THE HIGH COURT

[2022] IEHC 726

[2017 770 S]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

ANDREW RISPIN AND DENIS RYAN

DEFENDANTS

THE HIGH COURT

[2017 771 S]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

ANDREW RISPIN AND MICHAEL HUGHES

DEFENDANTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 21st day of December 2022

Introduction

1. Four applications came before the court on 29 November 2022. The first and second comprised motions by the plaintiff (hereinafter the "Bank") seeking to amend the summary summons in both cases (2017/770S and 2017/771S) *"… for the purpose of setting out further particulars of how the sum claimed as due".* The third and fourth were 'Summary judgment' applications brought in each case.

2. The motions to amend were brought in the wake of the Supreme Court's decision in *Bank of Ireland Mortgage Bank v. O'Malley.* Both '*O'Malley*' applications were issued on 27 October 2021 and grounded on Affidavits sworn on 19 October 2021 by a Mr. Brian Feeley, Bank Official, who exhibited an amended summary summons in each case.

3. The applications were moved by Mr Keys BL for the plaintiff in each case. Mr O'Higgins BL represented Mr Rispin (who is the first defendant in each case). Mr Hand BL represented Mr Ryan (the second defendant in proceedings under record number 2017/770S). Mr Casey, solicitor, represented Mr Hughes (the second defendant in proceedings under record no. 2017/771S).

***O'Malley* applications**

4. The stance adopted by all 3 three defendants was neither to consent nor to object to the '*O'Malley'* applications. For the reasons explained in an *ex tempore* decision given on the day, I granted the relief sought in both motions and made an award in favour of each of the defendants in respect of the costs of these motions.

***Ex tempore* ruling**

5. At that point an application was made on behalf of Mr Hughes, who argued that the *O'Malley* applications and the summary judgment applications should not be dealt with on the same date. It was contended that, having granted the relief sought in the *O'Malley* applications, the Court should adjourn the summary Judgment applications to be heard at a later date. I refused this application for reasons set out in an *ex tempore* decision given on 29 November 2022, which, for the sake of clarity, can be summarised as follows:-

(i) a similar application was made in January 2022, to Meenan J by counsel for Mr Rispin;

(ii) Meenan J considered and rejected that application, and directed that all four motions (i.e. 2 x '*O'Malley'* applications and 2 x 'summary judgment' applications) should be listed for hearing together;

(iii) there had been no appeal against the said decision by Meenan J;

(iv) each of the defendants had, from January to November 2022, the opportunity to file such additional affidavits as they might wish;

(v) there was no suggestion that liberty to file any further affidavit(s) had been declined;

(vi) the matters appeared in the 'call-over' on Thursday 24 November and there was no suggestion that any such an application was going to be made;

(vii) the case was called before Meenan J at 11am on 29 November and, again, there was no indication given that an application of this sort was going to be brought.

6. The *ex tempore* ruling emphasised that there could be no criticism of Mr Casey for moving an application which his client had instructed him to move. However, in substance, it comprised an application which had already been made, and rejected, and I was satisfied that the justice of the situation required the Court to decline the application to adjourn. Thus, the Court proceeded to deal with the remaining two applications i.e. applications for Summary Judgment.

Summary Judgment

7. Immediately before the court embarked on a consideration of the summary judgment applications, I was informed that, as a result of discussions between the relevant parties, judgment could be entered, on consent, against Mr. Michael Hughes for the sum of €366,099.40, with costs in favour of the plaintiff, and a six–month stay on execution.

Relevant legal principles

8. As regards the appropriate approach for this court to take to an application for summary judgment, the jurisprudence is well known and well settled. Before looking closely at the facts which emerge from the affidavits before the court, it is important to refer to certain statements principle which must guide this court in respect of both motions for summary judgment.

9. In *A.C.C. Plc v. Elio Malocco* [2000] IEHC 13 Laffoy J made it clear that:-

"*The Court has to look at the whole situation to see whether the defendant had satisfied the Court that there is* ***a fair or reasonable probability of his having a real or bona fide defence, or, whether what the defendant said is credible****. In my view, looking at the whole situation must involve an assessment of the cogency of the evidence adduced by the Plaintiff in relation to the given situation which is to be the basis of the defence*". (Emphasis added).

10. McKechnie J's decision in *Harrisrange Ltd. v. Duncan* [2003] 4 IR 1 remains the 'touchstone' insofar as the correct approach is concerned. Having reviewed earlier jurisprudence, the learned judge stated:

"….it seems to me that the following is a summary of the present position: -

(i) The power to grant summary judgment should be exercised with discernible caution,

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

(iii) In so doing the Court should assess not only the Defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the Plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting Affidavit evidence,

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

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

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

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

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

(ix) ***Leave to defend should be granted unless it is very clear that there is no defence,***

(x) Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the Defendant or has reason to doubt whether he has a genuine cause of action,

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

(xii) The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just

result whether that be liberty to enter Judgment or leave to defend, as the case may be." (Emphasis added).

11. In the judgment of Baker J. in *ACC Loan Management Ltd. v. Dolan & Ors* [2016] IEHC 69, the learned judge took the view that in what was a summary judgment application, she could not resolve a dispute of facts but the court: -

> *" . . may assess the evidence including the exhibited correspondence and come to a determination whether the defendants have made out an arguable or bona fide or credible defence on this basis"* (para. 51).

12. In determining whether assertions were credible, Baker J. referred to the judgment of Charleton J. in *NAMA v. Barden* [2013] 2 IR 28, wherein he said the following at para. 5: -

> *"**The mere assertion on affidavit of a defence is insufficient. A defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation**. An assertion, for instance, that a cheque was paid in discharge of a debt means little if no bank statements are produced to show the provenance of the funds or when, how or to whom money was remitted. Often, arguments are advanced as to collateral contracts or representations that are claimed to override the express terms of a written contract. It is for each such allegation to be analysed in the context of whatever claim the plaintiff may make in response, bearing in mind that the summary judgment procedure does not involve the weighing of competing facts but rather requires an analysis as to whether a defence that might reasonably be an answer to the plaintiff's claim has been made out. If it is very clear that the defendant has no defence, the court should proceed to enter summary judgment".* (Emphasis added).

13. At para.62 of her judgment in *ACC Loan Management* Baker J referred to another decision by Charleton J (in *NAMA v. Barker & Ors* [2014] IEHC 216) wherein the learned judge made clear that:

> *"A bald assertion of a fact in answer to a claim may not be enough when it is not backed up by any independent material, most especially if it is highly unlikely. Every such case, however, must be judged on its own merits. If an assertion of fact is made which is in the teeth of a written contract, then a particular scrutiny will be made of that fact and how it is alleged to fit within the matrix that amounted to the contract between the plaintiff and the defendant. Where a case is based on documents, a defendant must be in a position to show that the defence which they seek to make is not totally undermined by the correspondence between the parties".*

14. More recently, in *Allied Irish Bank plc. v. Cuddy* [2020] IECA 211, Collins J. stated the following:-

> *"27. This is an application for summary judgment pursuant to O. 37. In a short concurring judgment in Promontoria (Aran) Ltd. v. Burns [2020] IECA 87, I stated that: -*
>
> > *'1. Within its proper parameters – as to which see, for instance, the helpful synthesis of the jurisprudence in Harrisrange Ltd. v. Duncan [2003] 4 IR 1, at pp. 7- 8 – O. 37 of the Rules of the Superior Courts is intended to provide a relatively expeditious and inexpensive mechanism for recovering judgment for debts or liquidated demands which are clearly due and owing.*

2.It is obviously in the public interest, as well as the interests of creditors, that there should be such a mechanism and that it should operate effectively. It is not in the interests of the public – or in the interest of the parties – that straightforward claims for debt or liquidated demand should require to be determined by plenary hearing, with the additional delays and cost that such a hearing involves and the additional burden thereby placed on the resources of the justice system.'

28. The 'proper parameters' of the Order 37 procedure provide the critical guardrails for the appropriate resolution of this appeal. A defendant against whom summary judgment is granted is thereby deprived of a full hearing on the merits. Ordinarily, they will not have an opportunity to cross – examine the deponent(s) for the plaintiff, will not be able to compel third parties to give evidence by way of subpoena and will have no opportunity to seek discovery or avail of any of the other litigation tools available to parties in plenary proceedings. That is justified and proportionate where - and only where – 'it is very clear that there is no defence': Harrisrange, para. 9(ix). That summary judgment should not be granted where there is any arguable defence – there being no requirement to show a prima facie defence, less still a defence that will probably succeed at trial – has been emphasised by a long line of authorities, many of them analysed by McKechnie J. in Harrisrange. The decision of the Supreme Court in Irish Bank Resolution Corporation (in special liquidation) v. McCaughey [2014] IESC 44, [2014] 1 IR 749 reaffirms the continuing vitality of these authorities, as well as emphasising the very limited role of the court at summary judgment stage in making any qualitative assessment of the credibility of a defence.

29. As regards issue of law, while such issues may in principle be resolved on an application for summary judgment, a court should only do so 'where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment': per Clarke J. (as he then was) in McGrath v. O'Driscoll [2006] IEHC 195, [2007] 1 ILRM 203 (at p. 210), cited with approval by the Supreme Court (Denham J.) in Danske Bank t/a National Irish Bank v. Durcan New Homes [2010] IESC 22".

15. The relevant test which the court should apply when summary judgment is sought has been expressed in a variety of ways in the authorities, with Hardiman J pointing out, at p.623 of his judgment in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 IR 607:

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

16. In approaching the determination of the plaintiff's motions for summary judgment, the foregoing principles have been applied. This Court is acutely aware that for the plaintiff to succeed at the summary stage the court must be satisfied that it is very clear the defendant has no case. If, on a careful examination of the totality of the material before this Court, it is clear that a potential conflict arises, be that a conflict of fact, the resolution of which is material to success or failure, or a question of law which is other than straightforward or relatively so, it would not be appropriate to find for the plaintiff at the summary stage and leave to defend

at a plenary hearing should be granted. In other words, if it is clear that such a potential conflict arises, the resolution of which is material to the outcome of the case, that conflict should be determined at a plenary trial, regardless of what reservations a court may have as to the strength of the defence disclosed.

