Neutral Citation Number: [2019] EWHC 2463 (Comm)

Case No: C40MA020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)

Manchester Civil Justice Centre.
1 Bridge Street West,
Manchester
M60 9DJ

Date: 20 September 2019

Before :

HIS HONOUR JUDGE PEARCE

- -

Between :

BANK OF BARODA	**Claimant**
- and -	
(1) Mrs ANNE MANIAR	
(2) Mr NAEEM MANIAR	**Defendants**

- -
- -

Mr BEN HARDING (instructed by **KENNEDYS LAW LLP**) for the **Claimant**
Mr SHAIL PATEL (instructed by **FIELDFISHER LLP**) for the **Defendants**

Hearing dates: 1st – 3rd April 2019

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JUDGMENT

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Pearce :

1. In this matter, the Claimant ("the bank") claims sums due pursuant to deeds by which the Defendants[1] guaranteed and/or indemnified the liabilities to the

[1] Referred to in this judgment collectively as the Defendants and individually as Mrs Maniar and Mr Maniar respectively.

Claimant of ACCHL Ltd ("ACCHL"). The Defendants deny liability on a number of grounds set out more fully below.

2. The trial took place on 1 to 3 April 2019.

3. During the trial the following witnesses gave evidence on behalf of the Claimant:

   (a) Mr Michael Walshe, by statement dated 16 May 2017 and oral evidence;

   (b) Mr Brendan Frawley, by statement dated 16 May 2017;

   (c) Mr Shailendra Singh, by statement dated 17 May 2017;

   (d) Mrs Anne Kershaw, by statements dated 18 May 2017, 20 June 2017 and 12 October 2018 and oral evidence;

   (e) Mr Rossa Fanning SC, by statement dated 21 January 2019, joint report with Mr McCarthy dated 11 March 2019 and oral evidence.

4. On behalf of the Defendants, evidence was given by:

   (a) Mrs Maniar, by statement dated 12 October 2018 and oral evidence;

   (b) Mr Maniar by statement dated 12 October 2018 and oral evidence;

   (c) Mr Ross Gorman, by statement dated 12 October 2018 and oral evidence;

   (d) Mr Gary McCarthy SC, by statements dated 8 February 2019 and 15 March 2019, together with the joint statement with Mr Fanning of 11 March 2019 and his oral evidence.

5. At the end of the trial, the parties made oral submissions on certain of the issues and an order was made for the service written closing submissions on other issues, with a right of reply. Those submissions were filed by 8 May 2019. The Claimant served submissions dated 29 April 2019, with a reply to the Defendants' submissions dated 8 May 2019. The Defendants served

submissions dated 26 April 2019, with a reply to the Claimant's submissions dated 8 May 2019.

Background

6. The Claimant is an Indian bank which carries on business in the United Kingdom.

7. The Defendants are a married couple. In 1998, Mr Maniar established Aim Cash and Carry Limited, a company registered in Ireland. Its business involved importing goods and selling wholesale to traders in Ireland. In 2014, the company changed its name to ACCHL[2]. Throughout the relevant period, he and Mrs Maniar were directors of the company, though Mr Maniar was the person who took the lead in running and managing the company.

8. ACCHL entered into a credit facility with the Bank in 2005. The facility was renewed from time to time.

9. In 2008, ACCHL acquired the exclusive rights to the Iceland franchise in Ireland. It opened a number of supermarkets under that name.

10. In 2010, the Defendants each entered into deeds of guarantee in respect of the liability of the company to the Bank. Both deeds were stated to be subject to English law and the parties submitted to the non-exclusive jurisdiction of the High Court of Justice in England.

11. In 2015, ACCHL entered into examinership pursuant to Part 10 of the Companies Act 2010. The chronology of that process was as follows:

    1.7.15 Originating notice of motion presented to the Circuit Court, Dublin Circuit by Cosgrove Gaynard on behalf of ACCHL for the appointment of an examiner.

    8.7.15 The Circuit Court granted ACCHL protection and directed a hearing on 20.7.15.

    17.7.15 Kennedys Solicitors, on behalf of Claimant, gave notice of intention to appear at hearing on 20.7.15.

[2] Referred to as ACCHL, whether in reference to events before or after the name change.

27.7.15 First hearing of the petition. Judge Linnane made an order appointing Mr Joseph Walsh as Examiner and adjourning the matter to 9.9.15 with protection.

7.9.15 Mr Walsh reported to the court proposing a meeting of members and creditors on 18.9.15.

18.9.15 Claimant sent letters to the Defendants by International Recorded Delivery from Manchester containing offers pursuant to Section 549. The offers were copied to a number of people including the First Defendant and Ms Susan Cosgrave, solicitor for ACCHL, under cover of an email from the Claimant's solicitor (Mr Walshe of Kennedys) stating, "*Please find attached a copy of the Section 549(2) Notice which has been served in respect of the personal guarantees held by Bank of Baroda."* Mr Walshe received a message stating that delivery to Mr Maniar's email address had failed because "*the email address you entered couldn't be found."*

22.9.15 An Post[3] attempted to deliver the letters posted by International Recorded Delivery; no one was at the Defendants' home address so notices were left stating that the letters would be held at the depot for 16 working days.

23.9.15 A meeting of the creditors and members of ACCHL took place.

24.9.15 Mr Walshe submitted his report to the Circuit Court.

30.9.15 Hearing before the Circuit court. Examiner's proposals and scheme of arrangement approved.

1.10.15 Mr Maniar collected the An Post notices from the local post office.

7.10.15 Examiner discharged.

9.10.15 Examiner sends cheque for €13,057.97 to the Claimant.

12. On 16 October 2015, the Bank demanded payment of €439,770.13 from the Defendants pursuant to the deeds.

13. On 21 March 2016, the Claimant issued the claim herein for €426,754.83 (the sum claimed on 16 October 2015 less credit for the payment made by the examiner on 9 October 2015, though the figures do not exactly tally). These proceedings have had a convoluted history, set out at paragraph 24 of the Claimant's opening submissions. That history is not relevant to the matters that I have to decide.

[3] The Irish state postal service

14. Meanwhile, in or around January 2017, the Defendants each commenced the process of entering into a Debt Settlement Arrangement ("DSA"), a scheme pursuant to Part 3 of Chapter 3 of the Personal Insolvency Act 2012. Ms Claire Kelly of Kildare Audit and Accountancy Services was appointed the Personal Insolvency Practitioner in respect of the arrangements.

15. The Circuit Court approved the DSAs on 12 January 2018. Under the DSAs, the Claimant sought to prove for a costs order but did not seek to prove in respect of liability under the personal guarantees. In the event, the sum of €1 was included in the list of creditors as a contingent liability to the Claimant to reflect the potential liability under the guarantees[4]. With the addition of the costs liability, the Claimant was paid the sum of €1,434.74 out of the DSAs.

16. On 22 June 2018, the Claimant applied for summary judgment in these proceedings. The application notice stated, "*The Defendants have no reasonable prospect of defending the claim because they entered into a debt settlement arrangement (DSA) in Ireland on 12 January 2018 under which the Claimant received a distribution."* The application was supported by a witness statement from a solicitor, Mrs Kershaw, who stated, *"The Bank cannot recover any further monies for the debt as it has been paid the full sum allocated to the debt … the whole claim has been compromised under the DSA."*

The Relevant Scheme of Irish Law - Examinership

17. Many of the issues in this case involve consideration of the scheme of examinership within Irish Insolvency Law. That scheme is set out in Chapter 4 of Part 10 of the Companies Act 2014 ("CA 2014"). In essence, it involves the appointment of an examiner who formulates a proposal for the restructuring of a company in financial difficulty. Such a scheme will typically involve the purchase of the company by a new investor and the writing down of debt. The examiner consults parties who may be affected by the proposed scheme and reports to the court at a "confirmation hearing" where the court may confirm,

[4] Ms Kelly explains the reason for this at paragraphs 17 to 26 of her statement dated 5 July 2018.

modify or reject the proposals. In the meantime, the court gives protection to the company against winding up or any enforcement of its liabilities.

18. In Re Traffic Group Limited [2008] 3 IR 253 at 260, Clarke J described the purpose of examinership under Irish Law as being:

"*…to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and of equal or indeed greater importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located … It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."*

19. Section 548 of the CA 2014 provides the general rule by which liability under a guarantee or indemnity is not affected by a compromise or scheme of arrangement in an examinership. This rule is however subject to an important exception, by virtue of Section 549 which provides:

"***Enforcement by creditor of liability: restrictions in that regard unless certain procedure employed to the benefit of third person***

549. (1) If the creditor proposes to enforce, by legal proceedings or otherwise, the obligation of the third person in respect of the liability, then he or she shall –

(a) if 14 days or more notice is given of such meeting, at least 14 days before the day on which the meeting is convened under section 540[5] *to consider the proposals is held, or*

(b) if less than 14 days' notice is given of such meeting, not more than 48 hours after he or she has received notice of such meeting,

serve a notice on the third person containing the following offer.

[5] That is to say a meeting of members or creditors (or classes of either group) summoned to consider the examiner's proposals for a compromise or scheme of arrangement.

(3) That offer is an offer in writing by the creditor to transfer to the third person (which the creditor is, by virtue of this section, empowered to do) any rights, so far as they relate to the debt, he or she may have under section 540 to vote in respect of the proposals for a compromise or scheme of arrangement in relation to the company…

(5) If the creditor fails to make the offer referred to in subsection (1) in accordance with that subsection, then, subject to subsection (6), the creditor may not enforce by legal proceedings or otherwise the obligation of the third person in respect of the liability."

20. It is immediately notable that, in order to comply with Section 549(1), the creditor may need to act very speedily – indeed, it may require the creditor to serve the Section 549 notice on the third party on the same day as they receive notice of the Section 540 meeting.

