants maintain that when the EBS loan was transferred to NAMA, and in the period thereafter and up until its acquisition by Promontoria, there was no demand made of them or reference to the defendants being personally liable for the loan and that this supports their assertion that the loan was on a non-recourse basis.

146. However, the subsequent conduct by EBS and NAMA is not entirely unequivocal. It is understandable that efforts would first have been made to recover what could be recovered from the development or sale of the site itself before having recourse to the defendants personally. The fact that this was not done immediately by EBS or by NAMA is not necessarily indicative of an acceptance that the defendants do not bear any personal liability for the loan. Even if the subsequent conduct were unequivocal to that effect (and I do not believe that it is), it is very difficult to see how such subsequent conduct could negate or vary the express terms of the relevant facility letters. I do not believe that it does.

(c) Summary of conclusions on the evidence

147. In the circumstances, the fundamental problem for the defendants in this case is that the facility letter of 6th February, 2009 (as amended) is clear in its terms that the loan was repayable on its expiry (i.e. after two years) and that the defendants were personally liable to repay it on a joint and several basis. None of the documents which predate the facility letter of 6th February, 2009 on which the defendants rely contain any reference to the loan being provided on a non-recourse basis or on any limited recourse basis (unlike the situation in *Galvin*). The documents which post-date the facility letter of 6th February, 2009 (as amended) such as the draft business plan are similarly silent on the loan being on a non-recourse basis. The only document which so asserts is Mr. Deeney's representation to Capita of 26th May, 2016, more than seven years after the loan was made.

148. In my view, having regard to the "*formidable obstacles*" faced by the defendants in light of the clear terms of the agreement contained in the facility letter of 6th February, 2009 (as amended), the defendants have not established an arguable case that the loan was provided to them on a non-recourse basis. In my view, it is very clear that the defendants do not have an arguable defence that the loan was provided on a non-recourse basis. Their assertions on affidavit (notwithstanding the absence of any direct contradictory evidence from Promontoria) are mere assertions which are unsupported by and are inconsistent with the contemporaneous documentation and do not afford a sufficient basis for the court to conclude that Promontoria's claim should be adjourned to plenary hearing on the basis of this defence. I am satisfied that it would not be appropriate to adjourn Promontoria's claim to plenary hearing on the basis of this defence. The defendant's assertions on affidavit are "*mere assertions*" which are not supported by any contemporaneous documentation, fly in the face of the facility letter of 6th February, 2009 (as amended) and do not amount to "*cogent evidence*" which would entitle me to conclude that they have an arguable defence on this ground.

(d) Counterclaim

149. Finally, in this context, the defendants have indicated an intention to counterclaim against Promontoria. It was made clear by Mr. Burke in his written submissions and in oral submissions on his behalf that he intends to seek set-off or counterclaim against Promontoria arising from the misrepresentations allegedly made by EBS and also to seek to enforce the alleged collateral contract to the effect that the loan was provided on a non-recourse basis. In oral submissions on his behalf it was indicated by his counsel that Mr. Burke would seek a declaration to the effect that the loan was provided on a non-recourse basis, as well as seeking damages for misrepresentation. While the question of a counterclaim was not dealt with expressly in submissions on behalf of Mr. Donnelly and Mr. Fleming, it is evident from Mr. Donnelly's affidavit of 7th of July, 2017 that they do wish to counterclaim.

150. While the detail of any proposed or intended counterclaim was not set out extensively in the submissions or affidavits on behalf of the defendants, on the assumption that the intended counterclaim is for declaratory relief that the loan was provided on a non-recourse basis and/or for damages for alleged breach of contract and misrepresentation, it is likely, even on the basis of s. 6 of the Statute, that any such counterclaim would be statute barred (insofar as the counterclaim for damages is concerned) and precluded by virtue of *laches* (in the case of any proposed declaration). A similar conclusion was reached by Kelly J. in the High Court in *McCaughey* in relation to a proposed counterclaim in that case. However, even if any such counterclaim would not be statute barred or otherwise precluded by *laches* (and I am not making any conclusive findings in that regard), I would not have permitted such counterclaim to be used in order to stay or prevent execution on foot of any judgment which Promontoria might obtain (but for the raising by the defendants of an arguable defence based on the Statute in light of my earlier conclusions). In other words, had I not found that the defendants had established an arguable defence based on the Statute and directed that that issue proceed to a further hearing, I would not have been prepared to grant a stay of execution on foot of the summary judgment to which Promontoria would otherwise have been entitled on its application but for that conclusion on the Statute. In reaching that conclusion in relation to the counterclaim, I have taken into account and applied the principles set out by Clarke J. in the High Court in *Moohan v. S&R Motors (Donegal) Limited* [2008] 3 I.R. 650, in particular, at para. 4.6 of his judgment (at p. 656) which were approved of and applied by the High Court (Kelly J.) in *McCaughey*.

Summary of Conclusions

151. In summary, I have concluded that the defendants have raised an arguable defence to the effect that Promontoria's claim is statute barred. I have concluded that the defendants are entitled to have that matter proceed to a further hearing, which may be the trial of a preliminary issue on the Statute where the defendants are likely to be the moving parties on the issue and where the defendants may seek to obtain discovery of certain documentation in respect of the Statute defence. I have concluded that it would not be appropriate for me to resolve the Statute issue on this summary application as it is not the trial of a preliminary issue and on the basis that there are disputed issues of fact in respect of which discovery may be necessary.

152. I have concluded that the defendants have not raised an arguable defence in relation to the other intended defences which they wish to raise. Specifically, the defendants have not raised an arguable defence in relation to the admissibility of the evidence adduced on behalf of Promontoria on its application for summary judgment or in relation to the proof of transfer of the defendant's EBS loan to Promontoria or in relation to the existence of an alleged joint venture agreement under which there was to be no recourse to the defendants in respect of the repayment of the loan. On each of these proposed defences, I have concluded that the defendants have not raised an arguable defence and that it is very clear that the defendants have no defence to Promontoria's claim.

153. I am satisfied on the basis of the authorities discussed earlier in this judgment that it is open to me under O. 37 rr. 7 and 10 RSC to give the defendants leave to defend the proceedings on the grounds of the Statute only, but to refuse such leave in relation to any of the other intended defences. I am satisfied that this is consistent with the approach taken by the High Court in *Aktiv Kapital* and in *Bussoleno* and by the Court of Appeal in *Kelleher*.

154. I will discuss with counsel the precise terms of the order to be made in light of my conclusions.