17. To avoid summary judgment a defendant must satisfy the court that they have a fair or reasonable probability of having a real or bona fide defence. As the authorities make clear, that does not mean a defence which will probably succeed or the success of which is not improbable, but it does mean that the court must be satisfied that what the defendant says is credible. The 'bar' facing a defendant is, in relative terms, a low one but, even so, it cannot be 'cleared' unless what the defendant says reaches the minimum standard of being credible. Although each case must be carefully considered, an example of something which may not meet that basic requirement is a 'bald' or mere assertion of fact, made without independent support, and which is wholly undermined by evidence.

18. I now turn to an examination of the evidence before the court, in the form of the averments made in the various affidavits, as well as the contents of documents which were exhibited thereto. It is against an analysis of same that this court must decide whether, what the defendant says by way of grounds of defence, is credible, or not. Given that Mr. Rispin maintains his opposition to *both* claims, I propose to deal first with the proceedings bearing record number 2017 / 771 S.

The plaintiff's claim against Mr. Rispin (2017 / 771 S)

19. The motion which issued on 6 July 2017 seeking judgment in the sum of €366,099.40, was grounded on the affidavit sworn on 26 June 2017 by Mr. Brian Feeley, a bank official employed as a business manager at the Eyre Square branch of the plaintiff bank. Mr. Feeley exhibited a 5 October 2007 letter from the plaintiff offering loan facilities to Messrs. Rispin and Hughes ("the Facility Letter"). This Facility Letter confirms that the amount and type of facility i.e. €775,000, by way of a 'Bridging Term Loan'. The purpose is stated to be to purchase two sites and to build a house on each (these sites being at Ballyjamesduff and Virginia, Co. Cavan, respectively). The facility letter also specifies, as regards terms and repayment, that it is ". . . *approved for a period of 12 months and is repayable in full by 30/10/2008. Interest repayments of €4,527 to be met monthly*". All the foregoing can be seen from the first page of the Facility Letter.

20. The second page of the Facility Letter specifies *inter alia* Security; Fees; and Conditions Precedent to Drawdown, whereas the third internal page of the Facility Letter deals with Covenants; the Bank's standard Terms and Conditions; the Review Date; and Acceptance.

21. The fourth page of the Facility Letter is entitled "*Form of Acceptance"* and Mr. Rispin's signature appears opposite the date '09 October 2007' and under the statement *"I have read and agreed to be bound by and fully accept all of the terms and conditions contained in this Offer Letter and in the appendix to this Offer Letter".*

22. The fifth internal page of the Facility Letter is entitled "*Appendix to Offer Letter dated 5th October 2007 to Mr. Andrew Rispin & Mr. Michael Hughes – TERMS AND CONDITIONS*". These terms and conditions begin at internal p. 5 of the Facility Letter and run to internal p. 12,

inclusive. Paragraph 12 on internal p. 11 is entitled "*Events of Default*" and goes on to specify that a range of matters will constitute an event of default including: -

(ii) If the Borrower defaults in the payment of any principal, interest, or other amount payable hereunder when due".

23. At para. 3 of his affidavit, Mr. Feeley avers *inter alia* that: -

"*The Defendants failed to make the required payments which amounted to an Event of Default…"*

At para. 4 of his affidavit, Mr. Feeley avers that the plaintiff issued formal demands to the defendants by letters dated 29 November 2013 and copies of same comprise Exhibit "BF 2". The letter, dated 29 November 2013, as well as inviting proposals to deal with the outstanding balance (stated to be €358,136,93) made a formal demand and went on to state that: -

"*If the liabilities are not discharged within fourteen business days from this date, the Bank will take such steps to enforce payment as the Bank may be advised".*

24. In the manner Mr. Feeley avers at para. 5 of his affidavit, letters of demand, dated 19 April 2017, were also sent by the bank's solicitors, Messrs. Harrison O'Dowd. Copies of these demands comprise Exhibit "BF 3" to Mr. Feeley's affidavit. The relevant letter addressed to Mr. Rispin begins as follows: -

"*We are instructed on behalf of The Governor and Company of the Bank of Ireland to apply to you for payment of the sum of €366,099.40 being an amount remaining due and owing by you . . .".*

25. The letter made specific reference to the relevant "*Term Loan Account Number 79754971*" and made clear *inter alia* that legal proceedings would be instituted unless payment was received within seven days. In the manner presently examined, the aforesaid account number is one and the same as appears on the relevant bank statements furnished by the plaintiff to Mr. Rispin, in respect of the facilities which were accepted and drawn down. It should also be noted at this juncture that the sum demanded in the 19 April 2017 letter from Harrison O'Dowd is the same sum which appears in the plaintiff's amended summary summons.

26. At para. 6 of his affidavit, Mr. Feeley avers that the total remaining due and owing to the plaintiff, as of 20 June 2017, is the sum of €366,099.40. At para. 7, he avers that the plaintiff does not claim contractual interest on the aforesaid outstanding sum. At para. 8 Mr. Feeley makes averments with respect to the Bankers' Books Evidence Act 1879 (as amended) and, at para. 9, he avers that the defendants have no defence to the plaintiff's claim.

27. In a second affidavit, sworn by Mr. Feeley on 21 November 2017, he exhibited *inter alia* bank statements in respect of account no. 79754971 (Exhibit "BF 5") and averred that: *"As can be seen therefrom, at the date of demand for repayment on the 19th April 2017, the balance due and owing was €366,099.40".* I have had sight of those bank statements which commence with an entry on 01 November 2007. The statements note the payments *"out*"; the payments "*in";* and the then "*balance*". There is no suggestion that the funds in question were not drawn down in the manner the statement records. Indeed, no issue is taken by Mr. Rispin with the accuracy of the bank statements exhibited. At para. 7 of his second affidavit, Mr. Feeley repeats a positive averment that ". . . *the funds were drawn down by the defendants in various tranches on term loan account no. 79754971*" and this is uncontroverted.

Mr Rispin's affidavits

28. In opposition to the plaintiff's application for summary judgment, Mr. Rispin swore affidavits on 3 November 2017, and 25 April 2018, respectively. Taking them together, the following comprises the grounds of defence advanced by Mr. Rispin: -

- He avers that ". . . *neither the sum of €366,099.40 nor any amount, is due or owing to the plaintiff as alleged or at all*" (para. 4 of his 3 November 2017 affidavit);
- He avers that he "*. . . has a bona fide defence"* to the proceedings (para. 5 of his 3 November 2017 affidavit);

29. I pause at this juncture to say that forgoing comprises an assertion *tha*t the first named defendant has a defence, but does not indicate the *nature* of the contended for defence. As to the basis for the alleged defence, Mr. Rispin makes the following averments from paras. 6 to 9 inclusive of his 3 November 2017 affidavit: -

"*6. I say that in or about 2008, your Deponent sold 20 acres of zoned lands for the M3 Motorway for a contract price in the amount of €1.1 million approx.*

7. I say that at that time I had a number of accounts with the plaintiff bank including loan accounts.

8. I say that ***I met with the plaintiff, its servants or agents, in or about April 2008 at which stage it was agreed that the sum of just over €900,000 of the proceeds of sale from the lands referred to at para. 6 above would be accepted by the plaintiff in satisfaction of all monies then due and owing by your Deponent to the plaintiffs.*** *Accordingly, the said sum of just over €900,000 was paid to and accepted by the plaintiff.*

9. Notwithstanding the foregoing, I say that by reference to the matters set out in the Special Summons and the grounding affidavit I say and believe and am advised that ***the plaintiff's claim is statute – barred*** *pursuant to the provisions of the Statute of Limitations Act 1957 (as amended)".* (Emphasis added).

30. In the manner explained later in this judgment, it is now accepted that a defence based on the statute of limitations is not available, and none is relied upon. In the second affidavit sworn by Mr. Rispin on 25 April 2018, he repeated the assertion that the payment of €900,000 received from the sale of lands for the M3 Motorway constituted full and final settlement of his indebtedness to the plaintiff under a range of facilities, including the facility letter which is the subject of the present proceedings. Mr. Rispin also made certain averments in relation to a data protection request. It is appropriate to quote *verbatim* paras. 4 to 8 inclusive from Mr. Rispin's second affidavit where both matters referred to, as follows -

"*4. As per my previous affidavit I reiterate that the sum of €900,000 was paid to the plaintiff in full and final settlement of my indebtedness under the various facilities.*

5. I say and believe that the sum of €900,000 was the balance of the purchase monies received from the sale of lands following deduction of the usual fees incurred in the carriage of sale, legal fees and any tax liability arising on the sale.

6. I say that I have raised a Data Protection Request with the plaintiff seeking the relevant documentation concerning the payment the (sic) *said sum of €900,000 to the plaintiff. I say that whilst the plaintiff accepts that the said monies were paid it does not accept that the monies were paid in full and final settlement.*

7. Unfortunately, the plaintiff has adopted a position of not complying in full with the Data Protection Request. In this regard, despite your Deponent's numerous accounts and facilities with the plaintiff over the years, the only documentation received in reply to the Data Protection Request concerned an application for a credit card and related documentation. I say that the plaintiff has refused to furnish the documentation concerning the various facilities the subject matter of these proceedings but seeks to "cherry-pick" pieces of correspondence which suits their claim.

8. In the circumstances, and where your Deponent has settled his indebtedness to the plaintiff almost ten years ago, I say that it will be necessary to obtain discovery of the documentation held by the plaintiff, its servants or agents, for the Court to determine the issue of accord and satisfaction".