The Debt Settlement Arrangement

21. The Court has before it limited evidence on the nature of Debt Settlement Arrangements but the summary of the nature of DSAs within the statement of Mark Lonergan, barrister at the Irish Bar, dated 3 August 2018 and annexed to the witness statement of Mr Maniar dated 3 August 2018 is accepted to be a reasonable summary of the process for the purposes of this case:

"*Debt settlement Arrangement (DSA) is one of 3 debt resolution mechanisms introduced by the Personal Insolvency Act 2012 for people who cannot afford to pay their personal debts…The Debt Settlement Arrangement applies to the agreed settlement of unsecured debts usually over a period of 5 years…When the DSA concludes successfully, the debts that it covers will be fully discharged and the debtor will be solvent again. The debtor must make his proposal through a Personal Insolvency Practitioner (PIP). The DSA must then be agreed then approved at a creditors' meeting. The proposed DSA must get the support of creditors representing at least 65% of the total debt that it covers. DSA may involve the debtor making regular payments of agreed amounts to your* (sic) *Personal Insolvency Practitioner who will distribute them to your creditors per the terms of the DSA. The creditors may not take*

any action against the debtor to enforce the debt during the lifetime of the DSA. If one keeps to the terms of the DSA, the rest of the debt to the creditors that it covered will be discharged and the debtor will be solvent again."

22. The Irish law experts agree that: "*the underlying claim by Bank of Baroda against the Maniars on foot of the guarantee has been compromised as a matter of Irish Law by the DSA under Part 3 of the Personal Insolvency Act 2012 which was approved by an Irish Court on 12 January 2018 and not appealed."*

The Issues

23. The defence to this claim turns on:

(a) whether absence of proper notice under Section 549 of the Companies Act 2014 would defeat the claim;

(b) if so, whether proper notice was given (or should be deemed to have been given);

(c) what the effect is of the DSAs.

24. There is also an issue as to the correct quantification of the claim.

25. There is common ground as to the issues that the court must decide.

(a) Section 549

i. Is the effect of section 549 such that these proceedings may not be pursued unless there is good notice under that section?

(b) Service

i. What is required for actual service?

ii. Was actual service effected?

iii. Is it open to any court[6] other than the Irish court conducting the examinership proceedings to deem service to have been good?

iv. Is it open to an English court to deem service good?

v. If so, should the court deem service to be good?

(c) Debt settlement agreements

i. What effects do the DSAs have on any liability under the deeds?

(d) Quantum

i. Is any indebtedness of the Defendants to be calculated having regard to the alleged offset agreement?

26. At the start of the trial, counsel for the Defendants raised an issue as to the manner in which the Claimant was seeking to advance the argument about the effect of the DSAs. The DSAs had not been entered into when proceedings were issued but by paragraph 28 of the Amended Defence, the Defendants argued that the Claimant was bound by the DSAs, as a result of which any judgment in the Claimant's favour is limited to the payment of €1,434.73 made to the Claimant in the DSA; alternatively that the Claimant is estopped from denying that this is the effect of the DSAs; alternatively that the effect of the DSAs is to discharge all liability of the Defendants. The Claimant denied in the Amended Reply that the court should apply Irish Law to give effect to the DSAs and denied that any estoppel arose. (In the event the argument based on estoppel has not been pursued.)

27. In their joint statement, the experts agreed, as set out above, that the effect in Irish law of the DSAs was that the underlying claim by the Bank under the deeds has been compromised. However, in its skeleton argument for the purpose of the trial, the Claimant asserted that, as a matter of Irish law, the DSAs do not have the effect contended for by the Defendants. The Defendants

[6] This question can most obviously tested by considering whether any Irish court other than that conducting the examinership could deem service good. If the answer is no, the same must apply in the domestic jurisdiction. If the answer is yes, the separate question in the following sub-paragraph arises.

objected to this line of argument since it had neither been pleaded nor addressed by the experts. I upheld that objection for reasons given at the time, thereby in effect limiting the Claimant to its pleaded case.

28. The Defendants complain that the Claimant's closing submissions resurrect those arguments that I ruled could not be relied upon. The Claimant counters that this is not so - its pleaded case is that it is for the Defendants to prove Irish law; the underlying point it seeks to make is that the experts' agreement as to Irish law on the effect of the DSAs is unpersuasive, the arguments advanced in the closing submissions simply being examples of why that is so.

29. I agree with the Defendants that it is not now open to the Claimant to take these points. It is unfair for a party to seek to undermine the agreed position of experts by positive assertions as to the matters upon which the experts have opined without giving the opposite party and the experts an opportunity to comment on those matters. That unfairness is not mitigated by the party saying that it is not seeking to establish a positive case that counters that of the experts, but rather is merely seeking to persuade the court that the common position of the experts is in fact not made out on the balance of probabilities. Whilst I accept the Claimant's point that it is always for the court to weigh the evidence of experts and there are circumstances in which the court may reject a jointly agreed position, that does not undermine the procedural unfairness that flows from springing a previously unexplored line of argument on the experts, the opponent and the court. The Claimant is therefore not at liberty to advance a positive case on this issue.

30. As it happens, for reasons set out below, I find the Claimant's argument to be unpersuasive in any event. Even if it had been permitted to advance the argument, it would not have succeeded.

Evidence – the Claimant's witnesses

31. Mr Walshe was the partner in the Dublin office of Kennedys Solicitors who had conduct of the examinership on behalf of the Claimant. In his statement, he explains the nature of examinership. That description is largely uncontroversial. He states that the time scales of examinerships can prove

problematic in particular because generally notice of a meeting under section 540 of the CA 2014 is given less than 14 days before the meeting is to take place, so that the notice required to be served on the third party under section 549(1)(a) is often limited to 48 hours. He asserts that "*the courts are very much alive to the risk of the short time limit being abused by evasive guarantors and are known to exercise their wide discretion under Order 9, rule 15 of the Rules of the Superior Courts to deem service good."* I am of course conscious that he was not called as an expert witness. In any event, his evidence goes no further than the agreed statement of the experts that a court may deem service to be good where there is proof of an attempt to evade service.

32. As to notice in this case, Mr Walshe states that Hughes Blake, who were handling the examinership, gave notice of a meeting of members and creditors of ACCHL by email received at 15.19 on 18 September 2015. The meeting was due to take place on 23 September 2015, less than 14 days thence. In consequence, the notice under section 549 needed to be served on the Defendants by 21 September 2015, the usual 48 hours' notice being extended because it otherwise expired on a Sunday[7]. The Claimant sent notice to the Defendants by International Recorded Delivery and Mr Walshe emailed a copy of the notice to Susan Cosgrove of Cosgrove Gaynard solicitors, who were acting for ACCHL in the examinership. He believed that she was also acting for the Defendants .

33. In cross examination, Mr Walshe was asked about why he had copied Mr Maniar into the email to Ms Cosgrove. He accepted that, as a matter of principle, in Ireland, a lawyer should not contact directly a represented party (the obvious inference from the fact that he copied Mr Maniar in to the email being that he did not believe Ms Cosgrove to represent Mr Maniar). Mr Walshe emphasised that he felt it was necessary to draw the attention of people who were in daily contact with Mr Maniar to the section 549 notice.

34. Mr Walshe was asked about the delivery failure receipt that he received in respect of the email to Mr Maniar later on 18 September 2015. He realised that

[7] See Mr McCarthy's report at paragraph 31(iii)..

there was a risk that Mr Maniar would not get the document within 48 hours. He said, "*I was satisfied that in the time between Friday and ensuing Monday that between Ms Cosgrove and Mr Noone*[8]*, it would be brought to the attention that the bank had taken that step (*sc. of serving section 549 notices)."

35. Mr Walshe accepted that, having received the delivery failure email, there were other steps that could have been taken. He could have tried to identify another email address for Mr Maniar, could have tried to find a phone number or could have arranged for the documents to be served personally or delivered to his home address.

36. He further accepted that, in none of the written communications did Cosgrove Gaynard say that they were acting for the Defendants personally, nor was it necessarily the case in the case of a petition such as this that the solicitors for the company were representing the directors personally. However he said that the interests of the Defendants were inextricably bound up with those of the company and he therefore thought that Cosgrave Gaynard were in fact acting for the Defendants. Mr Walshe stated that Mr Maniar had attended the hearing on 27 July 2015 with a woman whom he could not identify. At this hearing the company was represented by Cosgrove Gaynard and that this must have caused his belief that the solicitors were acting for Mr Maniar as well.

37. In his witness statement, Mr Walshe refers to stating at the confirmation hearing on 30 September 2015 that the Claimant intended to rely on the guarantees. He accepted that he could not produce a note that shows that this was said, but denies that it was a case of "*wilful misremembering."*

38. It is obviously the case that Mr Walshe has a motive to assert that the Defendants were made aware of the Section 549 notices by some means, given that his firm was responsible for the service of the notices, yet now are being met with the assertion that service was not effective. I did not however form any impression that his evidence was inaccurate, still less than he was wilfully mis-stating what had happened in the examinership hearing. In any event, had

[8] The person at Hughes Blake to whom the same email was copied

he been intending to give false evidence to support a case that Mr Maniar was fully aware of what was going on, I would have expected a more elaborate account.

39. Mrs Kershaw works for the Claimant's solicitors in their Manchester office. Much of her evidence relates to the use of recorded delivery and the service of notices by An Post. In large part it involves recounting what she has been told about the system of recorded delivery. In summary, that procedure involves an attempt to deliver the item to the address. If delivery cannot be achieved because no one is present to sign for it, a note is left at the property which invites the addressee to collect the item but states that the recipients can request that it be redelivered to the address or delivered to an alternative address.

40. In this case, the information from An Post indicates that an attempt to deliver was made on 22 September. The usual note was left. The items were not signed for until 1 October 2015.

41. Ms Kershaw accepted that the estimated time for delivery by International Recorded Delivery from the United Kingdom is probably 3 to 5 days not 2 to 5 days as stated in the Reply.

42. In her first statement, Mrs Kershaw referred to an investigation into the email address to which the 18th September email was copied. That address, *naeem@a-i-m.ie*, had been used by Mr Maniar in his previous dealings with the bank. On 12 May 2017, Mrs Kershaw says that she sent an email to that address. It was not returned nor did she receive notice of failure of delivery. The obvious inference is that the email address was active then.

