THE HIGH COURT

[2023] IEHC 676

[Record No. 2016/913S]

BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

PETER HANLEY, ANDREW HANLEY AND PHILIP HANLEY

DEFENDANTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 1st day of December, 2023.

INTRODUCTION

1. This matter comes before me on the Plaintiff's application by Notice of Motion dated the 27th of February, 2019 for liberty to enter final judgment against the First and Third Named Defendants separately in the sum of €120,000 each. Judgment is sought on foot of two separate guarantees (hereinafter "the Guarantee") signed by each of them in July, 2006 in favour of Dublin Balloon Printing Company Limited (hereinafter "the Company"), a company of which they were directors. The First and Third Named Defendants maintain, alternatively:

(i) that the Plaintiff has failed to establish its proofs on a summary application by reason of a failure to place sufficient evidence before the court to establish *prima facie* that the debt alleged is due in reliance on the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 (hereinafter "*O'Malley*");

(ii) in the alternative, that the Defendants have a possible Defence to these proceedings based on (a) the Statute of Limitations, 1957 (as amended); and (b) the failure to serve a demand as a precondition to the Defendants' liability to pay under the terms of the guarantees executed by them.

BACKGROUND

2. In the guarantee entered into by each of the Defendants (on the 5th of July, 2006 in the case of the First Named Defendant and the 10th of July, 2006 in the case of the Third Named Defendant), they each guaranteed the liabilities of the Company up to a maximum amount of €120,000. The Company went into liquidation on the 4th of February, 2011. At the date of its liquidation the Company had accrued liabilities to the Plaintiff on foot of two facilities being an overdraft facility and a term loan account.

3. The Plaintiff issued a summary summons on the 1st of June, 2016 seeking judgment against each of the Defendants in the sum of €120,000. In the Special Endorsement of Claim to the Summary Summons it is pleaded that under the terms of the Guarantee executed the Defendants, in consideration of facilities advanced to the Company, unconditionally and irrevocably guaranteed and agreed as a continuing obligation to pay to the Plaintiff on demand all sums of money which were then or should at any time be owing or remain unpaid to the Plaintiff anywhere from or by the Company, whether as principal or surety, provided always that the total amount did not exceed €120,000 together with interest and fees.

4. It is pleaded that the liquidation of the Company constituted "*an event of default*" under its terms and conditions entitling the Plaintiff to demand repayment of the term loan facility. It is further pleaded that under its terms and conditions the overdraft facility was repayable on demand. It is pleaded that as of 10th of May, 2016 when the Plaintiff made demand of the Defendants through its solicitors for payment on foot of the guarantee, the sum of €205,482.89 had accrued in respect of the Company's liabilities to the Plaintiff on the facilities provided to the Company. No particulars of this sum are given and the claim as against each Defendant is for the full amount of the Guarantee in the sum of €120,000 each.

5. A Notice of Motion seeking liberty to enter final judgment which issued in February, 2018 was struck out on consent for failure to issue a Notice of Intention to Proceed as required by Order 122 of the Rules of the Superior Courts, 1986. This was followed by the issue of the within motion in February, 2019. A number of Affidavits have been exchanged in the proceedings.

6. In grounding the application for liberty to enter final judgment, an official of the Plaintiff exhibits a loan offer dated the 12th of May, 2006 in the sum of €300,000.00 addressed to the Directors of the Company at the Third Named Defendant's address in which conditions are set out including conditions as to the calculation of interest, the imposition of surcharges and legal and other charges. Events of default are set out and include the appointment of a liquidator. The Statements of Account in respect of the Company's current account and term loan account are exhibited. It is averred on behalf of the Plaintiff that funds were drawn down on the term loan in November, 2006 and regular payments were made up to the beginning of 2011.