31. As can be seen from the foregoing averments, the defence asserted is that Mr. Rispin and the plaintiff reached an agreement in 2008 that payment of a certain sum was in full and final settlement of all liabilities.

32. With respect to Mr. Rispin's contention that he "*met with the plaintiff, its servants or agents, in or about April 2008*", it seems to me that this is an assertion made in the vaguest of terms. By that I mean, the first named defendant does not identify any *person* or persons whom he claims to have met. He does not say *where* this meeting is supposed to have taken place. He does not state what *date* in April 2008 the meeting is supposed to have taken place on. He exhibits no *correspondence* in relation to either the *setting up* of the meeting, or its *outcome*. Indeed, the sum supposedly accepted by way of full and final settlement is not even identified, specifically. Rather, it is described as *"the sum of just over €900,000"*. Furthermore, although the first named defendant avers that *"€900,000 was paid to the plaintiff in full and final settlement of my indebtedness under the various facilities"*, he has exhibited no correspondence in which he, or any solicitor representing him, furnished that payment on that basis.

The Bank's response

33. By contrast, Mr. Feeley made the following averments in his second affidavit which was sworn on 21 November 2017:-

> *"5. I wish to state categorically that the plaintiff did not, at any time, agree to accept a sum of money from either of the defendants herein in satisfaction of all monies due and owing by them. It is notable that the first-named defendant is unable to exhibit any correspondence from the plaintiff confirming or supporting that for which he contends. This is simply because no such correspondence exists. On the contrary, such correspondence as has passed between the plaintiff and the first-named defendant's solicitors makes quite clear that any outstanding balances not realised from the sale of property continue to be due and owing by the defendants and must be repaid. In this regard I beg to refer to a letter dated the 21st March 2013 from the plaintiff to solicitors acting for the defendants in connection with the sale of a*

property in County Cavan. In another letter from the plaintiff dated the 29th January 2014 addressed to solicitors acting on behalf of the first-named defendant in relation to the sale of the lands referred to by him in paragraph 6 of his affidavit, it is expressly stated that on receipt of the Compulsory Purchase Order monies, all remaining facilities not fully repaid, remain due and owing. I beg to refer to these two letters upon which, pinned together and marked with the letters and number "BF4" I have signed my named prior to the swearing hereof. It is apparent from the plaintiff's letter of the 29th January 2014 that the CPO monies were not received by the plaintiff until November 2010, a fact which contradicts his averment that he had a meeting with the plaintiff in April 2008 and entered into an agreement to pay a lump sum in settlement of his indebtedness to the plaintiff."

34. The first of the letters to which Mr. Feely refers (dated 21 March 2013) was sent by a named Senior Business Manager in the Bank, to Messrs. Dillon Geraghty & Co. It is not disputed that the latter were the solicitors are acting for both the first and second named defendant in respect of the sale of certain property at Virginia, County Cavan. The said letter referred to property which was to be sold for the sum of €95,000. The plaintiff Bank confirmed in this letter that legal fees and auctioneer's fees could be deducted from the purchase price, prior to remitting the balance of the purchase monies to the Bank. The letter went on to confirm that, on this basis, and upon the receipt of net sale proceeds, the Bank agreed to release the solicitor's undertaking in respect of the property in question. The letter then proceeded to state the following:-

"For the avoidance of doubt, the Bank's agreement to release the Undertaking and accept net sale proceeds in relation to this Property in the manner described above ***cannot be viewed as a waiver of the Borrower's obligations to discharge the entire of the monies due by the Borrower to the Bank*** *pursuant to the Letter of Offer. Any outstanding balance not realised from the sale of the Property will continue to be due and owing by the Borrower to the Bank and must be repaid to the Bank.* ***The Bank will continue to rely on its rights pursuant to the letter of offer in respect of the balance of the monies due and owing by the Borrower pursuant to the Letter of Offer****.*

Except as expressly provided in this letter, the Letter of Offer shall continue unchanged and in full force and effect. In this regard, ***we reserve all our rights under the Letter of Offer and the security we hold in respect of any facilities*** *to the above named."* (Emphasis added).

35. Mr. Feeley avers, at para. 6 of his 21 November 2017 affidavit that at no time were the contents of this letter *"challenged or queried by the defendants herein or the said solicitors to whom they were addressed"*. This is uncontroverted evidence.

36. It is also very clear that a letter sent to the first defendant's solicitors dated 21 March 2013 *post-dates* the alleged agreement of April 2008. Furthermore, the contents of the 21 March 2013 letter are entirely *inconsistent* with any such agreement being in place. It is common case that Messrs. Dillon Geraghty & Co. certainly did not respond to the Bank to refer to any

supposed agreement dating from April 2008 and/or to suggest that, in 2013, that Mr. Rispin no longer had any indebtedness to the Bank.

37. The second of the letters which comprise exhibit "BF4" is a letter (dated 29 January 2014) which was sent by the same Senior Business Manager in the plaintiff Bank, to Messrs. Fitzgerald & Company, solicitors representing Mr. Rispin. The letter referred, *inter alia*, to the compulsory purchase of lands for the N3 motorway and, for present purposes, it is appropriate to quote as follows from the final paragraphs:-

> *"Our discussions with Andrew were in order to ascertain the net proceeds that the bank would receive in reduction of his outstanding borrowings, such* ***discussions culminating in the bank's letter of 9th November 2010 to Andrew Rispin, and signed by him on 10th November 2010.***
>
> *Finally, to clarify, whilst loan facilities 90403099 & 45334020 were fully repaid, (and Current Account 22660720 Overdraft Facility cleared) on receipt of the compulsory purchase order monies, other facilities in the name of Andrew Rispin and others, whilst reduced, were* ***not fully repaid at the time and balances remain outstanding****."* (Emphasis added).

38. The foregoing letter from the plaintiff, sent in January 2014, is utterly inconsistent with the contended for Agreement of April 2008. Mr. Rispin does not suggest that, in response to it, he or his solicitors referred to any supposed agreement of April 2008 and/or suggested that he was no longer indebted to the Bank. Given the reference, in the January 2014 letter, to a 9 November 2010 letter, signed by Mr Rispin on 10 November 2010, it is important to look closely at same, as follows.

Data protection request / Bank's 9 November 2010 letter

39. In the third affidavit sworn by Mr Feeley on 16 April 2019, he addressed the contention that the plaintiff had not fully complied with Mr Rispin's data protection request. At para. 7 of Mr Feeley's affidavit, he exhibited the data protection request (dated 6 November, 2017) and the reply furnished by the plaintiff (19 December, 2017). Having done so, Mr Fehily proceeded to make the following averments: -

> *"I say and believe the volume of documentation which was furnished to the first named defendant pursuant to his data protection request was extensive in that the response contained approximately 696 pages. I say that the documentation was collected by the first named defendant's solicitors and, as can be seen from the Bank's letter dated 19th December, 2017 referred to at exhibit 'BF6' above, the aforesaid documentation was over and above any documentation which may have been furnished to the first named defendant by Bank of Ireland credit cards.*
>
> *8.* ***Included in the documentation furnished to the first named defendant was a copy of the aforesaid letter dated 9th November, 2010, duly signed by the first named defendant on 10th November, 2010****. I beg to refer to a copy of this letter upon which, marked with the letters and number 'BF7' I have signed my name prior to the swearing hereof. As is apparent from the terms of that letter,* ***it does not by any reading of same point to or suggest the existence of any agreement as contended for by the first named defendant.*** *I say, therefore, that this letter is of no assistance whatsoever to the first named defendant."* (Emphasis added).

40. It is to quote, *verbatim,* the entire body of the letter, dated 9 November 2010 (which was sent by the same representative of the plaintiff Bank, who later wrote the letters dated 21 March 2013 and 29 January 2014, discussed earlier). It is addressed to Mr Rispin and states:

"Re: 20 acres at Bohermeen, Navan – funds due from CPO.

Dear Andrew,

I refer to the above and I understand that the CPO has been settled at €1,100,000.

The bank have now agreed to the disbursement of funds as follows: -

- ***Reduce liabilities*** *of Andrew Rispin by €465,000, which leaves an outstanding amount of €22,000 to be cleared over 10 years/on maturity of Asian Fund.*
- *Pay Capital Gains Tax of €80,000.*
- *Pay legal fees of €10,000.*
- *Pay €30,000 due on foot of right of residence.*
- *Make final payment to Private Banking's Asian Fund of €62,500. We will forward a draft for this amount to them on receipt of funds from your solicitor.*
- ***Reduce loan*** *of Patrick Rispin by €80,000.*
- *€10,000 to current account of Patrick Rispin.*
- *€10,000 to current account of Andrew Rispin to cover outstanding bills.*
- *€23,000 to current account of Andrew Rispin to enable payment be made to fund liability on foot of a personal letter of guarantee.*
- *€50,000 to fund required work to fully complete house in name of Rispin & Hughes. €10,000 of this will be released immediately with any further drawdowns against invoices. The balance of these funds to be held in an assigned ICS deposit account.*
- ***€250,000 to reduce loan in the name of Rispin & Hughes.***
- *€29,500 to* ***reduce loan*** *in the name of Rispin & Ryan.*

Please contact your solicitor re above and request that they forward total proceeds to the Bank, less of course their legal fees, capital gains tax liability and liability on foot of rights of residence. We will then arrange for the disbursement of funds as detailed above.

Also ***please sign this letter as indicated below confirming your acceptance of this agreement.***

Yours sincerely,

_____

Paul Algar…

I, Andrew Rispin, agree to the above.

Signed: ***[****Signature of* ***Andrew Rispin]*** *Date: 10/11/2010"* (emphasis added).