43. In her oral evidence, Mrs Kershaw asserted a belief on her client's behalf that Mr Maniar had somehow manufactured the bounce back of the email. She accepted that she had no expertise in this issue.

44. Mrs Kershaw's evidence was straight forward. Whilst her belief that Mr Maniar engineered the bounce back of the email is clearly controversial (and obviously in the interest of her employer, the Claimant's solicitors), in reality

she put forward no basis for asserting the point and treated it as more a matter of her own personal belief than of something which she considered she would be capable of persuading anyone else. I accept her evidence to be accurate and reliable, including her belief that Mr Maniar engineered the bounce back, though in reality that belief does not take matters any further given the lack of evidence before the court as to how Mr Maniar in fact could have achievd this.

45. The evidence of Messrs Singh and Frawley was relied on pursuant to the Civil Evidence Act 1995. Hearsay notices were served. In fact nothing of significance turns on their evidence.

Evidence – the Defendants' witnesses

46. Mr Maniar gave evidence at some length. He said that his wife had been involved in the day to day activities of the business of ACCHL in its early years but that she had had not such involvement since 2008. She would leave business decision to him though would sometimes express unhappiness at being asked to sign papers and had asked to be removed as a director.

47. The personal guarantees were entered into because the bank required them before they would fund the business expansion that he wanted. The guarantee had to be signed in England not Ireland.

48. Mr Maniar was questioned about his statement of means dated May 2014 that was provided to the bank. It was not easy to follow his attempts to explain the figures.

49. Mr Maniar denied that Cosgrove Gaynard were ever instructed to act for him or his wife personally. They had other solicitors who acted for them personally.

50. As to the email address, he said that he regularly used the address to which the email on 18 September 2015 was sent. As far as he was concerned, it worked properly though there were occasions when the server was down. He had 3 other "personal" email addresses, two with Google and one with iCloud. He asserted that the Claimant knew at least of the Google mail addresses.

51. Mr Maniar was questioned about the extent of his disclosure for example on whether the bank was aware of another email address for him. He accepted that his obligation was to identify any document from the bank and said that he had done that.

52. As to Mrs Cosgrove giving evidence, he said that he had asked her to do so but that she said she was owed money and that needed to be dealt with first. He understood that there was no power to subpoena her but said that it was "*astonishing"* that she had not been called to give evidence.

53. Mr Maniar denied any knowledge of the intention of the bank to serve Section 549 notices or that he was attempting to evade such service. He did not have regular contact with Ms Cosgrove.

54. In respect of the hearing on 30 September 2015, Mr Maniar accepted Mr Gorman's account as reasonably accurate. He denied that Mr Gorman was acting on his behalf generally. He said that he did not recall Mr Walshe mentioning the bank's intention to seek to enforce the guarantees.

55. Mr Maniar said that, at the time of confirmation hearing, he did not know anything about section 549 notices. He was asked about a letter from him to the bank dated 21 October 2015 in response to a letter dated 16 October 2015 demand payment under the guarantee. It was pointed out that that letter disclosed some reasonably detailed knowledge of the section 549 notice process which ran counter to Mr Maniar's evidence that in the previous month he had not known about the process. Mr Maniar said that the letter was written by his then personal assistant who went on to become a barrister.

56. Mr Maniar said his witness statement was incorrect where, in the final sentence of paragraph 111, he says that, had Mr Walshe mentioned the intention to enforce the guarantee the confirmation hearing ,*"I would certainly have taken issue with it as I had not been made aware of this beforehand and neither my wife nor I had been served with the required notices under s549."* This sentence was again inconsistent with his assertion that, at the time of the confirmation hearing, he was unaware of the procedure for section 549 notice.

57. Mr Maniar asserted that he did not discuss the guarantees with the examiner though he had the guarantees in mind during the examinership.

58. In his witness statement at paragraph 138, Mr Maniar deals with the assertion at paragraph 12 of the Amended Defence that monies held on deposit would be used to offset indebtedness under ACCHL's facility with the bank, thereby reducing the interest payable. In the statement it is said that this agreement was made "*orally with the deputy executive director of the London branch"* of the Claimant. Mr Singh's unchallenged evidence on behalf of the Claimant was that this job title did not exist in the Claimant. In oral evidence, Mr Maniar suggested that the person was in fact a "*deputy chief executive"* and suggests that it was a Mr Sharma or a Mr Bhalia. He accepted that he had not mentioned these people before, but said that, whilst going through documents for the purpose of the trial, he had seen reference to the job title "*deputy chief executive"*, that this had triggered his memory. He accepted that he had Mr Singh's statement since October 2018 so that he had time to reflect on the matter but that he had only remembered the names recently. He accepted that there was no document in which the offset agreement was mentioned.

59. On the issue of the service of the section 549 notice, Mr Maniar said that he was not aware that there was any attempt to serve such a document. He was aware that An Post had left a card regarding the non-delivery of a package. His wife had told him that that was in the week commencing 21 September. The delay from then till collecting the letter on 1 October was not a consequence of an attempt to avoid service, the Defendants being unaware of what the undelivered package was.

60. There were a number of troubling features of Mr Maniar's evidence:

    (a) The detailed legal points made in the statement appear to have been drafted on his behalf. Although he said that he believed them to be true (presumably having been told that they are), his statement gives the uncomfortable impression that it has been subject to detailed drafting work that has put words into his mouth. This sense is fortified by his disavowal of the final sentence of paragraph 111 of his statement. He

was happy to adopt the statement when he thought it helped his cause but then to distance himself from it when it became problematic.

(b) It is surprising that, during the examinership, he was as ignorant of the Section 549 process as he claims. He accepts that the existence of the guarantees was in his mind. It is implausible that he would not have sought advice of the effect of the section 549 process on them.

(c) His explanation of the figures in the statement of means from May 2014 was incomprehensible. Whilst nothing in this case directly turns on the issue, it again gives the sense that Mr Maniar is not a reliable witness. I accept however that it is possible that he was making a genuine mistake in misinterpreting the figures rather than this being indicative of a general tendency to misrepresent matters or to be a generally unreliable witness.

(d) His explanation for the late recollection of the possible names of the person with whom he says he entered into the offset agreement is unconvincing. Had he genuinely remembered these names earlier, one would have expected a supplemental statement dealing with the matter, rather than his simply introducing them in answer to a question in cross examination.

61. Overall, I have considerable concern about accepting Mr Maniar's evidence where it is not consistent with other material before me.

62. Mrs Maniar's witness statement deals with her relationship with Cosgrove Gaynard and the attempted service of the Section 549 notices. On the former issue, she stated that she had not instructed Cosgrove Gaynard to act on her behalf. On the second issue, she says that she was mostly at home over 19 to 21 September 2015 and she was not aware of any attempt to deliver documents. On 21 September 2015, whilst at home she had accepted service of papers on behalf of her husband and herself from Ulster Bank.

63. From Mrs Maniar's oral evidence, it was apparent that she had little involvement in running the company. She trusted her husband and signed

documents when asked to. She recalled having met the examiner, but it was apparent that she had limited understanding of the examinership process.

64. As for service of the documents, Mrs Maniar accepted in cross examination that An Post had left a note that there was a failed delivery. She said that she probably received the note a little time before she went to the depot to collect the post, though she would usually go within the week to collect a package when this happened.

65. Mrs Maniar's evidence was limited in ambit but straightforward. I gained no impression that she was trying to dissemble in asserting that she was not aware of the section 549 notice until she collected it on 1 October 2015. I accept that evidence.

66. Mr Gorman is an Irish Barrister who was instructed by Cosgrove Gaynard to represent ACCHL at the hearing on 30 September 2015. The Revenue Commissioners initially opposed the examiner's proposal for ACCHL because of a concern about a debt owed to them. They did not wish Mr Maniar to be a director of the company in the new arrangement. This issue was resolved by Mr Maniar giving an undertaking to the court on 30 September 2015 to resign as a director of ACCHL and not to act as a director of the company for 3 years. At the hearing, Mr Gorman was asked to and did give the undertaking on behalf of Mr Maniar.

67. The Claimant's case is that, since he acted for Mr Maniar in this hearing, he was representing them personally on a more general basis and that equally his instructing solicitors, Cosgrove Gaynard were or must have been acting for the Defendants. Mr Gorman denied that to be the case both in his statement and his oral evidence (which was given by telephone for reasons of convenience).

68. In his oral evidence, Mr Gorman stated that he agreed to give the undertaking on behalf of Mr Maniar because it was convenient to do so – otherwise Mr Maniar would have had to take the oath. However, he represented Mr Maniar for this limited purpose only and was not representing the Maniars more generally at this or any earlier hearing.

69. Mr Gorman was asked about Mr Walshe's evidence that he had mentioned the bank's intention to enforce the guarantees at the hearing on 30 September. He said that he had no recollection or note of this but accepted that it might have happened.

70. I found Mr Gorman's evidence to be clear and convincing on the matters that he was able to deal with.

Evidence – the experts

71. The experts agreed that, unless the notice was brought to Mr and Mrs Maniar's attention during the 48 hour period following receipt by the bank of notice of a meeting pursuant to section 540, extended to the following Monday, 21 September 2015, the Claimant could only prove service by relying on the deemed service provisions.

72. During the course of trial, there was considerable discussion about what amounted to "service" for the purpose of Section 549. As Mr Fanning pointed out, the statute does not provide for what is required by way of service. In his evidence, both oral and written, he concentrated on the question of deemed service. In his report at paragraph 36, Mr Fanning referred to Order 9, Rule 5 of 15 of the Rules of the Superior Court which provide that "*In any case, the court may, upon just grounds, declare the service actually effected sufficient."* He saw this as the root of the court's power to deem service good.

73. His evidence as to the exercise of the power to deem service was:

(a) The court has a wide power to deem service to be good.