7. It is confirmed on behalf of the Bank that the sum of €205,482.80, a figure obtained by adding the final balances on both accounts, was due and owing on both facilities. The statement on the overdrawn current account ran to March, 2015 while the statement on the term loan account gave a final balance as at the 23rd of May, 2011. Although exhibiting the statements on both accounts which on their face were addressed to the Company (in liquidation from February, 2011) at the same address given by the Third Named Defendant in his affidavits sworn in these proceedings, the Plaintiff has not deposed that these statements were sent to the Company or the First and Third Named Defendants.

8. The Plaintiff's deponent exhibits the Guarantees executed. He confirms demands were made in writing to the First and Third Named Defendants by letter dated the 26th of July, 2011 and again by letter dated the 10th of May, 2016, calling on them to discharge all sums then due and owing in respect of the liabilities of the Company.

9. The parties both rely on the terms of the Guarantee in their submissions on this application. The Guarantee executed by the First Named Defendant gave a different address to that used in the Bank's subsequent correspondence with him, whereas the Guarantee executed by the Third Named Defendant bears his current address and the address which appears on the Statements of Account and on letters of demand as exhibited on behalf of the Plaintiff. Particular emphasis was placed by the parties in argument on Clauses A, A(ii) and B(9), B(13), B(21) and B(28)(i).

10. Clause A refers to an obligation on the part of the Guarantor to pay "*on demand*" and provides in relevant part as follows:

"....the Guarantors unconditionally and irrevocably guarantee and agree as a continuing obligation to pay to the Bank on demand all sums of money (hereinafter called "the ultimate balance") which are now or shall at any time be owing or remain unpaid to the Bank anywhere from or by the Customer whether as principal or surety...."

11. Similarly, Clause A(ii) refers to the customers liability enforceable under the Guarantee from the date of "*the demand*" as follows:

"provided always that the total amount ultimately enforceable against the Guarantors under this Guarantee shall not exceed the principal amount set out below and to the extent they relate to such principal the following additional amounts:

(i) ...;

(ii) all interest on the Customer's liabilities from the date of demand under or earlier determination of this guarantee until payment calculated at the rate and in the manner applicable to the relevant account of the Customer...."

12. The Plaintiff relied on Clauses A, A(ii) together with Clause 9 to contend that the Guarantee provided for a liability to pay "*on demand*" with the result that time did not run for the purposes of the Statute of Limitations, 1957 (as amended) until demand was made. Like A and A(ii), Clause 9 refers to "*demands under this Guarantee*" in a manner which it is contended supports the Plaintiff's claim that under the terms of the Guarantee a cause of action did not accrue until demand was made.

"9. Demands under this guarantee may be made from time to time and may be withdrawn and subsequently made again and the liabilities and obligations of any of the Guarantors under this guarantee may be enforced irrespective of:

(a) Whether any demands, steps or proceedings are being or have been taken against the Customer, any other of the Guarantors and/or any third party; or

(b) Whether or in what order any security to which the Bank may be entitled in respect of the ultimate balance is enforced.

In any case where the liability of the Customer to the Bank is in respect of a liability of the Bank incurred on behalf the Customer which is contingent a demand for payment of any such liability may be made by the Bank at any time on the Guarantors for an amount not exceeding the likely maximum amount as determined by the Bank of that liability;

notwithstanding that at the time of such demand the Bank has not been called upon to make payment on behalf of or in respect of the Customer. In the case that any amount so paid by the Guarantors to the Bank hereunder shall exceed the amount of the liability actually incurred by the Bank upon crystallisation of such contingent liability the Bank shall refund such excess amount together with any interest that would have accrued thereon had a similar amount been placed on deposit with the Bank for a similar period of time.

In the event of any demand being made under this guarantee, the Bank may continue its account(s) with the Customer notwithstanding the calling in of the Guarantors' liability in respect of the amount due from the Customer at the date when the calling in takes effect and such amount due shall remain regardless of any subsequent dealings in any such account(s)."