41. The first named defendant does not deny signing this agreement on 10 November 2010. Plainly, it *post-dates,* by over two and a half years, the contended for April 2008 agreement. It is also utterly inconsistent with the existence of same. I say this not least because, as of 10 November 2010, the first named defendant explicitly agreed *"to reduce"*, by €250,000, his liabilities to the plaintiff pursuant to the loan agreement which is the subject of the present

proceedings (namely, what is described in 10 November, 2010 agreement as *"loan in the name of Rispin & Hughes"*).

42. The said reduction of €250,000 was to be funded, as the first named defendant explicitly agreed, from *"funds due from CPO"*. This is utterly inconsistent with, and entirely undermining of, the proposition advanced by the first named defendant, in 2017, to the effect that, in April 2008, he and an unnamed representative of the Bank agreed that payment of the *same* CPO funds would be in full and final settlement of *all* liabilities.

43. For the sake of clarity, Mr Rispin does not contend that he was in any way mistaken when he reached the aforesaid agreement with the bank on 10 November 2010. Yet, the 9 November 2010 letter clearly does <u>not</u> make any reference to 'full and final settlement' of all Mr Rispin's liabilities, in return for payment of funds due from CPO. Rather, it explicitly refers to the *reduction* of liabilities commensurate with specific sums received against those liabilities.

44. In my view this agreement of November 2010 highlights that the contended-for defence raised by Mr Rispin, seven years later, comprise no more than mere or 'bald' assertions, without any reasonable foundation (see Charleton J in *NAMA v Barden* [2013] 2 IR 28 at para. 5).

45. Furthermore, these bald assertions are made by the first named defendant 'in the teeth of' (i) the terms of the 5 October, 2007 facility letter, which he accepted on 9 October 2007; (ii) the terms in the plaintiff's letter to him dated 9 November 2010, which he explicitly agreed to, on 10 November 2010; (iii) the terms of the Bank's letter to his solicitors dated 21 March 2013, to which he and his solicitors made no objection; and (iv) the terms of the Bank's letter to his solicitors dated 29 January 2014, to which no objection was ever made.

46. When subjected to appropriate *"scrutiny"* (see Charleton J in *NAMA v Barker & Ors.* [2014] IEHC 216 as cited by Baker J at para. 62 of her judgment in *ACC Loan Management Limited v Dolan & Ors.* [2016] IEHC 69) the first named defendant's assertions are utterly lacking in detail, support, or credibility, given the factual matrix amounting to the contractual relations between the plaintiff Bank and Mr Rispin.

<u>2013 payment</u>

47. I am fortified in this view by the fact that, some five years *after* the alleged agreement (of April 2008) and some three years *after* the CPO monies were paid (in 2010), solicitors representing the first named defendant paid monies to the plaintiff bank (in 2013) in part - reduction of the first named defendant's liabilities under the facility letter which is the subject of these proceedings. This is clear from the bank statements exhibited by the plaintiff which records *inter alia* a payment *"in"* of €39,456.00 made by Messrs Dillon Geraghty Solicitors, on 25 October, 2013.

48. To see where, in the relevant chronology, this payment was made, it is appropriate to recall the contents of the Bank's letter of 21 March 2013 which was sent to Messrs Dillon Geraghty. This letter explicitly stated that *"the Bank will continue to rely on its rights pursuant to the Letter of Offer in respect of the balance of the monies due and owing by the borrower pursuant to the Letter of Offer".* The 'borrower' was a reference to Messrs Rispin and Ryan (both of whom are named in the 21 March 2013 letter, and in the 5 October 2007 facility letter). Thus, seven months *after* the Bank makes its position clear to Messrs Dillon Geraghty & Co Solicitors, the same firm lodges €38,456.000 which – entirely and, indeed, only, consistent with the Bank's

position - is accepted in part discharge of the then liability of Messrs Rispin & Hughes in respect of term loan account number 79754971 (for which the Bank seeks summary judgment in these proceedings).

Section 65 of the Statute of Limitations, 1957

49. Section 65 of the Statute of Limitations, 1957 concerns the *"Fresh accrual of right of action on payment (action to recover debt)"* and states the following:

"65. – (i) where –

(a) any right of action has accrued to recover any debt, and

(b) the person liable therefor makes any payment in respect thereof,

the right of action shall be deemed to have accrued on and not before the date of the payment…".

In light of the part–payment on 25 October 2013, it is clear that the right of action accrued then, not earlier. For this reason, Counsel for Mr Rispin acknowledged that his client was no longer relying on any statute of limitations point. That was a very appropriate acknowledgement, in circumstances where part-payment of an indebtedness, in October 2013, was followed by the issuing of the present proceedings on 2 May 2017 (i.e. well within a six year period). However, it also seems to me that the abandoning by the first named defendant of any statute of limitations point (by reason of the acknowledgement of indebtedness as of 25 October 2013) also fatally undermines his contended-for defence. I say this because to acknowledge indebtedness in 2013 is utterly inconsistent with also asserting that, as and from April 2008, there was no indebtedness whatsoever. However, lest I be wrong in the foregoing view, I want to emphasise that I have considered in this judgment, all averments made by the first named defendant as regards the alleged agreement of April 2008 in the context of the relevant legal principles, to see whether it discloses the possibility of there being a bona fide defence.

Submissions

50. Counsel for Mr Rispin submitted that the Bank's claim required a plenary hearing. As to why this was so, his principal submission was that there was "*a dispute as to what precisely happened in 2008*". His submissions around this central contention comprise the following:-

(i) There is no dispute concerning the fact that Mr. Rispin "*paid €900,000 of the CPO monies"* to the Bank;

(ii) However, there is a "*proper dispute"* of fact, because Mr Rispin "*says it was in full and final settlement"* whereas the plaintiff says that this payment cleared "*two loan accounts and an overdraft"*;

(iii) A Data Protection Act request is "*no substitution for discovery"* and "*Mr Rispin wants to find out where the €900,000 was placed after the payment was made"*;

(iv) What is at issue is "*the standing of the agreement as originally made"*.

51. Regardless of the skill with which these submissions are made, and the force with which they are urged on the court, I cannot agree that there is truly any "*proper dispute"*, be it of fact or law.

52. It seems to me that Mr Rispin has not set out anything like a sufficient factual basis to ground the contention that there was an agreement in April 2008. In reality, he has done no more than make a bare assertion that there was an agreement. Yet this supposed April 2008 agreement

is fatally undermined by what Mr Rispin agreed two years later (on 10 November 2010) and what his solicitors agreed three years thereafter (part payment of the debt on 25 October 2013).

53. Furthermore, Mr Rispin has provided next to nothing by way of basic details essential for any agreement. Taking Mr Rispin's averments at their height and looking at same through the lens of fundamental principles of contract law (offer, acceptance, consideration and intention to create legal relations) very obvious questions arise, none of which are answered in Mr Rispin's averments, including: (i) who made the 2008 offer? (ii) was it Bank or borrower and, who represented the Bank? (iii) what were the circumstances in which the offer was accepted? (iv) why, in circumstances where Mr Rispin already owed a *greater* sum, did the bank purportedly agree to accept a *lesser* sum? (v) where did negotiations take place? (vi) were they by phone, email, correspondence, 'face to face', or a combination of the foregoing? (vii) why was nothing whatsoever documented? The answers to all of these questions are entirely lacking.

54. The height of what emerges from Mr Rispin's averments are that an unknown person or persons, at an unknown date or dates, agreed to accept less from Mr Rispin than he already owed the Bank and did so without their being any record in writing whatsoever of the negotiations which led up to this concession or, for that matter, of the agreement itself. Furthermore, Mr Rispin's contention is that a bank – which deals, daily, with very specific amounts, and which bank had granted loan facilities to him which were calculated in very specific amounts as to capital and interest - nevertheless agreed that his entire liability would be discharged without agreeing any specific amount (Mr Rispin refers only to a *"sum of just over €900,000"*). In addition, is the uncontroverted evidence that Mr Rispin made a substantial part payment of his liabilities in 2013 utterly undermining of his contention that he had no liabilities to the Bank at any point after the supposed April 2008 Agreement.

55. Taking Mr Rispin's assertions at their very 'height', they fall well short, in my view, of any *credible* basis to deny the plaintiff's application for summary judgment in respect of the claim in proceedings under record number 2017/771S. They constitute bald assertions which utterly lack credibility. Not only are they devoid of detail, they are unsupported by any objective evidence. Moreover, they are utterly undermined by uncontroverted evidence, including the entering into by Mr Rispin of a subsequent agreement (in 2010) in which he acknowledged his indebtedness, as well as a part payment (in 2013) of the very liabilities he now contends to have been settled (in 2008). The following extract from the judgment of Charleton J delivered on 10 April, 2014 in *National Asset Loan Management Limited v Barker & Ors.* [2014] IEHC 216 seems to me to be particularly appropriate: -

> *"Where a case is based on documents, a defendant must be in a position to show that the defence which they seek to make is not totally undermined by the correspondence between the parties."*

56. In the manner examined in this judgment, it seems to me that the contended for defence is utterly undermined by the correspondence and documents, to which I have referred. As Eager J made clear in *Bank of Ireland v Corrigan & Ors.* [2017] IEHC 318: -

> "*33. McKechnie J in Harrisrange Ltd v Duncan [2003] 4 I.R. 1 identified twelve factors material to the court's consideration on such an application. It is clear from this decision,*

that a mere assertion as to a given situation which is to form the basis of a defence is insufficient. The defendant must do better than bold (sic) assertions."

Whether the learned judge was referring to 'bald' or 'bold' assertions, the first named defendant in the present case has done no more than make assertions which simply lack any credibility and provide no basis for opposing the Bank's application.