(b) On the case as pleaded in paragraphs 14 and 15 of the reply (namely that the Claimant sent section 549 notices on 18 September 2015 and emailed Cosgrove Gaynard and Mr Maniar on the same day, that it can be inferred that Mr and Mrs Maniar failed to make themselves available to sign for the letters and that it can be inferred from events at the hearing on 30 September 2015, that Cosgrave Gaynard were acting

for Mr Maniar personally as well as ACCHL), the court would "*readily"* make an order service deeming service to be good.

(c) Given that the Bank had been admitted in full as a creditor for the purpose of Mr and Mrs Maniar's DSAs, the court would not now entertain an issue as to whether they had given adequate notice in the examinership.

(d) On the assumed facts of the case, the court would take a "*practical view"* by deeming service to be good.

(e) The court's view would be "relatively benign" (sc. to the Claimant) because of the short opportunity for it to effect good service.

74. On the issue of the timing of a court exercising the power to deem service good, Mr Fanning maintained that the Irish court could do so at any time. His reasoning for this was that there was nothing in the statute to limit when the court could consider the issue. However, he accepted that he was aware of no case either way on whether, in guarantee proceedings following an examinership process where actual service of the section 549 notice could not be proved, the Irish court had the power to deem service good.

75. In terms of actual service, Mr McCarthy speaks at paragraph 36 of this first report of a need for notice to be "*physically served"* on the person. In cross examination, he was asked about paragraph 38 of his first report where he said, *"It appears to me that the statute is clear in that for notice to be valid it must be served personally to be valid* (sic)." He said that by referring to "*personal service*" he was not speaking in some technical sense, for example that the document had to be handed to the person. He felt that it sufficed for the offer to be "served" that the person was made aware of the offer.

76. In the context of posting, Mr McCarthy considered that service required that the relevant document was put through the letter box of a person's normal residence, though he accepted that there might be an issue if the person was away. He appeared to think that an email that was not read would not amount to "service" as such, but that if the email went to a person's usual email

address, that would be highly supportive of the court deeming service to be good.

77. On the issue of whether any court other than the Irish court which is dealing with the examinership has the power to deem service to be good, Mr McCarthy stated that only the examinership court can make such an order, his reasoning being that that court alone is charged with the examinership process. In particular, a court could not deem service to be good in later proceedings such as this to enforce a guarantee because section 549 prevents such proceedings being brought.

78. Mr McCarthy also states that the Irish courts have exclusive jurisdiction under the European Insolvency Regulations and that, even if an Irish court could deem service to be good, that is not a power available to English Court. However, it must be said that, even if the Irish court has exclusive jurisdiction, the application of that law is a matter of EU and domestic law. Accordingly, this aspect of his evidence falls outside the ambit of that which Mr McCarthy can properly opine on in this court.

79. In their joint statement, the experts agree on the effects of the Debt Settlement Arrangements in the passage referred to above.

80. Both experts were clearly trying to assist the court. In fact there was little difference between them as to matters of Irish law relevant to this trial.

81. My overwhelming impression from both experts was that the nature of "service" as it has developed in Irish law is different from that in English law. In the English system, emphasis tends to be put on form – it suffices to prove service that a document was transmitted in accordance with rule such as CPR Part 6, and the court may find "actual" service regardless of whether the person has read the document or was aware of its contents. On the other hand, in Irish law the emphasis is on proving whether the person was actually aware of the contents of the document. In so far as the Irish rules may create a problem for the person seeking to serve a document in that they cannot prove whether a person was actually aware of the contents of the document, the solution lies in the exercise of the inherent power to deem service good where

proper attempts have been made to make the intended recipient aware of the contents of the document.

Section 549 – the Claimant's case

82. The Claimant's case is that:

(a) it is for the Defendants to prove that the English Court should "recognise" the alleged effect of Section 549;

(b) the Defendants fail to discharge that burden.

83. On the first issue, the Claimant relies on the conventional statement of law in *Dicey & Morris*, paragraph 9-025, citing Dynamit v Rio Tinto [1918] AC 260*: "The burden of proving foreign law lies on the party who bases his claim or defence on it."*

84. As to whether the English court should "recognise" the effect of Section 549, the Claimant contends that the Defendants fail to show any proper basis for finding that Section 549 applies to as to modify the Defendants' liability to the Claimant:

(a) Regulation (EC) 593 of 2008 on the law applicable to contractual obligations ("Rome 1") provides amongst other things:

Preamble 11: "*The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations."*

Article 1(1): "*This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters."*

Article 3(1): "*A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their*

choice the parties can select the law applicable to the whole or to part only of the contract.

Article 12(1): "*the law applicable to a contract by virtue of this Regulation shall govern in particular:*

(a) Interpretation;

(b) Performance;

(c) Within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in is far as it is governed by rules of law;

(d) the various way of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract."

85. The Claimant contends that the effect of Section 549 which the Defendants advance amounts to an assertion that, where notice has not been given under that section, the liability of the guarantor/indemnifier is effectively discharged. Whilst the list under Article 12(1) does not expressly include "*the enforceability of obligations*", the Claimant notes that the list is non-exhaustive and contends that it is clear that, under Rome 1, the question of the enforceability of the obligations should be judged pursuant to English Law, not Irish law. There is nothing in English law to render the guarantor's liability unenforceable simply through failure to comply with the Section 549 procedure. It follows that Section 549 has no consequence for the enforceability of the guarantee.

86. The Claimant notes a passage from Fletcher's The Law of Insolvency (5th Edition), cited with approval by Hildyard J in Re OJSC International Bank of Azerbaijan [2018] EWHC 59 (Ch), at paragraph 45:

> *"According to English law a foreign liquidation - or other species of insolvency procedure whose purpose is to bring about the extinction or cancellation of a debtor's obligations - is considered to effect the discharge only of such of a company's liabilities as are properly governed by the law of the country in which the liquidation takes place or, alternatively, of such as are governed by some other foreign law under which the liquidation is accorded the same effect. Consequently, whatever may be the purported effect of the liquidation according to the law of the country in which it has been conducted, the position at English law is that a debt owed to or by a dissolved company is not considered to be extinguished unless that is the effect according to the law which, in the eyes of English private international law, constitutes the proper law of the debt in question."*

87. This principle expresses the decision of the Court of Appeal in Anthony Gibbs & Sons v La Société Industrielle et Commercial des Metaux (1890) LR 25 QBD, the so-called Gibbs rule.

88. The Claimant notes the Defendants' reliance on the Council Regulation No. 1346/2000 on Insolvency Proceedings ("EIR")[9]. Article 4 of EIR provides the general principle:

> *"(1)…the law applicable to insolvency proceedings and their effects shall be the law of the Member State within the territory of which such proceedings are opened…*
>
> *(2) The law of the State of the opening of proceedings shall determine the conditions of the opening of those proceedings, their conduct and their closure. It shall determine in particular:*

[9] It is common ground that the Council Regulation 1346/2000 applies to the Examinership Process. On the other hand, the recast Regulation on Insolvency proceedings 2015/848 ("RR") applies to the DSAs. In fact there is no material difference between EIR and RR for the purpose of the issues in this case.

…

j. The conditions for and the effects of closure of insolvency proceedings, in particular by composition;

k. Creditors' rights after the closure of insolvency proceedings."

89. EIR is intended to provide a scheme of efficient cross-border insolvency regulation by seeking to avoid a multiplicity of competing insolvency proceedings. It was described by Christopher Clarke J in Syska v Vivendi Universal SA [2008] EWHC 2155 (Comm) as "*a piece of subordinate Community legislation which forms part of English law. It was introduced in order to lay down mandatory rules for choice of law, jurisdiction, recognition, enforcement and co-operation applicable to cross border insolvencies within the European Union."* He went on, "*The correct approach to the interpretation of the regulation was accurately summarised by the Tribunal when it observed that, 'the interpretation of the EC Regulation should strive to establish an autonomous (European) meaning based on the different language version of the regulation, considering (i) the overall scheme and purpose of the Regulation (teleological method of construction) and (ii) taking into account interpretative sources, such as the Preamble of the Regulation and the Virgos-Schmitt Report, but also the available authorities, such as Court decision – in first line, those of the ECJ – and the opinions of legal commentators'."*

90. The Claimant notes paragraph 90 of the Virgos-Schmitt Report:

"*The law of the State of the opening of proceedings determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned….The substantive effects referred to the competence of the law of the State of the opening by Article 4, are those typical of insolvency law, i.e. effects which are necessary for the insolvency proceedings to fulfil its aims. To this extent the law of the State of the opening may displace (unless the Convention provides otherwise) the law normally applicable under the common pre-insolvency rules on conflict of laws to the act concerned."*

91. Thus, whilst the Claimant concedes that law of the State of the opening, namely Irish law, may be required to be given effect under the EIR, that effect is limited to those aspects of Irish insolvency law which are necessary for the insolvency proceedings to fulfil their aim.

92. The Claimant draws my attention to the decision of Knowles J in Edgeworth Capital Luxembourg Sarl v Maud [2015] EWHC 3464. The Court was concerned with the alleged effect of Spanish insolvency law on a guarantee entered into by the Defendant of certain rights, the benefit of which was acquired by the Claimant. The principal debtor had entered into a voluntary insolvency process in Spain called *concurso*. The Defendant argued that the effect of Article 97.2 of the Spanish Act 22/2003 was to extinguish the principal debt and the guarantee. Knowles J found against the Defendant on the issue of construction of the guarantee, but in respect of the argument that the effect of Article 97.2 discharged the guarantee, and that the Court was obliged to give effect to Spanish law by virtue of EIR, he said this:

"*In my view the mere fact that the Article 97.2 is to be found in legislation dealing with insolvency is not enough to bring it within the Insolvency Regulation. A close analysis of Article 97.2, of the legislation in which it is found and of the Insolvency Regulation is required. Having regard in particular to paragraphs (6), (11), (12), (22), (23) and (25) of the preamble to the Regulation and Articles 1.1, 4 and 25 of the regulation, if Article 97.2 did indeed extinguish third party obligations as contended by the Defendant, I would have great difficulty in accepting that Article 97.2 in that respect was a provision that fell within the Insolvency Regulation."*

93. Applying the analysis of Knowles J, the Claimant contends that Section 549 does not fall within the ambit of "*the law applicable to insolvency proceedings*" to which Article 4(1) of EIR applies. In particular:

    i. Section 549 has nothing to do with the rights and obligations of the company that is subject to the insolvency proceedings; rather it is concerned with the rights and obligations of third parties such as guarantors;

ii. Nothing in the EIR suggests that it is intended to affect the rights and obligations of guarantors. In particular this is not a category of issue which is listed in Article 4(2).

iii. In so far as the Defendants contend that Section 549 relates to "*the conditions for and effects of closure of insolvency proceedings*" that might fall within Article 4(2)(j), the Claimant contends that the effect of section 549 is not connected with or arising from the closure of the examinership.

iv. In so far as the Defendants contend that Section 549 fall within Article 4(2)(k) as relating to "*creditors rights after the closure of insolvency proceedings",* the Claimant draws attention to the comment on that provision in the Report which speaks of *"any possible discharge of the debtor"* – Article 4(2)(k) is concerned with the discharge of the principal debtor not the discharge of the liabilities of third parties.

v. It is not necessary to achieve the purpose of EIR for the rights and obligations of guarantors to be regulated.