13. The Defendants for their part originally did not dispute that the Guarantee was a guarantee on demand but contended that a demand in accordance with the terms of the Guarantee had not been made with specific regard to the terms of Clause 13 which provided for a certificate in writing signed by a duly authorised officer of the Bank. The Defendants pointed out that the copy letters of demand exhibited in the proceedings did not bear a signature from an authorised officer of the Bank but were unsigned. This argument was not maintained on behalf to the Defendants, however, once it was pointed out on behalf of the Plaintiff that Clause 13 was directed to a certificate which operated as conclusive evidence of the debt and not to a demand. No such certificate was being relied upon by the Plaintiff who accepted that it had a burden to meet in establishing the debt. Clause 13 provides:

"13. A certificate in writing signed by any duly authorised officer of the Bank stating the amount at any particular time due and payable by the Guarantors to the Bank shall (save for manifest error) be conclusive evidence as against the Guarantors."

14. In addition to the argument that the demands were defective because they did not bear a signature of an officer of the Bank, it was also argued on behalf of the Defendants that there had been non-compliance with Clause 21 of the Guarantee which provided for service of a demand. The Defendants maintained that Clause 21 required both that the demand, if sent by post, be sent to the address on the Guarantee (as opposed to the address occupied by the Defendants) and that the Plaintiff must nonetheless prove service. Clause 21 provides:

> *"21. Any notice or demand hereunder shall be in writing and shall be expressed to be a notice given hereunder and shall be deemed to be given upon being left at or transmitted by telex to the correct telex number of the party to whom it is being transmitted or by telefax to the party to whom it is being sent or forty-eight hours after having being posted by pre-paid ordinary post to the party to which it is to be given as its addresses hereinbefore set out or such other address as such party shall have previously communicated by notice to the party giving such first mentioned notice or demand. In the case of death of any of the Guarantors any notice or demand by the Bank shall be sufficiently given if delivered or sent by prepaid ordinary post addressed to the deceased or his personal representative at his address last known to the Bank or stated hereunder unless and until the Bank shall have received notice in writing of the name and address of the person to whom representation has been granted."*

15. In argument before me the Defendants placed most weight on Clause 28 which provides for a waiver of demands which the Defendants maintains has the effect of creating an immediate liability under the Guarantee upon execution with the result that a claim not commenced within six years was statute barred. The Plaintiff's response to this argument by pointing out that the waiver is directed to demands on the Customer i.e. the Company and not the Guarantors. Clause 28(i) provides:

> *28. (i) The Guarantors hereby waive all demands on the Customer for performance of any of the covenants, terms, conditions and agreements of any facility or accommodation or for payment of any moneys by the Customer hereby secured and also hereby waive the necessity for any presentment for payment notice of dishonour protest and such other notice (if any) which the Bank might otherwise be required to give in connection with the exercise of its rights or any of them in respect of any of the obligations contained herein or otherwise."*

ISSUES RAISED ON PLEADINGS

16. In their replying affidavits the Defendants raise various issues and have adopted somewhat contradictory positions as regards the construction of the terms of the Guarantee. However, not all of the issues raised were maintained at the hearing before me. Of continuing relevance, the Defendants dispute:

I. That the debt claimed is due;

II. That the liability of the guarantors under the Guarantee was never subject to the issuing of a demand by reason of the waiver at clause 28(i) of the Guarantee and the Bank's cause of action on foot of the guarantees, not being dependent on the issue of a demand, accrued in 2006 with the result that the proceedings are statute barred as having been instituted more than six years later;

III. If the Plaintiff was required to issue a demand, which is denied by the Defendants in making their argument at II, it is further denied that the demands relied upon by the Bank were never received by the Defendants. Further, in the case of the First Named Defendant, it was not addressed to the address given on the Guarantee. While Clause 21 of the Guarantee provides that the demand is deemed delivered after being posted by pre-paid ordinary post, in circumstances where the Defendants have failed to prove posting of the demand by an appropriate affidavit of service, it is contended that liability under the terms of Guarantee does not arise.