Consideration

57. In addition to the foregoing analysis, Counsel for the plaintiff drew this court's attention to the decision by Irvine J (as she then was) delivered on 13 February, 2015 on behalf of the Court of Appeal in *Harrahill v Swaine* [2015] IECA 36. With reference to the decision by the Court of Appeal of England and Wales in *Re Selectmove Limited* [1995] 1 WLR 474 (as endorsed by Keane J in *Truck and Machinery Sales Limited v Marubeni Komatsu* [1996] 1 I.R. 12) Irvine J stated the following at para. 53: -

"53. In addressing the submission made on behalf of the defendant that there was no consideration to support the alleged agreement to waive the debt, Keane J. stated (at p. 28):-

'It has been settled law since the decision of The House of Lords in Foakes v. Beer that a promise to pay part of the debt is not good consideration in law. Its applicability in circumstances such as the present was considered by the English Court of Appeal in Re Selectmove Limited… where a company claimed that it had come to an arrangement with the Revenue as to the payment of arrears. The Court of Appeal unanimously held that it was bound by the decision in Foakes v. Beer to reject the argument that a promise to pay a sum, which the debtor was already bound by law to pay to the promise, could afford any consideration to support the contract'".

The rule in *Pinnel's* case

58. Quite apart from my findings that the first named defendant has done no more than make bald assertions (in the vaguest of terms, which are unsupported by any independent material, but wholly undermined by evidence to the contrary, including his own agreement) it also seems that the contended-for defence is, in essence, that Mr Rispin agreed with the Bank that he would pay *less* than he was *already* obliged to pay. The foregoing offends the rule in *Pinnel's* case. On this topic, it is appropriate to quote further from the decision in *Harrahill*, where Irvine J proceeded, from para. 54, to state the following: -

54. The aforementioned statement of the law was reinforced most recently in this jurisdiction by Laffoy J. in The Barge Inn Limited v. Quinn Hospitality Ireland Operations 3 Limited [2003] IEHC387 in which she reviewed a significant number of authorities going back as far as Pinnel's case itself.

…

57. At para. 62 of her judgment Laffoy J. concluded as follows:

'It is beyond question that the rule in Pinnel's case still represents the law in Ireland and this Court is bound by it, although the introduction of a new element into the relationship of the debtor and creditor, such as the collateral advantage to the creditor, may remove the relationship from the scope of the rule'."

59. In light of the foregoing it seems to me that another insurmountable problem for the first named defendant is that the contended-for agreement of April 2008 is one which lacked consideration. In stating this, I do not want to suggest that anything turned on this finding for the purposes of this Court's decision. On the contrary, the application by this Court of the principles outlined in *Harrisrange* satisfies me that leave to defend should be refused, for the simple reason that it is very clear that there is no defence.

60. I have come to this view very conscious that summary judgment represents the exception, not the rule, and equally conscious of the fundamentally important right of access to justice. Nevertheless, this is a case where, despite how sparingly the court should exercise the jurisdiction to grant summary judgment, this is an appropriate case to grant the relief sought by the Plaintiff.

Decision in relation to Plaintiff's claim (2017/771S)

61. The plaintiff is entitled to judgment against Mr Rispin (on a joint and several basis, in circumstances where Mr Hughes has already consented to judgment against him) in respect of the claim pleaded in proceedings bearing record number 2017 No. 771S.

62. My preliminary view on the question of costs is that the plaintiff, as the entirely successful party, is entitled to an order for costs, to include all reserved costs, to be taxed or adjudicated in default of agreement. In short, my view is that the justice of the situation would appear to be met by not departing from the 'normal' rule that 'costs follow the event'.

63. I now turn to the bank's claim against Mr Rispin in the proceedings bearing record number 2017/770S.

Bank's claim against Mr Rispin (2017 No. 770S)

64. The Bank's claim is articulated in the amended summary summons. Paragraph 1 of the special endorsement of claim pleads that the plaintiff's claim against the defendants (*i.e.* jointly and severally as against Mr Rispin and Mr Ryan) is for the following:

> *"(1) The sum of €176,504.03 being the amount remaining due and owing by the defendants to the plaintiff, representing the unpaid balance at the date of closure by the plaintiff (following default by the defendants and the disposal of secured property) and* ***term loan account number 56285842.*** *That account was formerly maintained by the defendants at the plaintiff's Kells, County Meath Branch Office on foot of monies advanced by the plaintiff to the defendants under a facility letter dated the 12th day of December 2006 as varied by a letter of facility dated the 9th day of October 2007 and as further varied by a letter of facility dated the 14th day of January 2008 by way of Development Loan for a period of six months subject to the terms of the Facility Letter dated the 14th day of January 2008 including terms as to repayment, events of default, the rate, basis and timing of related interest and fees and charges. The defendants failed to repay the full amount of the said loan in accordance with the terms of the Facility Letter, dated the 14th day of January 2008."*

65. The schedule to the amended summary summons specifies (a) the total advanced between 15 December 2006 and 19 April 2017, being €654,550.00; (b) interest charged between those dates, being €87,759.13; (c) total repayments between the said dates, being €565,805.10; leaving (d) a balance due and owing as at 19 April 2017 of €176,504.03. The appendix to the

amended summary summons comprises a setting out (with reference to date; transaction; debit; credit; and balance) of the relevant transactions.

66. On 6 July 2017, the plaintiff issued a motion seeking judgment, which application was grounded on an affidavit sworn by Mr Feeley, on 24 June 2017. At para. 2, Mr Feeley averred that by letter dated 12 December 2006 ('facility letter no. 1'). The plaintiff offered to make available to the defendants, jointly and severally, the sum of €595,000 by way of a Development Loan to fund the purchase of a site and the construction of a dormer bungalow in Virginia, County Cavan and the purchase of two sites and the construction of a two-storey house on each site at Ballyjamesduff. Exhibit 'BF1' to Mr Feeley's affidavit comprises a copy of facility letter no. 1. It is addressed to Mr Rispin and Mr Ryan "*c/o Grange, Bohermeen, Navan, Co. Meath"*. Under the heading "*Terms of Facilities and Repayment*", the following appears on internal page 1 of facility letter no 1: -

> *"Facility 1: This facility is approved for a period of 9 months and due to be cleared in full, inclusive of interest, by 30/06/2007 from the sale of properties at Lisnannymore, Virginia, Co. Cavan and Ballyjamesduff, Co. Cavan and/or from the compulsory purchase order funds due. Irrevocable contracts are to be in place by 30/6/2007, with regard to these properties. Exact repayments will be determined on date of drawdown, based on the interest rate then prevailing".*

67. Facility letter no. 1 also refers *inter alia* to Security; Fees; Conditions Precedent to drawdown; Covenants; Standard terms & conditions; and a Review date. Both Mr Rispin and Mr Ryan signed under the heading "*FORM OF ACCEPTANCE*", dated 12 December, 2006. Internal pages 4-11 inclusive, of facility letter no. 1 comprise an appendix, being the bank's "Terms and conditions". Just as was the case in respect of the claim discussed earlier, para. 12 of the plaintiff's terms and conditions states the following under the heading "Events of Default": *"(ii) if the Borrower defaults in the payment of any principal, interest, or other amount payable hereunder when due."*

68. At para. 3 of his affidavit Mr Feeley goes on to aver that, by further facility letters dated 9 October 2007 and 14 January 2008 ('facility letter no. 2' and 'facility letter no. 3', respectively):

> *"…the plaintiff offered to make available to the defendants, jointly and severely varying sums by way of renewal of the Development Loan together with, in the case of the last of those letters, an additional sum of €115,000.00 to complete a house at Lisnannymore, Virginia, Co. Cavan. Each of the said offers was made on the revised special terms and conditions as set out in the respective Facility Letters and as supplemented by the plaintiff's general terms and conditions which were appended thereto. Facility letter no. 3 provided that the Development Loan was approved for a period of six months and was repayable in full by the 31st day of July 2008. All of the Facility Letters were duly accepted by the defendants."*

69. Exhibits 'BF2' and 'BF3' respectively, comprise copies of facility letters no. 2 and no. 3. At para. 4, Mr Feeley avers that the defendants failed to make all of the required payments in accordance with the bank's terms and conditions, and that this amounted to an event of default pursuant to clause 12(ii). At para. 5, Mr Feeley avers that the plaintiff made a formal demand of each defendant, by letters dated 29 November 2013, and copies of these letters comprise exhibit 'BF4'. The first of these two letters is addressed to "*Mr Andrew Rispin & Mr Denis Ryan c/o Mr*

Denis Ryan, Grange, Bohermeen, Navan, Co. Meath", whereas the second is addressed to "*Mr Andrew Rispin & Mr Denis Ryan c/o Mr Andrew Rispin*" at the same "*Grange"* address. The letters are otherwise identical in terms and call for proposals to deal with the outstanding balance and require payment within fourteen business days, in default of which enforcement steps will be taken without further notice.

70. At para. 6 of his affidavit Mr Feeley avers that letters of demand were sent by the Bank's solicitors, dated 19th April 2017. Exhibit 'BF5' comprises of copies of both letters from Harrison O'Dowd Solicitors. These demand letters were sent to the "*Grange*" address and call for payment of €176,504.03, within seven days, in default of which legal proceedings would be instituted. The foregoing is the sum claimed in the amended summary summons. At para. 7 Mr Feeley avers that the sum claimed represents the indebtedness of the defendants to the plaintiff in respect of term loan account number 56285842, taking account of all due allowances.

71. At para. 8, Mr Feeley makes clear that the plaintiff does not claim contractual interest on the said sum. Paragraph 9 comprise averments made by Mr Feeley to the Banker's Books Evidence Act 1879 (as amended). At para. 10 he refers to an Appearance entered on 16 May 2017 (on behalf of the first named defendant) and an Appearance dated 6 June 2017 (entered by the solicitors for the second defendant, Mr Ryan). Mr Feeley also avers that the defendants have no defence to the claim and, at para. 11, liberty to enter final judgment is sought.