94. The Claimant concedes that one aspect of the Section 549 process that may have a bearing on the examinership is the nature of the offer under Section 549(3) – in effect, where the creditor proposes to enforce the guarantee, that offer gives the guarantor the opportunity to be represented at a meeting of creditors and to use the votes that would otherwise be attributed to the creditor in respect of the principal debt. To that extent, it must be conceded that section 549 is relevant not only to the residual liability of the guarantor but also may affect the conduct of the examinership. But the Claimant contends that this has no bearing on the orderly conduct of the examinership.

95. In summary, the Claimant, whilst conceding that Section 549 appears in the part of the Companies Act 2014 dealing with insolvency, contends that this is a matter of form rather than substance. In substance, the provision does not deal with the opening, conduct, closure or effect of the examinership process. It would be surprising if the enforcement of a guarantee which is subject to

English law would be affected by a provision of Irish law as to the giving of notice.

96. Indeed, the deeds provide on their face (at clause 5(a)) that the Claimant need not take any action before enforcing the guarantee. The legitimate expectation of the parties was that no notice was required to enforce the guarantee and the imposition of such an obligation by giving effect to the Section 549 procedure would be contrary to such an expectation.

97. It follows that, on the Claimant's case, the failure to serve a Section 549 notice is not a provision to which the English court is bound to give effect by virtue of EIR. It does not act so as to prevent the English courts enforcing the guarantee.

Section 549 – the Defendants' case

98. The starting point of the Defendants' case is the joint statement of the Irish law experts, in particular the following agreed paragraphs:

(a) "*Section 548(1) of the Companies Act 2014 provides that as a general rule that (sic) the liability of a person under a guarantee or indemnity to another person in respect of a debt of the company in a scheme of arrangement shall not be written down by the compromise or scheme of arrangement.*

(b) "*The Section (sc. 548) is drafted widely enough to include both a guarantee or an indemnity.*

(c) *"Section 549 of the Companies Act 2014 provides a mechanism for keeping alive the rights of creditors under a guarantee. If a creditor wishes to rely on a guarantee it must within 48 hours of receiving a notice of a meeting of creditors serve a notice on the third person that complies with section 549(2) of the Companies Act 2014."*

99. The Defendants contend that the effect of the failure to give section 549 notice, coupled with the conclusion of the examinership, is that the liability of ACCHL to the bank is extinguished. They rely on the statement of law at

paragraph 31-114 of Dicey, Morris and Collins on the Conflict of Laws (15th edition) :

"*It is an established principle of English law that a discharge from any debt or liability under the bankruptcy law of a foreign country outside the United Kingdom is a discharge therefrom in England if, and only if, it is a discharge under the law applicable to the contract. According to Art 4(2)(j) of the Regulation (Rule 183(2)(j)), the law of the State of the opening determines the conditions for and effects of closure of insolvency proceedings. This means that where main proceedings in another Regulation State are closed and the closure has, under the law of that Regulation State, the effect of discharging the debtor, that discharge must be recognised even if it is not an effective discharge under the law applicable to the contract."*

100. The Defendants go on to argue that it is clear that the examinership procedure, including the requirement of an offer under Section 549, are aspects of the insolvency, the efficiency of which would be adversely affected by the failure to recognise the effects under Irish law of failure to give notice. The Defendants contend that the Claimant's case requires the Court to excise some parts of the examinership process from the obligation of cross-border recognition, whilst leaving others, most obviously the discharge of the insolvent company's own liabilities under a confirmed scheme, to have cross-border effect. This is contrary to principle.

101. The Defendants say that it is wrong to place excessive reliance on the decision of Knowles J in Edgeworth Capital:

i. his comments are obiter;

ii. they relate to a different process, the Spanish concurso rather than the Irish examinership;

iii. apparently unlike the Spanish procedure with which that case was concerned, there is in this case an intimate connection between the enforceability of the guarantee and the insolvency process, by reason of

the relevance of the Section 549 offer to the exercise of voting rights at a creditors' meeting.

102. In so far as the Claimant raises an issue that the legitimate expectations of the parties under the deeds did not require the service of any notice to enforce the guarantee, the Defendants point out that this is inconsistent with the Claimant's own case in seeking to prove that it did all that it could to serve the relevant notice and that the Defendants were seeking to evade such service.

103. In any event, it is not atypical in English law that an insolvency process may render a liability under a guarantee enforceable – the Defendants cite the judgment of Etherton J as he then was in Prudential Assurance v PRG Powerhouse [2007] EWHC 1002 (Ch) as to the potential for a CVA to prevent a creditor taking steps to enforce the obligations of third parties to the creditor.

Section 549 - discussion

104. Three important points of law are undisputed:

i. The law of the relevant contracts is English law;

ii. The law of the state of the opening of the insolvency proceedings is Irish law;

iii. The English court is bound by the EIR to give effect to Irish law in respect of those insolvency proceedings.

105. The remaining questions that are in dispute are:

i. What is the effect of failure to serve notice in accordance with section 549 at common law?

ii. Are the English courts obliged to give effect to the consequences under Irish law of failing to serve a notice under section 549, by reason of EIR?

106. On the first of these points, the express terms of section 549(5) is that, if the creditor fails make the relevant offer, they "*may not enforce by legal*

proceedings or otherwise the obligation of the third person in respect of the liability." The Irish law experts did not suggest that the effect of the failure to make an offer under Section 549 is that the liability either of the principal or the guarantor is discharged. The wording of Section 549(5) simply does not bear that meaning.

107. It follows that, whilst discharge of either ACCHL or the Defendants as the guarantors under Irish law might bring into play the principle referred to at paragraph 99 above, that issue does not in fact arise here.

108. On the second issue, the acute difference between the parties on the application of EIR arises. There is force in the comments of Knowles J in Edgeworth Capital as to the need to look carefully at both the foreign law provision that is in issue and the EIR to determine whether the foreign law provision is in fact an aspect of "*the law applicable to insolvency proceedings"* to which the domestic court is obliged to give effect by Article 4 of EIR.

109. The important point here is the potential effect of a Section 549 offer on creditors' meetings. The fact that the making of such an offer gives rise to the possibility of the guarantor accepting the offer and exercising the voting rights of the creditor at a members' meeting creates a significant connection between the notice and the conduct of the examinership itself. This brings the procedure within the ambit of Article 4 of EIR.

110. If the Claimant were able to show some legitimate expectation on its part that events in the examinership would not affect the underlying liability under the guarantee, that might be a significant factor to weigh in the balance. But if anything, the evidence here points the other way. The Bank engaged in the Section 549 process by attempting to effect service on the Defendants. That suggests a realisation (indeed an acceptance) that the principal debtor was subject to the Irish law of insolvency including the examinership process. One might expect a sophisticated financial institution in the position of the Claimant to have such an awareness. Whilst of course the proper application of the EIR to the particular procedures of particular countries cannot turn on

the sophistication of the parties in the individual action, I can see no basis for concluding that a creditor seeking a guarantee of debts of an Irish company would expect that the Irish law of insolvency might not be relevant to the enforceability of the guarantee.

111. It follows that failure to comply with the Section 549 notice procedure would be fatal to an action to enforce these guarantees in the English courts.

Service – the Claimant's case

What is required for actual service?

112. The Claimant was of course not able to show that it had sent the document to either Mr or Mrs Maniar in accordance with the time limit prescribed by Section 549. In closing submissions, the Claimant put its case as being that, in order to prove actual service on Mr Maniar, the court would have to find that one of the recipients of the email sent by Mr Walshe on 18 September 2015 had told him what they had received and forwarded it to him.

Was actual service effected?

113. As the Claimant rightly accepted, Mr Maniar denied in evidence that anyone had told him of the contents of the email or forwarded it to him. There was no other direct evidence on this issue. however the Claimant invited me to reject Mr Maniar's evidence and find that he had been made aware of the contents of the email (and indeed that there had been an offer to forward it to him) for the following reasons:

(a) It is inherently improbable that neither the company's solicitor nor the examiner would have communicated their receipt of section 549 notices to Mr Maniar;

(b) The recipients of the email were duty bound to communicate the contents of the email to Mr Maniar;

(c) The Defendants failed to call the recipients of the email to say that they had not forwarded the contents or at least communicated the subject of

the notice to Mr Maniar. The court can draw the inference from this that they did do so.

(d) The Defendants' disclosure was inadequate. Proper disclosure would have revealed documents that might have shed light on the issue. The obvious inference to be drawn from the failure to give adequate disclosure is that the documents would have undermined the Defendants' case on this issue.

(e) Mr Maniar had failed to adduce evidence, whether expert or otherwise, to explain why he did not get the email. The obvious inference to be drawn from this is that such evidence would have tended to show that Mr Maniar had in fact been made aware of the notice.