17. In response to the denial that sums were due and that demand for payment had not been received, the Bank sought to rely on open correspondence with an Accountant engaged by the Defendants in which offers to compromise liabilities were made in 2014 and 2015. The Defendants dispute the Bank's entitlement to rely on this correspondence which it is argued benefits from a "*without prejudice*" privilege even though it does not purport to be written on a "*without prejudice*" basis. The Defendants further dispute that it can be construed as an acceptance of liability to pay the sums claimed on foot of the Guarantee but rather as a *bona fide* attempt to settle a dispute to avoid litigation.

18. The argument advanced on affidavit to the effect that this is not a "*demand*" guarantee is squarely advanced in the face of the express reference to a continuing obligation to pay "*on*

demand" at A, further provision for the making of demands from time to time at Clause 9 of the Guarantee and is based solely on the language of the waiver at Clause 28(i) which provides for a waiver by the Guarantors of all demands "*on the Customer*", in this instance the Company (not the Guarantor). In submissions on this point, it is contended that the Defendants' position based on their construction of the Guarantee is supported by the decision of *In re J. Brown's Estate* [1893] 2 Ch. 300 (Chitty J.). On the other hand, the Plaintiff refers to the dicta of Lord Hoffman in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 (applied in this jurisdiction in *Analog Devices (Ireland) Limited v. Zurich Insurance* [2005] 1 I.R. 274 (The Supreme Court, Geoghegan J.) where the general principles to be applied in construing a contract were set out to urge that when one applies the natural and ordinary meaning of the words in the relevant paragraphs of the Guarantee, the Guarantee could not be clearer and a demand is required in order to trigger the liability of the Guarantors.

19. While the parties urge different constructions of the Guarantee on me, it is not disputed that where I am satisfied as a matter of construction that this is a demand guarantee the liability accrues upon the making of a demand and the cause of action is subject to a six-year limitation period. Accordingly, it is conceded that if, as a matter of construction, a court is satisfied that the contract entered by the parties provides for a guarantee payable "*on demand*", then these proceedings are not statute barred having issued within six years of a demand being made in accordance with s. 11(1)(a) of the Statute of Limitations Act, 1957 and on the authority of *Northern Bank Limited v. Quinn* [2016] IECA 96 (Irvine J.).

20. It is at this point that the Defendants' argument turns, in the alternative, to an asserted failure to prove that the demand letters were sent as provided for under Clause 21 of the Guarantee (reliance being placed on *In the Matter of Riveriera Leisure Ltd and the Companies Acts 1963-2006* [2009] IEHC 183, an authority in respect of the obligation to prove service of a statutory notice in this submissions on this point). It is noteworthy, however, that while reference was made to the absence of a signature on the copy letters of demand dating to July, 2011 exhibited on behalf the Plaintiff in replying affidavits filed on behalf of the Defendants in April, 2018 (in response to the first motion) and April, 2019 (in response to the second motion), the first denial that letters of demand had not been received at all was made on Affidavit sworn in January, 2020.

DISCUSSION AND DECISION

21. The legal test to be applied on an application for a summary judgment is not in dispute. The principles identified in cases such as *Aer Rianta c.p.t. v. Ryanair Ltd*. [2001] 4 I.R. 607 and *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 and *Ennis v. AIB PLC* [2001] 4 I.R. 607 establish that leave to defend ought to be granted unless it is very clear that there is no defence. In submissions I have been referred to more recent iterations of the applicable test as set out in *IBRC Ltd. v. Kelly and Jaguar Capital Limited* [2014] IEHC 160 (Birmingham J.) and *ACC Loan Management DAC v. O'Toole* [2017] IECA 316 amongst others. One relevant authority identified in the submissions before me is *McGrath v. O'Driscoll* [2007] 1 ILRM 203 (Clarke J.) insofar as it confirms that the court can resolve contested issues of construction of documents on a summary application but should only do so where the issues are relatively straightforward and there is no risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.