Asserted defence

72. It is fair to say that the first defendant makes precisely the same response to this claim (2017/770S) as he did to the bank's claim against him in the proceedings which this Court has dealt with earlier in this judgment (2017/771S). Indeed, the affidavit sworn by Mr Rispin in opposition to this application for summary judgment was sworn on the same date (3 November 2017) as the affidavit sworn in proceedings bearing record number 2017/771S and, with the exception of having a different record number and title, the averments made by Mr Rispin are *identical* in response to both claims.

73. The same can also be said with respect to the averments made at paras. 1 to 8, inclusive, of the supplemental affidavit sworn by Mr Rispin on 25 April 2018 in response to the present claim by the bank. Those averments are *identical* in every way to the averments made by Mr Rispin in his affidavit (also sworn on 25 April 2018) in response to the bank's claim in the proceedings discussed earlier (2017/771S). Thus, it is unnecessary to repeat the entire of the analysis set out earlier. It is sufficient to say that, in response to the present claim, Mr Rispin does no more than make the same 'bald' assertions, utterly lacking in detail and credibility. These mere assertions also 'fly in the face' of (i) the contract as between the bank and borrowers, as evidenced by the facility agreements entered into by Mr Rispin as well as (ii) his own actions, *subsequent* to the contended-for April 2008 agreement (i.e. entering a 10 November 2010 agreement which acknowledges his liability; and subsequently making a substantial payment to the Bank, which will be referred to presently). In short uncontroverted evidence fatally undermines the supposed April 2008 agreement.

74. Mr Feeley makes the following averment at para. 5 of his 16 November, 2017 (second affidavit):

> *"I wish to state categorically that the plaintiff did not, at any time, agree to accept a sum of money from either of the defendants herein in satisfaction of all monies due and owing by*

them. It is notable that the first-named defendant is unable to exhibit any correspondence from the plaintiff confirming or supporting that for which he contends. This is simply because no such correspondence exists. On the contrary, such correspondence as has passed between the plaintiff and the first named defendant's solicitors makes quite clear that any outstanding balances not realised from the sale of property continue to be due and owing by the defendants and must be repaid."

75. It will be recalled that this averment is similar to the averment which Mr Feeley made in the proceedings which this Court has already dealt with. Mr Feeley went on to exhibit the correspondence of 21 March 2013 from the Bank to the solicitors acting for the defendants in connection with a sale of property in County Cavan. He also exhibited the letter dated 29 January 2014 addressed to the solicitors acting on behalf of the first named defendant. Given that these letters have been examined earlier, it is not necessary to do so again. It is sufficient to note that these letters state, explicitly, that "*the bank will continue to rely on its rights pursuant to the letter of offer in respect of the balance of the monies due and owing by the borrower pursuant to the letter of offer*" (21 March 2013 letter) and that "*…whilst Loan Facilities 90403099 & 45334020 were fully repaid, (and Current Account 22660720 Overdraft Facility cleared) on receipt of the compulsory purchase order monies, other facilities in the name of Andrew Rispin and others, whilst reduced, were not fully repaid at the time and balances remain outstanding".* (Letter dated 29 January 2014).

76. To echo this Court's previous analysis, these letters are *entirely*, indeed *only* consistent with the written contract between the plaintiff and Mr Rispin (and his co-borrower Mr Ryan). In my view the correspondence and written agreements totally undermine the contended - for defence. This Court has already looked closely at the Bank's 9 November 2010 letter (signed, by way of agreement, by Mr Rispin on 10 November 2010) with respect to his payment to the bank of the CPO monies and what facilities were (and were not) discharged. As examined earlier, there was certainly no suggestion whatsoever that payment of circa €900,000 was in full and final settlement.

Payment to reduce loan in name of Rispin and Ryan

77. As of 10 November 2010, Mr Rispin put his name to an agreement in which he acknowledged *inter alia*, with respect to the disbursement of the CPO monies: *"€29,500 to reduce loan in the name of Rispin & Ryan"*. For Mr Rispin to have acknowledged that he was *reducing*, by €29,500, the loan facilities in respect of which the present proceedings are brought (2017 no. 770S) is utterly undermining of his contention that, two years *earlier*, he and the Bank agreed that the payment of CPO monies of €900,000 was in full and final settlement of all liabilities.

€29,000 paid on 17 November 2010

78. In Mr Feeley's second affidavit (sworn 16 November 2017) he repeats the averment that *"…the funds were drawn down by the Defendants in various tranches on Term Loan Account Number 56285842"* and he exhibits copy bank statements with respect to the said account (exhibit 'BF7'). As well as showing the various drawdowns under the heading of payments "*out",* the statement confirms an entry (dated 17 November 2010) by way of a payment "*in*", in the name of "*A Rispin*", of the sum of €29,500.00. In other words, even though Mr Rispin contends that his liabilities were fully and finally settled by means of an agreement in April 2008, over two

and a half years *later* he makes, or causes to be made, a payment of €29,500 in respect of the self-same liabilities. It is a statement of the obvious to say that this payment which was made on 17 November 2010 is precisely the same amount as is specified in the agreement which Mr Rispin signed on 10 November 2010 i.e. an amount by which the liabilities of Rispin/Ryan (which liabilities are the subject of the present proceedings / summary judgment application) would be *reduced*.

Payment of €90,775.50

79. In addition, the bank statements exhibited by Mr Feeley contain *inter alia* a further payment "*in*", which was made on 16 July 2013, in the sum of €90,775.50. This payment, which was made over *five* years after the contended for April 2008 agreement and some *three* years after payment of the CPO monies (in 2010) is both an acknowledgement of indebtedness and utterly undermining of the asserted defence. Furthermore, Mr Feeley avers at para. 8 of his 16 November 2017 (second) affidavit that, as the Bank statements confirm:

> *"…there was a further drawdown on the account in April 2008. I say that it is not credible to suggest that the plaintiff would have agreed to accept a lump sum in settlement of the debt due, while at the same time allowing a further drawdown on the defendants' account".*

80. Applying the test articulated in *Harrisrange*, I am satisfied that this is one of those rare cases where leave to defend should be refused. This is because it is clear that Mr Rispin has no defence to the plaintiff's claim. I have come to this view taking fully on board what Mr Rispin has averred in response to the affidavit sworn on 8 January 2018 by Mr Ryan. I will presently come to the differences between them. However, for present purposes, nothing Mr Rispin says in response to Mr Ryan (see paras. 9-13, inclusive of Mr Rispin's 25 April 2018 affidavit) is contended by Mr Rispin to provide any basis for a defence in respect of the Bank's claim.

81. In circumstances where the contended-for defence is one and the same in respect of both of the claims by the plaintiff Bank against Mr Rispin, it is not necessary to comment, again, on the submissions made on behalf of Mr Rispin. Suffice to say that, notwithstanding the clarity and skill of those submissions, they simply cannot avail Mr Rispin, in view of the undisputed facts before the court.

82. In short, leave to defend by way of plenary hearing should be refused in this case because there is simply no issue, be it of fact or law, which requires to be determined. The height of what Mr Rispin has put forward by way of a supposed defence constitutes bald assertions, wholly lacking in detail and credibility and undermined by uncontroverted evidence. In this regard, the court's earlier analysis applies.

83. Having dealt with the claims against Mr Rispin, I now turn to the Bank's claim against his co-borrower, Mr Ryan, in proceedings bearing record number 2017 No. 770S.

The Bank's claim against Mr. Ryan (2017 no. 770 S)

84. In response to the present application for summary judgment, Mr. Ryan swore a replying affidavit on 8 January 2018. It is entirely fair to say that the averments he makes are directed at his co–borrower, Mr. Rispin. A summary of Mr. Ryan's affidavit is as follows: -

- He is "*. . . a builder by trade and have worked in construction for many years*" (para. 3);

- In or about 2006 he was approached by his ". . . *brother-in-law, the first named defendant, who asked me to become involved in a construction project he was starting"* (para. 4);
- Mr. Rispin ". . . *did not have any expertise in construction*" (para. 4);
- Mr. Ryan told Mr. Rispin that he did not have the finance or security to fund such a project and Mr. Ryan was reluctant to become involved as he was "very concerned about borrowing substantial sums of money" because if the venture was not successful, he and his family ". . . *would be left with significant debts with no means to repay them*" (para. 4);
- Mr. Rispin assured Mr. Ryan ". . . *that he would make all necessary arrangements in relation to financing the project*" (para. 5);
- At that time, Mr. Rispin ". . . *was about to receive very substantial funds (in excess of €1 million) from Meath County Council arising from the compulsory purchase of lands to build a roadway through his lands (the CPO monies). He informed me that he would use this money as security for any loans advanced for the project. He assured me that the security he would provide to the lender would be more than adequate to cover any shortfall should the venture prove to be unsuccessful. At all material times, it was understood that the CPO monies would only be used as security for the loans which we were about to draw down*" (para. 5);
- It was agreed between them that Mr. Rispin ". . .*.. would ultimately be responsible for repaying any sums due and owing to the plaintiff in the event that the funds raised from the sale of the development properties were insufficient to repay the outstanding loans*" (para. 6).
- It was agreed between them that Mr. Ryan "*would have no responsibility or liability for the discharge of any outstanding sums due and owing to the plaintiff"*. (para. 6);
- "*There were some limited discussions in relation to whether and how any potential profits from the venture would be shared if successful, but no agreement was made in this regard*" (para. 6);
- The facilities were due to be cleared by the sale of "*….the developed properties and/or from the CPO monies*" (para. 7);
- ". . . .*it was my understanding that the CPO monies would only be used as security for the loans advanced by the plaintiff and would not be used to secure any other loans or credit facilities"* (para. 7);
- "*While I worked exclusively on the site, the first named defendant was in charge of all financial and legal aspects of the project, including the manner in which the sale proceeds were transferred to the plaintiff to pay down the outstanding loans*" (para. 8);
- "I *did not personally receive any correspondence from the plaintiff until I received the letter dated 29 November 2013 exhibited at 'BF 4' of Mr. Feeley's affidavit. After I received the letter, I approached the first named defendant to ask him what did it relate to. His response was that I should not worry about it as he had taken care of it*" (para. 9)