114. As for Mrs Maniar, the Claimant accepts that service on Mr Maniar is not itself enough to prove service on Mrs Maniar, but that the overwhelming inference to be drawn is that, if the court finds that Mr Maniar was aware of the notice, he would have spoken to Mrs Maniar about it.

Is it open to any Irish court other than the Irish court conducting the examinership proceedings to deem service to have been good?

115. The Claimant sees no problem in the Irish Courts exercising the power to deem service good for whatever purpose may be necessary. No principle of Irish law is identified to prevent this.

Is it open to an English court to deem service good?

116. The Claimant contends that not only can the English Court consider the issue of whether service should be deemed to be good, it is obliged to do so. On the assumption that the Court is required to apply Irish law to the question of the adequacy of service, that law gives the court a discretion. The court cannot adopt only part of the law of the foreign court, it must adopt the whole of that law, including in this case the power to deem service,

117. The Claimant relies on the decision of Nicholas le Poidevin QC siting as a High Court Judge in In the Matter of Kerswell Developments Ltd [2018] 4

WLUK 539, judgment handed down on 27 April 2018. In that case, the Judge was concerned with a misfeasance claim against directors, in which the directors' duties were accepted to be governed by Jersey law, in particular Article 74(1) of the Companies (Jersey) Law 1991. Article 212 of the same statute provides as follows:

"If in proceedings for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor it appears to the court that that officer or person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that the person has acted honestly and that having regard to all the circumstances of the case (including those connected with his or her appointment) he or she ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the court may relieve the person, either wholly or partly, from his or her liability on such terms as it thinks fit."

118. The question arose as to whether the English Court could exercise the discretion to give such relief. Mr le Poidevin QC held that "*the court*" in Article 212 is a reference to the Jersey court not a foreign court but that the English court could exercise that discretion:

"*when the English court applies a foreign law it does not do so because the foreign law is in force in England but because English rules of the conflict of laws call for an application of the foreign law. That means the whole of the foreign law material to the case, the lex causae. The only way in which that can be achieved is for the English court to assume the discretion conferred by article 212. If article 74(1) were enforced in England without regard to article 212, the English court would be applying only a truncated version of Jersey law."*

119. The Claimant contends that this reasoning is compelling - to fail to apply discretion that lies with the foreign court is to apply only a truncated version of the law of that country. This would be both illogical and absurd.

If so, should the court deem service to be good?

120. As indicated above, the Claimant contends that deemed service involves the exercise of the power under Order 9, Rule 15 of the Rules of the Senior Court. That it a wide power and the Claimant contends, on the basis of Mr Fanning's evidence, that the Irish court would take a favourable view to deeming service on the facts of this case for the following reasons:

(a) The approach of the Irish courts to deeming service to be good is a "*practical*" one, influenced by the particular situation in which service is necessary. In the case of a Section 549 notice, the time limit is very short as identified earlier, leaving very little time for the person seeking to serve the document to ascertain what method of service is most likely to be effective in bringing the document to the attention of the other party. This would lead to the court being amenable to deeming service good.

(b) The rules of service are designed to bring a document to the attention of the recipient. If the recipient is actually aware "*or reasonable steps are taken to that end"*, the court will probably conclude that enough has be done to justify applying the deeming provision.

(c) The Irish Court would be keen to ensure that the strict service requirements of Section 549 did not become a rogue's charter, under which guarantors are incentivised to make service difficult, for example by going on holiday at a crucial time. That would be a particularly powerful argument where, as here, the guarantor is a director who would be expected to know of the timing of examinership proceedings because of their involvement with the principal debtor.

(d) The court would look at what efforts had been made to attempt service, particularly where the time within which service needed to be effected was very short.

(e) The court would bear in mind the close connection between the company going into the examinership and the guarantors as directors

and/or shareholders of the company. It would bear in mind that the directors were likely to have full knowledge of what was going on and would have regular involvement with the examiner and the company's solicitors.

(f) The position of the guarantors meant that they would not be prejudiced by the lack of notice – since their company was going into examinership anyway, they presumably supported the examinership.

(g) The Act does not prescribe a particular method of service, nor is there a requirement on the creditor to use every possible means to effect service.

(h) The Court would bear in mind that the notice was sent to the company's solicitors and that this might be a route by which the directors would receive a copy.

(i) The Irish Court would not entertain a dispute about whether service was good when the Claimant had been admitted in full as a creditor for the purpose of the DSAs in any event.

121. As to the expert evidence, Mr McCarthy's written report stated that "*physical service*" on the person to be served was required under section 549. By the end of his oral evidence, it was not clear what service was sufficient absent the court applying the deeming provision. This undermined Mr McCarthy's evidence in so far as it differed from Mr Fanning, but in any event, it supported Mr Fanning's opinion that the requirement of service was less strict than Mr McCarthy initially stated.

Service – the Defendants' case

What is required for actual service?

122. The Defendants contend that, for the Claimant to prove service on a particular Defendant, it would have to show that the particular Defendant was aware of the contents of the notice.

Was actual service effected?

123. The Defendants reject the suggestion that the court can draw the inference either that Mr Maniar was aware of the contents of the notice or that he told Mrs Maniar of the notice.

(a) There is nothing improbable in the contents of the Section 549 offers not being communicated to Mr Maniar by either the examiner or the solicitors. Quite the contrary – the email of 18 September 2015 referred to it being served, which was obviously a reference to service on the Defendants. If the Claimant had served the Defendants as it appeared to be saying it had, why would they separately serve the Defendants?

(b) There was no duty on the recipients of the email of 19 September to communicate the contents of the email to Mr Maniar. Again, the fact that the Claimant said it was serving the documents on the Defendants defeats any conceivable such argument.

(c) The Defendants wished to call Ms Cosgrove, but she would not attend because she has not been paid by the company. The Defendants had no control over her attendance.

(d) Any criticism of disclosure could and should not lead to the inference of evasiveness on the Defendants' part.

(e) The failure to adduce expert evidence about why the email rebounded takes the matter no further. The simple fact is that email did bounce back and the court has no material from which to draw the inference that this could have been, still less that it actually was, a consequence of Mr Maniar's actions.

Is it open to any Irish court other than the Irish court conducting the examinership proceedings to deem service to have been good?

124. The Defendants adopt the evidence of Mr McCarthy. His opinion that the application needs to be made in the examinership makes good sense and is

consistent with what actually happened in the case of Ely Medical, to which both experts referred in their evidence.

Is it open to an English court to deem service good?

125. The Defendants contend that, even if a court other than supervising the examinership can deal with the issue of deemed service, only an Irish court can deal with the issue of deemed service. In this regard, the Defendants refer to the opinion of Mr McCarthy in his supplementary report; "*It is common case that the opening of the examinership proceedings within the meaning of the Insolvency regulation) occurred in Ireland. This is important as this gives exclusive jurisdiction to the Irish Courts to hear and determine the Examinership."*

126. The Defendants draw attention to the concept of Centre of Main Interest and the provision of recital 12 to EIR which provides, "*This Regulation enables the main insolvency proceedings to be opened in the member state where the debtor has the centre of his main interest*." (There is an exception for secondary proceedings that may occur in member states in which the debtor possesses an establishment, but such secondary proceedings are limited to assets of the debtor situated in that state. That exception has no application here.) Article 25 provides for the automatic recognition of the judgment of a court of a member state concerning the course and closure of insolvency proceedings, where the opening of insolvency proceedings in that court is recognised pursuant to EIR.

127. The Defendants contend that the effect of this exclusive jurisdiction of the court in which the proceedings are opened means that a decision of the Irish court on the issue of service would should be recognised by the courts of other member states. But the Defendants say that the principle goes further: the courts of another member state cannot make an order relating to service – that is a matter for the courts of the member state in which the proceedings were opened,

128. In support of this second proposition, the Defendants rely on the judgment of Mann J in Re Eurodis Electron [2012] BCC 57. In considering the effect of a

winding-up order made by a Belgian court which was said "*almost certainly*" should not have been made in Belgium, Mann J said, "*the purpose of the regulation is to produce a degree of uniformity and consistency of approach to insolvency matters across the Member States that are subject to it. It works by requiring the courts of one country to give effect to the orders of another or to decline to make orders where they ought to be made in another."*

If so, should the court deem service to be good?

129. The Defendants accepts that the Irish court may be willing deem service to be good where there is evidence of attempts to evade service. But beyond that they contend that the position is "*murky*" with no clear guidance. They point to the mandatory requirement of service of a Section 549 notice then look at the position here. As Mr Patel puts it in his closing submissions, "*To look at the question of why actual service was not effected, one answer might be an attempt to evade service. Here the answer is failures by the Bank. To deem service in those circumstances would be in effect to forgive the bank those errors."*

Service – analysis

What is required for actual service?

130. I have no doubt that both experts were seeking to assist on the issue of what amounts to actual service, but were doing so from a standpoint that lay greater emphasis on the substance of service than its form. This standpoint no doubt reflects the position of Irish law – given the acceptance that the court has a broad power to deem service and will frequently exercise the power, it is easy to understand why the experts did not see the need to be too precise in defining the boundary line between service which does not rely on the deeming provision and service which does. Unfortunately, it is necessary to make that distinction in order to deal with the Defendants' contention that the English Court cannot consider the exercise of the power to deem service to be good, such that the issue of service stands or falls on what amounts to service without considering that provision.

131. The formulation by Counsel for the Claimant in closing submissions comes close to what the experts state to be good service. On the evidence before me, I find that Irish Law requires that for the service of an offer under Section 549 to be found to be good without reliance on any deeming provision, the Court would need to be satisfied that either:

(a) the person to be served had actually received the document, either by it being handed to them or by it being delivered (whether electronically or by hard copy) to an address to which they had access; or

(b) the person to be served was aware that the Claimant was trying to serve the notice upon them and was aware, at least in general terms, of the nature of the document.

132. I decline to analyse further the nature of the access required to satisfy the first of these (for example, what the effect would be of a person being away from their home or unable to access a computer) because that issue does not arise on the facts of this case.

Was actual service effected?