22. As the question of leave to defend on a summary application only arises where a *prima facie* entitlement to judgment has been demonstrated, logically, I must first consider the case made that the claim is inadequately particularised in the light of the decision of the Supreme Court in *O'Malley*. In his judgment for the Supreme Court Clarke CJ. stated (at para. 5.2) as follows:

> *"5.2 Where it comes to the evidence which is required to be placed before the court, it does seem to me that it is important to emphasise that there is an obligation on any plaintiff to produce prima facie evidence of their debt if they wish the court to grant summary judgment (or, indeed, if, in the absence of the filing of an appearance by the defendant, they bring an application for judgment in the Central Office). The jurisprudence on the question of what a defendant must do to resist summary judgment primarily focuses on cases where a prima facie claim to a debt is established and the defendant wishes to put forward a positive defence. In such cases, it is necessary for the court to assess, in accordance with the detailed requirements which can be found in the relevant jurisprudence, whether what is said to amount to a defence amounts to mere assertion or meets the threshold for entitling the defendant to a full or plenary hearing.*

5.3 However, it also seems clear that the obligation on a defendant to establish an arguable defence is, in reality, one which only arises if the plaintiff has first placed sufficient evidence before the court to establish prima facie the debt alleged is due. There are, therefore, two questions. The first is as to whether the plaintiff has put sufficient evidence before the court to establish a prima facie debt. If the answer to that question is no, then the plaintiff cannot be entitled to summary judgment in any event. If, however, the answer to that question is yes, then the court must go on to consider, in accordance with the established jurisprudence, whether the defendant has put forward a credible defence."

23. On the issue of the necessary particulars for the Special Indorsement of Claim, Clarke CJ. went on to state (at para. 5.5):

"5.5 So far as the pleadings are concerned, it does seem to me that a court may be entitled to take into account, in assessing the adequacy of the manner in which a debt claim is particularised, any documentation which has been sent to the defendant in advance of the commencement of the proceedings. The procedures are intended to be summary. They are not intended to involve an overly detailed account of every twist and turn of a banking relationship which might go back many years and involve, in at least some cases, thousands of transactions or measures potentially affecting the liability of the borrower. The more detail the borrower has been given in advance, the more it may be possible to justify a relatively shorthand way of describing how the amount due is calculated. But even there, it seems to me that it is necessary for a plaintiff, if they wish to rely on previously supplied details, to at least make some reference to those details in its special indorsement of claim."

24. He continued:

"5.7 While the special indorsement of claim in this case sets out the terms of the loan, the fact that it was accepted and that the monies were drawn down and an assertion that Mr. O'Malley has failed to repay monies demanded in accordance with the terms of the loan which are therefore said to be due, there is only a bald reference to the fact that the sum said to be due in those circumstances is the amount of €221,795.53. No detail whatsoever is given as to how that sum is calculated. It is true that the same sum

is mentioned on the Statement of Account as previously supplied to Mr. O'Malley. That fact would, therefore, in my view have at least been sufficient to transfer the analysis of the sufficiency of the details given from the special summons to the Statement of Account, had there been some reference in the special indorsement of claim to the fact that the sum in question was calculated in accordance with the terms of the Statement of Account."

25. While statements of account are exhibited in this case, it has not been confirmed in evidence that these were ever sent to the Defendants in advance of the commencement of proceedings. As in *O'Malley*, the Special Indorsement of Claim provides no particulars of how the sum of €205,482.89 said to be due and owing by the Company, is calculated. No reference is made to the statements of account in the Special Indorsement of Claim. The only references in the Summary Summons to the debt appear at paragraphs 14 and 17 of the Special Indorsement of Claim where it is stated:

"14. As at the 10th of May, 2016, the sum of €205,482.89 had accrued in respect of the Company's liabilities to the Plaintiff on foot of the said facilities."

...