- The next item of correspondence that Mr. Ryan received from the plaintiff bank was three years later, by means of the 19 April 2017 letter (para. 10);
- Whereas the CPO monies comprised €1.1 million and Mr. Rispin says that, in or around April 2008, it was agreed that the plaintiff would accept just over €900,000 from the proceeds of the CPO in satisfaction of all monies due and owing by the first defendant to the plaintiff, Mr. Rispin does not explain what happened to the remaining €200,000 of the CPO monies (para. 11);
- "*I am not in a position to comment definitively on what transpired at the meeting in April 2008 or the agreement referred to by the first named defendant. I did not attend this meeting with the plaintiff or any subsequent meetings*" (para. 12);
- " . . . . *it would appear that the plaintiff and the first named defendant arranged for the CPO monies to be used to fully repay certain loan facilities and clear certain overdraft facilities in the name of the first named defendant. This was done without any notification or consultation with me. I was not privy to any discussions or negotiations that they had in this regard. Neither the first defendant nor the plaintiff made any attempt to contact me or involve me in the discussions in relation to the loan, the alleged outstanding arrears or the use of the CPO monies*" (para. 14);
- "*It would appear that no CPO monies were used to pay down the loans that are the subject matter of these proceedings, with the possible exception of the sum of €29,500 paid over on 17th November 2010. As such, it constitutes a clear breach of the agreement and/or understanding and/or representations made between the first named defendant and I in relation to his responsibility for the discharge of any outstanding sums due and owing to the plaintiff*" (para. 14);
- ". . . *in failing to consult or notify me that the CPO monies held as security were to be used to pay down other debts in the name of the first named defendant, the plaintiff deprived me of the opportunity to take appropriate steps to enforce my agreement and/or understanding with the first named defendant*" (para. 14);
- Mr. Ryan asserts that ". . . *any liability in relation to the loans rests solely with. . .* [Mr. Rispin] " and that Mr. Ryan is "*. . . entitled to an indemnity from him*" (para. 16);
- By letter dated 2 November 2017, Mr. Ryan's solicitors wrote to Mr. Rispin's solicitors calling upon him to provide an indemnity, which has not been furnished (para. 17);
- Mr. Ryan's personal relationship with Mr. Rispin has deteriorated in the last number of years, and he has had no contact with him. Sadly, Mr. Ryan's wife was diagnosed with cancer in early 2007 and passed away in July 2012. Mr. Ryan also refers to a serious disagreement between himself and Mr. Rispin in relation to a sludge storing facility which the latter proposed to build close to Mr. Ryan's family home, to which he objected (para. 18);
- Mr. Ryan also asserts that the plaintiff's claim is statute barred (para. 19).

85. As Mr. Hand BL made clear, Mr. Ryan no longer relies on any statute of limitations issue. As to the other issues raised by Mr. Ryan in his 8 January 2018 affidavit, it seems appropriate to say the following: -

(i) Mr. Ryan nowhere asserts that he informed the bank about his agreement with Mr. Rispin;

(ii) Mr. Ryan does not assert that Mr. Rispin did either;

(iii) There is no evidence before the court that the bank was 'on notice' of, or ever consented to, the agreement between the borrowers to which Mr. Ryan refers; and;

(iv) Insofar as such an agreement was reached prior to the acceptance by both borrowers of the lending facilities, the explicit terms of the lending documentation confirmed that both borrowers are jointly and severally liable.

86. Taken at their very height, the averments by Mr. Ryan, regarding his discussions with Mr Rispin, concern arrangements which the plaintiff Bank was neither aware of, nor consented to. As such, I find it impossible to see how these averments disclose the possibility of a *bona fide* defence to the plaintiff's claim. It should also be noted that, by means of averments made at paras. 9–13, inclusive, of his 25 April 2018 affidavit, Mr. Rispin takes issue with Mr. Ryan's assertions. Mr. Rispin's position on the matter can be summarised as follows: -

- Mr. Rispin agrees that relations between himself and Mr. Ryan have "*soured*" as a result of the failure of the business venture (para. 9);
- Mr. Rispin describes Mr. Ryan as "...*a willing and informed participant in the venture*" (para. 10);
- Mr. Rispin says that "...*the failure of the venture had nothing whatsoever to do with the level of security in place in respect of the loan facilities*" (para. 11);
- Mr. Rispin avers that he did not use the fact that he "...*had land to offer as security to induce Mr. Ryan to enter into the business venture. To my knowledge, Mr. Ryan was aware that I had a number of facilities over which the said lands were offered as security*" (para. 12);
- Regarding the assertion by Mr. Ryan that Mr. Rispin offered to indemnify him, Mr. Rispin contends that they were "… *equal partners in the venture and it was agreed we would share equally in the profits and if arising we would share equally in the discharge of liabilities*" (para. 13);

87. For the sake of completeness, Mr. Ryan swore a further affidavit, on 9 May 2018, taking serious issue with Mr. Rispin's account of matters and asserting, *inter alia,* that: "*…at the time I entered into the agreement I did not know that the First Defendant had secured a number of facilities on the CPO monies*" (para. 5). Mr Ryan also repeats the averment that: -

> "...*what was certainly agreed was that I would have no responsibility or liability for the discharge of any outstanding sums due and owing to the plaintiff if the proceeds of the sale of the developed properties were insufficient to repay the outstanding loans*" (para. 5).

88. Again, Mr. Ryan does not assert that the Bank was ever aware of, or agreed to, the foregoing. His claim is that Mr. Rispin agreed to this. Thus, what emerges from the various averments is that, whilst there is a dispute between the defendants as to the basis upon which *inter se* they entered into obligations, neither assert that the bank was aware of, still less consented to, any alleged agreement between them. This can provide no credible basis for Mr Ryan to defend the Bank's claim. However the foregoing is not the end of the analysis.

10 November 2010 agreement signed by Mr Rispin

89. During the course of the hearing, it emerged that Mr. Hand BL had not seen the third affidavit sworn by Mr. Feeley (on 16 April 2019). That affidavit exhibited, *inter alia*, the 9 November 2010 letter from the Bank to Mr. Rispin which the latter signed, by way of agreement, on 10 November 2010. In the manner discussed earlier, that letter makes clear *inter alia* that, of the net CPO monies, there will be a payment of: *"€29,500 to reduce loan in the name of Rispin & Ryan".*

90. By agreement with counsel, I allowed some time for Mr. Hand BL to consider the contents of that affidavit and for the plaintiff's instructing solicitor to review the relevant file on the question of service of that affidavit. It emerged that there was no documentation evidencing service, but Mr. Hand BL was happy to proceed notwithstanding.

Submissions on behalf of the Bank

91. With reference to the delivery of correspondence to Mr. Ryan, counsel for the Bank referred the court to the "*Notice Provisions*", comprising para. 16 of the plaintiff's Terms and Conditions (found at internal p. 11 of each of the facility letters). These provide as follows: -

> *"16. Notice Provisions*
>
> *Any notice or demand to be given hereunder shall be in writing and shall be deemed duly given, upon being left at the borrower's last known address or registered office or place of business or 48 hours after having been posted by pre–paid post to the borrower at the borrower's last known address or registered office or place of business".*

92. Counsel for the Bank drew attention to the fact that the "*Grange*" address appears on all facility letters executed by Mr. Ryan (being the same address employed in the Bank's letters subsequently sent to Mr. Ryan). To my mind, nothing turns on the foregoing. In other words, it is not the question of whether any correspondence addressed to Mr. Ryan did or did not reach him, which is determinative of the present motion.

93. Mr. Keyes for the plaintiff went on to characterise Mr. Ryan's position as asserting a *non est factum* defence and he made reference, in particular, to the Court of Appeal's decision in *Allied Irish Banks plc. v. Higgins & Ors*. [2015] IECA 23 wherein, at para. 22, the Court of Appeal referred to the decision of Hardiman J. in *Aer Rianta cpt v. Ryanair Ltd*. [2001] 4 IR 607, in which the learned judge (at p. 40) described the defence of *non est factum* in the following terms: -

> "The defence of *non est factum* is one which has been considered in the context of an application for summary judgment by Morris J. (as he then was) in *Tedcastle McCormack & Company Limited v. McCrystal* (15th March 1999). There that judge considered the decision of the House of Lords in *Saunders v. Anglia Building Society* [1971] AC 1004 which is the authoritative modern authority on the topic. He said: -
>
> > *'I am satisfied that a person seeking to raise the defence of non est factum must prove:*
> >
> > *(a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;*
> >
> > *(b) That the mistake was as to the general character of the document as opposed to the legal effect; and*

(c) That there was a lack of negligence i.e., that he took all reasonable precautions in the circumstances to find out what the document was"".

94. With reference to the heavy burden imposed on a person seeking to rely on such a defence, Mr. Keys BL submitted that nothing averred to by Mr. Ryan discloses the necessary elements of a *non est factum*. According to counsel for the plaintiff, the insurmountable difficulty for Mr. Ryan is that, on three occasions, he signed contracts with the bank in his capacity as a borrower jointly and severally liable for the facilities which were drawn down.

95. Mr. Keyes also laid emphasis on the fact that Mr. Ryan never informed the bank of what he says was the arrangement between Mr. Ryan and Mr. Rispin. Counsel for the plaintiff characterised Mr. Ryan's averments as no more than 'bald assertions' which disclose no stateable defence.

Submissions on behalf of Mr Ryan

96. Mr. Hand BL made clear that the defence of *non est factum* was not sought to be raised by Mr. Ryan. Nor was Mr. Ryan seeking to argue any statute of limitations point. He suggested, however, that leave to defend should be granted because there is a conflict of fact between the defendants themselves. If the *only* defence asserted by Mr. Ryan, related to the agreement which he says he reached with Mr. Rispin, I could see no basis to refuse summary judgment.