133. On the test of service identified above, I have no hesitation in finding that, absent the deeming provision, the Claimant fails to prove service.

134. I accept that one might have expected the examiner and/or the solicitors to communicate with Mr Maniar about the Section 549 notice. But it was the company, not Mr Maniar, who was their client. Mr Maniar's evidence that the issue was not discussed is perfectly plausible.

135. Further, there is no material from which I can draw any safe conclusion about why the email bounced back. Whilst an email would not normally bounce back from an active email in this way, I simply do not know whether it is possible for Mr Maniar to have manufactured such an occurrence.

136. Accordingly, whilst I have some considerable caution about aspects of Mr Maniar's evidence for reasons identified above, there is not sufficient material

from which I can safely draw the inference that he is lying about knowledge of the document.

137. Given that the Claimant accepts that its only route to proving service on Mr Maniar (absent the deeming provision) was that he had been informed of the notices by another recipient of the email of 18 September 2015, the Claimant fails to prove actual service.

Is it open to any Irish court other than the Irish court conducting the examinership proceedings to deem service to have been good?

138. I agree with the Claimant's contention that no principle of Irish Law has been identified which would prevent a court other than that conducting the examinership from deeming service to be good. That being so, I look to the corresponding position in English Law. In exercising any power that was dependent upon proving service, the English court charged with that decision would have the jurisdiction to deal with adequacy of service. It follows that, in a corresponding position in the English courts, the court would have power to deem service good. Absent some provision of foreign law to differing effect, the same principle should be held to apply in Irish law.

Is it open to an English court to deem service good?

139. The starting point here is that EIR gives primacy to Irish Law in insolvency proceedings opened in that country. It is correct that, in determining issues in those proceedings, a court applying EIR must apply Irish law. But that is different from saying, as Mr McCarthy does in the passage cited at paragraph 125 above that exclusive jurisdiction lies with the Irish courts.

140. There is considerable force in the submission that for the English court to fail to consider how this discretion would be exercised in the foreign court is to give effect to part only of Irish Law. The discretion exists in Irish Law. There is some (very limited) Irish Law on how it should be applied. Whilst the determination of how a discretion would have been exercised in a foreign court is a potentially challenging task for the English court, it is one that

cannot be shirked if the English Court is properly to apply the foreign law that contains that discretion.

141. If it were the case that the Irish Courts could not consider the exercise of the discretion save in the course of examinership proceedings, there would be force in the argument that the English court equally could not do so. for reasons given earlier, that is not my finding as to Irish Law.

142. In so far as the Defendants rely on the judgment of Mann J in Re Eurodis Electron, it is at least arguable that, were there to be ongoing proceedings in Ireland in which the question of whether service should be deemed good arose, the English Court should decline to exercise the power to deem service good because to do so risks creating disharmony between two member states where one, Ireland, clearly has the primary role in Insolvency proceedings. It might be argued that, as a matter of either EU Law or domestic English law, the English court is not permitted to exercise the discretion at all. Alternatively it might be said that the English Court ought not to exercise the discretion. This has not been the subject of submission before me and it is not necessary to consider the issue further.

143. It follows that it is not only open to this court to exercise the discretion of the Irish Court, it is necessary for this court to determine (as a matter of fact applying Irish law) how that discretion would have been exercised on the facts of the case.

If so, should the court deem service to be good?

144. There is no dispute that the Irish court has a discretion to deem service good. For reasons that I have identified, that discretion can be exercised both within and outside of the examinership and, in so far as relevant, the exercise of the discretion can be considered by the English court. It is not however right to conceptualise this as the English court exercising the Irish court's discretion. Rather it is the English court determining how the Irish Court would exercise that discretion.

145. In English law, the exercise of a discretion tends to be a mixed question of fact and law. I see no reason to think that the situation in Ireland is different save that the evidence I have heard would suggest that there is in reality very little law to guide the exercise of this discretion.

146. Having heard both Irish experts, I am satisfied that the Irish court is obliged to consider all of the circumstances of the case and to take a broad view of what achieves justice between those affected by the determination of the issue.

147. I bear in mind the stage at which the question as to the proper exercise of the discretion arises. It may well be that, in the Irish courts the issue, if raised at all, would have been dealt with in the examinership (though Mr McCarthy suggested that that would be rare). No doubt, at that stage the court would not have available much, if any, evidence on the issue as to whether the reason for the non-effectiveness of service was that the guarantor was seeking to evade service. The court would have to form an impression on that issue and I can well see that, in order to avoid this becoming a rogue's charter, the court might lean in favour of deeming service to be good.

148. The suspicion that Mr and Mrs Maniar were seeking to avoid service arises from:

(a) The obvious potential benefit to them of doing so;

(b) The fact that the email bounced back;

(c) The fact that no one was available to accept delivery of the notices when delivery was attempted on 22 September 2015;

(d) The failure of the Defendants to collect the packages once the An Post notice was left at their house;

149. These points collectively have force, particularly where, as here, I have concerns about the reliability of Mr Maniar's evidence. But it is necessary to look with some care at the detail of the material.

(a) The potential benefit of avoiding service of a section 549 notice is somewhat questionable if the court is as willing to deem service good as Mr Fanning alleges that it would be. Of course that is not the evidence adduced on behalf of the Defendants, but it is perfectly plausible that someone advising on the effect of failure of service of a section 549 notice would have given advice along the lines of Mr Fanning's evidence had they been asked about the issue in September 2015 – put another way, it may be that if the Defendants had been aware of the issue of service of section 549 notices in September 2015, they would have been advised that the court would readily deem service to be good, in which case there was little reason to try to evade service.

(b) Notwithstanding the oddity of the email bouncing back, there is no satisfactory evidence before me to explain how this could have been caused by Mr Maniar's actions. Whatever the suspicion, I am simply in the dark about whether he could have done this. Questions as to his unreliability generally cannot bridge that evidential void.

(c) The absence of anyone from the house at the time of attempted delivery would be more suspicious if the Defendants had gone away from home for an extended period at what would be a crucial time for service of the notice. That would potentially enable them to avoid service. But Mrs Maniar's evidence, which I accept in the absence of anything to contradict it, is that she was generally around the house during the relevant period and indeed that she took delivery of a document from Ulster Bank. That tends to reduce any suspicion that they were deliberately absent when service was attempted.

(d) The failure to collect the package sooner is only suspicious if one assumes that the Defendants had a reasonable idea as to what it contained. It is possible that they did have such a suspicion, but there is limited material from which I could form any firm view on the point. This must, on any reading of events, have been a difficult time for the Maniars since the examinership and the future of ACCHL was

obviously a matter of importance to them. In that context, it is perfectly plausible that the failure to collect the package earlier was because of other calls on their time.

150. I have had the opportunity to hear from Mr and Mrs Maniar. Whatever the suspicions about why the email rebounded and why the notices were not collected until after the determination of the examinership process, I am satisfied on the balance of probabilities that Mrs Maniar was not seeking to avoid service. I have considered whether other doubts about Mr Maniar's evidence lead to the opposite conclusion in his case. Given the absence of direct evidence of an attempt to avoid service and the weaknesses in the inferences that the Claimant seeks to draw as identified above, I am not satisfied that he was trying to avoid service.

151. It is trite law that that which is found on the balance of probabilities to have happened is treated as having happened as a matter of certainty (see Mallett v McMonagle [1970] AC 166 per Lord Diplock at page 176). The corollary is that, where the evidence fails to establish that an event did not occur that is it is treated as certainty that it did not happen. This must be the case whatever the suspicion may be. It follows that, in considering this application, the court is bound in the light of the findings in the previous paragraph to accept that the Defendants were not seeking to evade service. It cannot fudge the issue by saying that nevertheless there was a suspicion of an attempt to evade service that might in another context have led the Irish court to exercise the discretion in a particular fashion.

152. The relevant factors to the exercise of the discretion in this case appear to me to be as follows:

(a) The Claimant sent the notices to the Defendants by a postal system that was never likely to effect service in time;

(b) The Claimant separately emailed the notice to Mr Maniar at an address at which they may have expected him to receive it, but were very shortly thereafter made aware by the delivery failure email that the email had not been delivered;

(c) The Claimant could but did not thereafter take steps to ensure that the notice came to the attention of the Defendants within 48 hours - in particular, delivery of the notices by hand to the Defendants' home, which would have been relatively straight forward, was not attempted.

(d) Whilst the Claimant's solicitors may have believed that the notices would come to the attention of the Defendants through various means, such as being mentioned by the examiner or the company's solicitors, there is no evidence that it was in fact so communicated or that the existence of the notices came to the attention of the Defendants by any other means.

(e) There is no evidence that leads me to the conclusion that the Defendants were trying to evade service.

(f) There is no material to cause me to think that the Defendants would have acted any differently if they had received the notices.

153. The difficult balance as to how the power to deem service good would be exercised lies on the facts of this case between, on the one hand, the failure of the Claimant to take all reasonable steps to serve the Defendants and on the other the lack of any meaningful difference that would have flowed if the Section 549 offers been properly served. On the first point, the evidence of Mr Walshe pointed to the apparent need to ensure that service was effected. It was an obvious step for the bank to serve personally on the Defendants. No good reason has been provided as to why it did not. On the other hand, I struggle to see how, if notices had been served, either the position of these Defendants or the conduct of the examinership would have been any different.

154. On such a fine balance, the court would be likely to find against the person bearing the positive burden of persuading it how to act. On this issue, I heard no evidence from either expert. I can safely assume, both as a matter of private international law (see Dicey, Morris & Collins on the Conflict of Laws, 9R-002) and as a matter of common sense, that Irish law on this issue is the same as English law, namely that the person seeking to persuade the Court to

exercise a discretion bears the burden of persuading the court to do so. In my judgment, the Claimant fails to do so.

155. It follows from this that the Claimant's claim cannot succeed, regardless of the other points before the court. however, given the effort that has been invested in arguing these points and the fact that the quantum argument, if it were to need to be considered at any stage, involves consideration of the witness evidence, especially that of Mr Maniar, it is appropriate for me to deal with these issues as I would have done had the Claimant succeeded on the section 549 point.