17. As at the date hereof, the said sum of €205,482.89 remains outstanding above all just credits and allowances."

26. The account statements for the Company's current account for the period 12th of July, 2006 to 8th of April, 2015 exhibited are incomplete. As of the 8th of April, 2015, the account statement provides an overdrawn balance of €74,699.07 but the Defendants point out that no explanation is provided as to why the decision was made to mark the 8th of April, 2015, as the date on which the Plaintiff relies to assert that the alleged debt is owed by the Defendants. When the Company went into liquidation on the 3rd of February, 2011, the account statement indicates that the balance stood at €46,163.92 overdrawn. Accordingly, between February 2011 and April, 2015, fees and interest of approximately €30,000.00 was added to this balance. No calculation is provided for the interest figure or penalties. It seems to me that this does not meet the test required by *O'Malley* where at para. 6.7 Clarke CJ. stated:

"6.7 But it does not seem to me to be too much to ask that a financial institution, availing of the benefit of a summary judgment procedure, should specify, both in the

special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest. Indeed, if it really is as simple as counsel suggested, then I cannot see any reason why Bank of Ireland should not have set out those calculations. A person confronted with a claim or a court confronted with a question of whether there is prima facie evidence for that claim is entitled to at least enough detail to know the basis on which the sum claimed is calculated. The defendant is entitled to that information to decide whether there is any point in pursuing a defence or, indeed, potentially expending monies on procuring professional advice in that regard. The court is entitled to that information to enable it to form an assessment as to whether there is sufficient evidence to say that the debt has been established on a prima facie basis. Neither the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court."

27. In *Cabot Financial (Ireland) Limited v. Kearney* [2022] IEHC 247 Holland J. had occasion to reflect on the common-place practice of amending pleadings to render them *O'Malley* compliant before of the more demanding standard is required of Plaintiffs when seeking summary judgment observing at para. 24 of his judgment:

"Typically in practice, O'Malley compliance is met by the Plaintiff having provided to the defendant, prior to the issue of the summary summons and then referring therein to, a statement of the account from drawdown of the loan, including detail of any interest rate changes and interest and other charges imposed from time to time. These statements are then exhibited to the affidavit grounding the application for summary judgment."

28. As already observed, however, there is no confirmation on affidavit that statements of account were furnished to the Defendants prior to the issue of the proceedings and the statements exhibited do not provide full details of interest rate changes and other charges imposed from time to time.

29. An important distinction between this case and *O'Malley* is that the claim advanced derives from the Guarantee executed by the Defendants. Clearly, suing on foot of a guarantee

is not the same as suing on a loan agreement. However, in *Promontorio (Aran) Ltd. v. Jazai Limited & Fried* [2021] IEHC 250, a case also involving an application for summary judgment in reliance on a guarantee, Sanfey J. relied on the decision in *O'Malley* in refusing to grant liberty to enter final judgment. At para. 22 of his judgment he states:

> *"22. As there is no evidence of the primary debt, the claim against Mr. Fried on the guarantee cannot succeed. Under the terms of the guarantee, Mr. Fried "...hereby guarantees payment to the Bank on demand of all present or future or actual or contingent liabilities of the Debtor to the Bank. Paragraph 12 of the guarantee states that "...a certificate by an Officer of the Bank as to the amount for the time being due from the Debtor to the Bank shall be conclusive evidence for all purposes against the Guarantor". As we have seen, there are certificates, but not by "an Officer of the Bank", or even by an officer of Promontoria. There is no admissible evidence before the court of the debt due by Jaszai, and accordingly the claim under the guarantee must fail."*

30. While there is a clause providing that a certificate shall be conclusive evidence of a debt in the Guarantees executed by the Defendants (Clause 13), reliance is not placed upon a certificate in this case. Accordingly, it is necessary on the authority of *Promontorio (Aran) Ltd. v. Jazai Limited & Fried*, for the Plaintiff to provide *prima facie* evidence to establish indebtedness at level claimed.