Breach of Contract

97. However, as Mr. Hand BL went on to submit, his client also contends that there has been a breach of contract by the plaintiff Bank, in circumstances where, according to the explicit terms of the facility letters which Mr. Ryan signed as co–borrower, the relevant borrowings were to be repaid from the proceeds of house sales and/or CPO monies. Despite the relevant contractual terms, merely €29,500 (out of CPO monies totalling €1.1 million) was ever paid in reduction of the loan facilities for which the plaintiff now seeks judgment against Mr. Ryan and Mr. Rispin, on a joint and several basis.

98. Although, earlier in this judgment, I quoted the relevant clause (as found in Facility Letter no. 3), it is appropriate to quote *verbatim,* as follows, from all three Facility Letters, in sequence:-

Facility Letter no. 1 dated 12 December 2006

"Terms of Facilities and Repayment

Facility 1: This facility is approved for a period of 9 months and due to be ***cleared in full****, inclusive of interest, by 30/06/2007* ***from the sale of properties*** *at Lisnannymore, Virginia, Co. Cavan and Ballyjamesduff, Co. Cavan* ***and/or from the compulsory purchase order funds due****. Irrevocable contracts are to be in place by 30/6/2007, with regard to these properties.*

Exact repayments will be determined on date of drawdown, based on the interest rate then prevailing". (Emphasis added).

Facility Letter no. 2 dated 9 October 2007

"Terms of Facilities and Repayment

Facility 1: This facility is renewed and due to be ***cleared in full****, inclusive of interest, by 31/12/2007* ***from sale of properties*** *at Lisnannymore, Virginia, Co. Cavan and Ballyjamesduff, Co. Cavan* ***and/or from the compulsory purchase order funds due****.*

Exact repayments will be determined on date of drawdown, based on the interest rate then prevailing". (Emphasis added).

Facility Letter no. 3 dated 14 January 2008

"*Terms of Facilities and Repayment*

Facility 1: This facility is approved for a period of six months and is ***repayable in full****, inclusive of interest, by 31/07/2008* ***from sale of properties*** *at Lisnannymore, Virginia, Co. Cavan and Ballyjamesduff, Co. Cavan* ***and/or from the compulsory purchase order funds due****.*

Exact repayments will be determined on date of drawdown, based on the interest rate then prevailing". (Emphasis added).

99. Counsel for Mr. Ryan contrasts the foregoing contractual terms which appear in all three facility letters with the fact that just €29,500 from the CPO funds (of €1.1 million gross) was paid to the Bank to reduce these facilities (for which the Bank now seeks summary judgment), whereas the vast majority of the CPO funds were paid elsewhere (i.e. in reduction of a variety of liabilities of Mr. Andrew Rispin, as well as and certain liabilities of Mr. Patrick Ryan).

100. In the manner examined earlier, the manner of distribution of the CPO funds is set out in the Bank's 9 November 2010 letter which the first named defendant signed on 10 November 2010. As Mr. Hand BL points out, the said letter was addressed *only* to Mr. Rispin. There is no evidence before the Court that the Bank either put his co–borrower, Mr. Ryan, on notice of the manner in which it was proposed to distribute the CPO monies, or that Mr Rispin did so. There is certainly no evidence that Mr Ryan agreed to the manner in which the CPO monies were distributed.

101. It seems to me that there is an obvious tension between, on the one hand, the contractual terms which I have cited above and, on the other, the reality that all but €29,500 of the CPO funds (referred to in facility letters no. 1, 2 and 3) were *not* used to repay the borrowings by Messrs. Rispin and Ryan which are the subject of the present application by the bank for summary judgment.

"or"

102. Mr. Keyes valiantly submits, on behalf of the Bank, that the use of the word "*or*" in each of the repayment clauses in the three sequential facility letters (which refer to repayment from certain sales "*…and/or from the compulsory purchase order funds due"*) means that this Court can confidently grant summary judgment. With respect, I must take a different view.

103. It seems to me that, properly applying the *Harrisrange* test, I cannot safely take the view that no issue has been raised, or that the issue is of such simplicity that it can be easily determined, without the necessity for a plenary hearing. On the contrary, it seems to me that Mr. Ryan has satisfied this Court that he has *"a fair or reasonable probability of having a real or bona fide defence*". As the authorities made clear, the 'bar' which Mr. Ryan must clear does not involve demonstrating that his defence is a strong one, or that it will probably succeed, but in my view, an arguable defence has been disclosed. To put it another way, I cannot safely say that it is very clear that there is no defence.

104. I am satisfied that a serious risk of injustice would arise were the court to grant summary judgment against Mr. Ryan, rather than directing a plenary hearing. This is not because there

are any issues of fact or law to be resolved in relation to any contended-for April 2008 agreement. Nor is it because there is a dispute between Mr. Ryan and Mr. Rispin as to what they privately agreed. However, justice requires that the matter is remitted to plenary hearing because it is at least arguable that there has been a breach of the repayment clause with respect to the use of CPO funds.

Questions

105. It seems to me that an important question, which this Court cannot safely resolve at the summary stage, can be put in the following terms: *Was the plaintiff Bank obliged to apply, in discharge of the borrower's liabilities pursuant to the facility letter dated 14 January 2008, the "Compulsory Purchase Order funds" referred to in the clause entitled "Terms of Facilities and Repayment"?* Thus, leave to defend at a plenary trial must be granted to avoid the risk of injustice. In the course of his submissions, Mr. Hand BL also raises a number of related questions, including: *Whether the plaintiff Bank and Mr. Rispin could lawfully make unilateral agreements (i.e. not involving Mr. Ryan) concerning repayment*?; or, put otherwise, *Whether the Bank could lawfully make "major decisions with one borrower to the exclusion of another"?*; and/or *Whether it was permissible for the Bank to agree to Mr. Rispin eliminating or reducing his liabilities "to the exclusion of reducing the liabilities of Mr. Ryan"?* The answer to these related questions is not readily apparent and cannot safely be determined by means of the summary process.

106. The submission is also made that a *different* decision concerning the distribution of the CPO monies had the potential to affect Mr. Ryan's position in a very fundamental way. In other words, it is submitted that, had *all* of the CPO funds been applied against the loan facilities in respect of which the plaintiff now seeks judgment, *all* Mr Ryan's liabilities would have been discharged. As a basic mathematical proposition, that would certainly appear to be so. Indeed, counsel for the Bank fairly acknowledged that this was the case. This, in my view, illustrates why it is not permissible for this court to grant summary judgment against Mr Ryan.

107. In concluding submissions, Mr. Keyes suggested that this Court should look separately at the positions of Mr. Rispin and Mr. Ryan, respectively. He also submitted that if this Court were to take the view that it would be appropriate to remit the Bank's claim against Mr. Ryan to plenary hearing, such a decision could not avail Mr. Rispin. In this I fully agree.

Conclusion

108. For the reasons set out in this judgment, the plaintiff bank is entitled to judgment, joint and severally, against Mr. Andrew Rispin and Mr. Michael Hughes (in proceedings bearing record no. 2017/771 S), in the sum of €366,099.40. As noted earlier, Mr. Hughes consented to judgment against him as well as an order for costs in favour of the plaintiff with a stay on execution for six months.

109. The plaintiff bank is also entitled to judgment against Mr. Andrew Rispin, in the sum of €176,504.03, in respect of the claim (in proceedings bearing record no. 2017/770 S).

110. With respect to the costs of *both* applications against Mr. Rispin, my preliminary view is that, as the entirely successful party, the Bank is entitled to an order for costs to include all reserved costs, to be adjudicated in default of agreement, consistent with the normal rule that costs should follow the event.

111. Finally, the bank's claim against Mr. Ryan in proceedings bearing record no. 2017 770 S should be remitted to plenary hearing. Subject to any alternative agreement which the relevant parties might reach, I propose to direct (i) the plaintiff to deliver a Statement of Claim within four weeks of the start of Hilary Term; (ii) any notice for particulars to be raised within a further four weeks and (iii) a further four-week period be allowed for the delivery of replies to particulars. Thereafter, (iv) a Defence should be delivered within four weeks, followed by (v) any Reply to defence to be delivered within two weeks; (vi) Discovery requests should be raised within a further two weeks and (vii) responded to within a further two weeks. Finally (viii) any motion for discovery by either side should be issued within four weeks from that point.

112. With respect to the question of costs, my preliminary view is that the appropriate order is that the costs of the application against Mr. Ryan should be 'costs in the cause'. This preliminary view reflects the following:

(i) On the face of the contractual documentation put before the court in this application, Mr. Ryan is jointly and severally liable;

(ii) Nothing averred to by Mr. Ryan in either his first affidavit (sworn on 8 January 2018) or in his second affidavit (sworn on 9 May 2018) discloses an arguable defence (as opposed to a dispute between Mr. Ryan and Mr. Rispin with respect to an agreement, between them, which neither suggest the bank was aware of, or consented to);

(iii) There could be no valid criticism of the plaintiff for bringing an application of this type;

(iv) As a result of bringing an application, the plaintiff now knows that Mr. Ryan opposes judgment and the Bank now has an understanding of the basis upon which judgment is opposed (namely, a legal argument, advanced with skill during oral submissions at the hearing before me, but not 'flagged' in advance by Mr. Ryan in any way);

(v) In an application of the present type, the 'bar' which a defendant must clear is set very low;

(vi) For this court to grant liberty to defend at a plenary hearing is not to hold that a defence will probably succeed and, in respect of the proceedings (bearing record no. 2017/ 770 S) it remains to be seen whether the plaintiff or the defendant will be successful at a future trial.

113. The parties are invited to liaise with each other as regards the final form of an order reflecting the findings in this judgment. In the event of any dispute between the parties on any issue, including the question of costs, short written submissions should be delivered within 14 days of the start of Hilary Term (i.e. by 25 January 2023).