DSA – the Claimant's case

156. The Claimant's case as to the effect of the DSAs is as follows:

(a) It is for the Defendants to prove the effect of the DSAs under Irish law.

(b) On the evidence, the Defendants fail to prove that the DSAs have the effect of discharging the debts.

(c) The court should reject the Defendants' contention that the Claimant submitted to the Irish insolvency process and is therefore bound by the DSAs at common law.

(d) The Court should reject the contention that it is bound to give effect to the Irish law consequence of the DSAs by virtue of RR.

157. At paragraphs 155 to 167 of its closing submissions, the Claimant sets out weaknesses in the expert evidence in support of the contention that I should not accept the experts' opinion. For reasons referred to above, it is not open to the Claimant to advance a positive case on this issue and I shall not therefore deal with its case further.

158. On the issue of submission to Irish Insolvency process, the Claimant, using the passage from the judgment of Hildyard J in Re OJSC International Bank of Azerbaijan op cit cited below, invites the Court to consider whether, as the Defendants' creditor, it has elected to vindicate its rights in the DSA

proceedings. It points to the following as indicia that the Claimant should not be found to have elected to vindicate its rights in respect of the personal guarantees:

(a) The Claimant did not concede that it was bound by the Irish proceedings but rather reserved its rights in respect of the claims on the personal guarantees (see in particular the letter of 3 July 2017 from the Claimant's solicitors to Ms Kelly);

(b) The Claimant did not submit a proof of debt in respect of the personal guarantee claims (in contrast to the debt in respect of the costs order);

(c) The Claimant did not vote in respect of the (alleged) liability under the personal guarantees;

(d) Whilst the Claimant's claim under the guarantee was included in the DSAs, this was not done at the Claimant's request;

(e) The Claimant took no step that was consistent with submission to the DSA process.

159. The Claimant's final argument is that the DSA proceedings have no relevance to the liability of the Defendants under the guarantees. Whilst, pursuant to Article 4(1) of EIR, the law governing the DSA process is Irish law, Article 15 of EIR provides that "*The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State of which that lawsuit is pending."*

160. In Virgos and Garcimartin, *The European Insolvency regulations: Law and Practice (2004)* Article 15 is explained thus:

"*255…This exception to the application of the law governing the insolvency proceedings has a twofold explanation: the fact that, as no enforcement action is involved, the principle of collective action inherent in the insolvency proceedings is not impaired; and the close link with the procedural laws of each state resulting from the fact that the lawsuit is already on course.* Further

explanation. *The difference between subjecting individual enforcements to the lex fori concursus and subjecting ordinary processes to the lex fori processus is sufficiently explained if we consider the different consequences of each on the insolvent debtor's estate. In the first case, the creditor satisfies his interest directly. In the second case, he obtains a decision on the merits which does no more than allow him to join the body of creditors with an established claim. 256. The use of the term 'solely' is aimed at preventing the cumulative application of different national laws. The meaning of this provision is to refer all questions concerning the possible effect of the opening of insolvency proceedings on lawsuits to the procedural law of the state where litigation is pending (or lex fori processus). the law will decide whether the proceedings are to be suspended or may continue subject to any procedural modification necessary in order to reflect the loss or restriction of the powers of disposal and administration of the debtor, and the intervention of the liquidator in his place, which all member states must recognise under article 16…"*

161. The passage was cited with implicit approval by Longmore LJ in Syska v Vivendi Universali [2009] Bus LR 1494.

162. The Claimant contends that the effect of the proper analysis of Article 15 is that this court should apply English law to decide the effect of the DSA procedure on these proceedings. The question of the substantive law of the guarantees remains English law under their own terms. An Irish law defence would only apply if, either applying the *Gibbs* rule or otherwise, the Court were bound to give effect to some relevant Irish law effect of the DSA.

DSAs – the Defendants' case

163. The Defendants raised an argument in respect of estoppel relating to submission to process, at paragraph 31(b) of the Amended Defence. That is not an argument that has been pursued.

164. As to the contention that the evidence of Irish Lawyers does not support the conclusion that the effects of the DSAs is to discharge the debts, the Defendants point to the agreed position of the experts. They say that there is no material that undermines that evidence.

165. On the issue of submission to process, the Defendants draw my attention to a passage in the judgment of Hildyard J in Re OJSC International Bank of Azerbaijan [2018] EWHC 59 (Ch), at paragraph 46 qualifying the Gibbs rule referred to at paragraphs 86 and 87 above:

"*If the relevant creditor submits to the foreign insolvency proceedings the Gibbs rule does not apply. The rationale is simple: the creditor will be taken to have accepted that the law governing that foreign insolvency proceeding should determine the contractual rights he has elected to vindicate in that proceeding."*

166. The editors of Cross Border Insolvency put the principle this way at paragraph 13.26:

"*Where a debt has been discharged under the law applicable to foreign insolvency proceedings and the creditor has submitted to those proceedings by taking or seeking to take a distributive share of the insolvent's assets thereunder, the creditor will generally be bound at common law by the foreign discharge."*

167. As the Defendants concede, the Claimant submitted a proof of debt in relation to the costs order in its favour but did not do so in respect of the liability under the personal guarantees. However, it received a distribution not only in respect of the costs claim but also in respect of the underlying claim under the personal guarantees. The Defendants contend that this amounts to a "*distributive share of the insolvent's assets".*

168. Further, whilst the Claimant did not seek this share, it did both accept the money rather than return it and subsequently act in a fashion that was indicative that it considered itself to have submitted to the process – see in particular the application for summary judgment where it stated "*The Defendants have no real prospect of defending the claim because they entered into a debt settlement arrangement (DSA) in Ireland on 12 January 2018 under which the Claimant received a distribution."*

169. In terms of the effect of the DSA, the Defendants contend that the Claimant misunderstands the nature of Article 15. That Article is only concerned with the relevant procedural law where there is lawsuit pending. It has no effect on the underlying substantive law. The law of the member state of the opening of proceedings determines the substantive effect of the proceedings (see recital 23 to EIR and Article 4 thereof, to which Article 15 creates an exception).

170. Thus, in answer to the Claimant's contention that this Court should only give effect to the DSA if it is required to do so by domestic law, the Defendants say that that principle is too narrow - this court is obliged to apply both domestic and EU law; and under EU law, the Irish law effects of the DSA apply.

DSAs – analysis

171. As I have indicated above, it is for the Defendants to prove the effect of the DSAs under Irish law, it is not open to the Claimant to mount a positive case that they do not have the effect contended for by the experts. The simple fact is that the agreed evidence of the experts is that they do have this effect. There is no material before me that so undermines the credibility of the experts as to cause me to reject their view notwithstanding that they have not been asked to explain or expand upon that opinion. I accept their opinion and find that the effect of the DSAs in Irish law is to discharge the debts of the Defendants. This deals with the first two points raised by the Claimants.

172. On the issue of submission to process, the Claimant raises powerful argument as to why it did not submit to the process. None of its actions indicate an intention to submit to such a process. Its failure to submit a proof of debt in respect of the personal guarantees is consistent with a lack of intention to submit to process, all the more so when such a proof was submitted in respect of the costs order.

173. The Claimant's case has been inconsistent in so far as it argued in the summary judgment application that the distribution meant that the Defendants had no real prospect of success in defending the claim (implying that it considered itself bound by the DSAs) but such a legal position, doubtless taken for tactical reasons, cannot amount to submission to a process that had

already occurred. I am also not persuaded that the failure to deal differently with the minimal distribution that was made amounts to submissions. It follows that the Claimant has not submitted to that process.

174. Finally on the effect of the DSA in this court, the Defendants' argument is plainly correct. This is an issue of substantive law which, by virtue of the EIR, is to be determined by the law of the Member State in which the insolvency process commenced, that is to say Irish Law. In Irish law, the liability under the guarantees has been extinguished by virtue of the DSAs for the reason given above. It follows that the liability is equally extinguished for the purpose of domestic law.

Quantum – the Claimant's case

175. The Claimant contends that the Defendants' case on the existence of an offset agreement is entirely unconvincing:

(a) it is implausible that such an agreement would have been reached without it being recorded in a document;

(b) the chronological section of the First Defendant's witness statement does not even deal with the issue;

(c) the incorrect job title of the person with whom Mr Maniar says he had the discussion, coupled with the failure to name the person until he was giving evidence at trial renders that evidence highly suspect.

(d) the actual dealings with the bank set out at paragraph 8 of the Amended Reply are inconsistent with such an agreement having been reached.

Quantum – the Defendants' case

176. The Defendants contend that Mr Maniar gave clear evidence as to the existence of an offset agreement to which the court should give effect. His evidence was persuasive and in particular his inability to recall the person with

whom he had agreed the arrangement is neither surprising nor suggestive that he is not telling the truth.

Quantum - analysis

177. I have indicated concerns about Mr Maniar's evidence above. An offset agreement of the kind he describes would be of considerable significance to ACCHL and the Bank. It is highly unlikely that the agreement would not have been evidenced in writing. Further, the dealings set out in the Amended Reply are indeed inconsistent with the agreement alleged by Mr Maniar. If such an agreement had been in existence, it is difficult to see why those dealings would have taken place.

178. The evidence taken as a whole fails to convince me that any agreement of the nature described by Mr Maniar was in place. It is probable that some discussion of an offset arrangement took place at some stage, but the Defendants wholly fail to persuade me that any concluded agreement was reached on the issue. Accordingly, I would have rejected the Defendants' contention that any indebtedness under the guarantees would have needed to be adjusted to reflect such an agreement.

Conclusion

179. It follows from this judgment that the Claimant's action against each of the Defendants fails.

180. The parties are invited to seek to agree a final order, in default of which the matters hold be listed for a further hearing before me. In accordance with an indication given in an email exchange with counsel, the time for applying for permission to appeal is extended to 4pm on 4 October 2019. I propose to deal with any such application on paper. The time for service of an Appellant's Notice is extended to 21 days from determination of the application for permission to appeal.

181.