31. A further feature of this case is that there was some engagement by an accountant on behalf of the Defendants with the Plaintiff before proceedings issued. In the face of objection from the Defendants, the Plaintiff refers to this engagement by the Defendants' accountant in relation to the indebtedness claimed in an open attempt to negotiate a compromise of liabilities without disputing the level at which this indebtedness is claimed as evidence both that:

i. the Defendants had received a demand as why else would they seek to negotiate; and
ii. the Defendants well knew the basis upon which the claimed indebtedness was calculated and did not dispute the accuracy of the Plaintiff's figures even though they were professionally advised by an accountant.

32. The Defendants object to reliance on this correspondence on the basis that it is privileged as "*without prejudice*".

33. Contrary to what is contended on behalf of the Defendants, I do not consider that there is any impediment to regard being had to this correspondence as it is plainly open correspondence. As found in *Acorn Wave Limited v. O'Riain* [2023] IEHC 448, correspondence directed towards the resolution of a dispute for the purpose of avoiding litigation only attracts "*without prejudice*" privilege when it is intended by the parties at the time it is written or potentially by subsequent agreement to be covered by privilege.

34. The mere fact that a letter is written to resolve a dispute and avoid litigation does not confer on it a cloak of privilege. Oftentimes, a tactical decision is made to write on an open basis not least because an open letter demonstrates *bona fides*. Writing on an open basis carries certain advantages as it means that the writer may seek to rely on the terms of the correspondence for other purposes such as, for example, evidencing a reasonable approach in seeking the indulgence of more time to pay or a stay, avoiding costs or explaining delay. It would be wholly unfair to permit the Defendants to write on an ostensibly open basis such that they are free to enjoy the benefits of having engaged in open correspondence while at the same time permitting them to hide behind a retrospective and unilateral assertion of "*without prejudice*" privilege when it transpires that it might suit their ultimate purposes better.

35. For the communication to be properly treated as privileged it is necessary to establish that the communication was made with the express or implied intention that it would not be disclosed if the negotiation failed. The fact that the letters in question in this case were not marked "*without prejudice*" is a clear indication of the parties' intentions when the letters were written. The failure to mark the correspondence as "*without prejudice*" or to otherwise communicate that the correspondence was intended to be on a "*without prejudice*" basis is not consistent with the truth or substance of the Defendants' *ex post facto* assertion of an intention to communicate on a "*without prejudice*" basis. Such an *ex post facto* assertion made for the first-time years after the correspondence was written in a replying affidavit in these proceedings, lacks any real credibility. It does not operate to confer the benefit of "*without prejudice*" privilege on correspondence of this nature between a bank and an accountant. The assertion of "*without prejudice*" privilege in this way made for the first time in these proceedings is no more than bare assertion to which I am not prepared to attach much weight.

I am therefore not satisfied that it is even arguable, on the facts and circumstances of this case, that the correspondence attracts "*without prejudice*" privilege and cannot be considered on this application.

36. While I am satisfied that I may have regard to the terms of this correspondence in adjudicating on this application for summary judgment, it is a separate question as to whether the two letters in question can properly be read either as an acknowledgement of the accuracy of the sums claimed or an acknowledgement that a demand had been received. By letter dated the 1st of August, 2014, Chartered Accountants and Registered Auditors acting for the Defendants in relation to the Company (in Liquidation) wrote under the heading "*current position*" as follows:

> *"the total amount outstanding is €200,328 made up of an overdraft facility of €69,545 and a term loan of €130,783."*

37. The letter continues immediately thereafter to address the Defendants' financial position and, before making a proposal to compromise the debt with financial support from other family members at a level which would see the Plaintiff absorbing a significant amount of the debt, states:

> *"Peter, Andrew Jnr, and Philip are currently not in a position to repay this debt."*

38. In May, 2015, a further letter was written in similar terms with a revised, enhanced proposal.

39. It is noteworthy that despite the passage of time between the dates of the two letters the total amount outstanding referred to in both letters is the same. For present purposes I do not construe the terms of these letters as an acknowledgement of the extent of the debt but rather as an acknowledgment that this is the sum which was then claimed by the Plaintiff. I read this acknowledgment as being for the purpose of introducing the compromise proposal which it was stated the Defendants could realistically afford to make which, while substantial in its own way, was significantly less than the sum claimed. In the context of the claim that the letters should be construed against the Defendants as an acknowledgement that they well knew the particulars of the debt claimed and more specifically how it was calculated as to interest and

charges, I do not attribute this meaning to the terms of the letter. Certainly, the letters do not dispute the accuracy of the sums claimed but as what was proposed was considerably less than the sum claimed and was an attempt to resolve matters, this is not surprising.

40. In my view the letters should not be read as a concession that the accountant had checked the Plaintiff's computation and figures and was satisfied that the amount claimed was properly calculated. Nor it must be said do they represent an irrefutable acknowledgement that demand letters had been received from the Plaintiff as the demand letters exhibited only refer to the sum of the Guarantee and not the sums claimed which are merely referred to as "*a larger debt owed to the Bank*". I see this case as distinguishable from *Pepper Finance Corporation (Ireland) DAC v. Emerald Properties (Irl.) Limited & Ors.* [2021] IEHC 114 (Quinn J.), relied on by the Plaintiff, as it is clear from the judgment that a failure to properly particularise the claim on the submissions was excused since a statement of account was already in the possession of the defendants which was sufficiently comprehensive (para. 173):

> *"to enable the second defendant and his professional advisors to formulate a report as to disputed items comprised in the balance claimed which was exhibited by him and formed the basis of his own replying affidavit. Therefore. they cannot protest that the claim is insufficiently particularised such as to justify remitting it to plenary hearing."*

41. In this case the Defendants have not relied on a professional advisor's report disputing the balance claimed. They have disputed the debt simpliciter without engaging in any analysis as to whether it is properly computed.

42. The parallels between this case and *Promontorio (Aran) Ltd. v. Jazai Limited & Fried* are clear. I see no proper basis for distinguishing that case insofar as it applies the *O'Malley* requirements to guarantee cases. I adopt and apply the reasoning of Sanfey J. in that case in concluding that there has been a failure to properly particularise the debt in the proceedings in line with *O'Malley* requirements. This then begs the question as to what the consequence of the failure to adequately particularise the claim should be for these proceedings.

43. The consequence in *O'Malley* of a failure to properly particularise the claim was not a dismissal of the claim *simpliciter*. Instead, as Clarke CJ records (at para. 7.1):

"It seems to me that the justice of this case would be fully met by allowing the appeal and by remitting the matter back to the High Court on the basis that Bank of Ireland can apply to amend the special indorsement of claim to include such details as they may think are appropriate in the light of this judgment and can also tender such further evidence as may be appropriate to fill the evidential gap identified."

44. In the light of the decision in *O'Malley* and notwithstanding that it was open to the Plaintiff to bring an application to amend its proceedings in advance of the hearing but it did not do so, it seems to me that the proper next step in these proceedings is not that I dismiss the proceedings but rather that I adjourn the matter to allow for a proper particularisation of the claim if it is to proceed as a summary application.

45. In view of my decision, the question of the Defendants' defence of the claim does not require to be determined at this juncture. Even though I have had the benefit of extensive legal submissions as to the proper interpretation of the Guarantee and the Statute of Limitations, 1957 (as amended), I will refrain from further comment on whether an arguable defence has been identified either on the statute or on the separate question of proof of service of the demand letters. A determination of whether an arguable defence on either of these grounds has been made out must await a proper particularisation of the claim.

CONCLUSION

46. As I have concluded that the Plaintiff's claim is inadequately particularised, I will take the same approach as the Supreme Court in *O'Malley* and adjourn this matter for a specified period of time to allow the Plaintiff to consider this judgment and to apply, at its election, either to amend the special indorsement of claim to include such details as is considered appropriate in the light of this judgment or to remit the matter to plenary hearing. This matter will be listed for mention two weeks post delivery to deal with consequential matters and determine the final form of the order to be made.