THE COURT OF APPEAL

Baker J.
Whelan J.
Collins J.

Neutral Citation Number: [2020] IECA 87
Appeal Record No.: 2019/189

BETWEEN/

PROMONTORIA (ARAN) LIMITED

APPELLANT

- AND–

GERRY BURNS

DEFENDANT

Appeal Record No.: 2019/188

BETWEEN/

PROMONTORIA (ARAN) LIMITED

APPELLANT

- AND–

ANNE BURNS

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 7th day of April, 2020

1. This is the appeal of Promontoria (Aran) Limited of the order of Noonan J. dated 13 March 2019 following delivery of a written judgment on 13 February 2019: [2019] IEHC 75. For convenience I will refer to the parties by their names and to the plaintiff as "Promontoria".

2. The action came on before Noonan J. as a motion for summary judgment, and having reserved judgment, Noonan J. adjourned the actions to plenary hearing confined to the single issue of the admissibility of the evidence adduced by Promontoria and made directions as to pleadings thereafter.

3. An appeal was lodged by Promontoria against the judgment in both cases and this judgment deals with both appeals. The appeals raise identical issues of law and fact, albeit the amount claimed by Promontoria differs in each case. Noonan J. delivered his judgment in the action against Mr. Burns. I will do likewise.

4. The point at issue in the proceedings concerns the admissibility of the evidence adduced by Promontoria in the summary proceedings, and whether it was sufficient to support the grant of judgment. The proof of debt in the present appeal is complicated by the fact that the plaintiff is not a bank and is an assignee of the original lender.

5. The issue of the admissibility of the evidence brings to bear a number of somewhat inconsistent and discordant judgments of the superior courts and more especially the Supreme Court, concerning the hearsay rule of evidence and the reach of the various statutory and common law exceptions to the strictness of its application.

Background

6. The facts may briefly be stated.

7. The proceedings issued on 16 December 2013 by Ulster Bank Ireland Limited with which Mr. & Mrs. Burns and companies associated with them had an ongoing business relationship over many years.

8. The summary summons is in relatively standard form and sets out the particulars of debt, the terms of various loans, the dates they were advanced and the specific amount and accounts into which they were drawn down. The claim against Mr. Burns is in monetary terms largely on foot of various guarantees entered into with Ulster Bank Ireland Limited of the indebtedness of four limited liability companies pleaded to be then in default. No argument is made regarding the particularity of the pleaded claim or the accuracy of the pleaded figures.

9. Ulster Bank made application *ex parte* for an order amending the title of the proceedings to substitute for it as plaintiff its successor in title Promontoria grounded on an affidavit of Jacinta Conway sworn on 18 December 2015 which exhibited a document called "A Global Deed of Transfer" made on 16 December 2014 by which Ulster Bank Ireland Limited assured certain loan assets as therein defined to Promontoria. The so called "hello" and "goodbye" letters to Mr. Burns and Ms. Burns were also exhibited.

10. On 21 December 2015 O'Connor J. made an order pursuant to O.70, r.4 of the Rules of the Superior Courts that the bank should be at liberty within fourteen days to amend the name and title of the plaintiff to substitute Promontoria as plaintiff.

11. Thereafter by motion issued on 13 December 2015 Promontoria sought liberty to enter judgment in the sum of €27m. (the figure for convenience here being stated in round figures) with accrued interest against Mr. Burns, and for a much smaller sum against Mrs Burns pursuant to O. 37, r.1 of the Rules of the Superior Courts, together with interest pursuant to contract and/or to the Courts Act 1981.

12. Mr. Burns represented himself at the hearing in the High Court and on the appeal, and his submissions were received also on behalf of his wife. The trial judge correctly refused to permit Mr. Burns to adduce unsworn evidence or advance matters of fact in the course of his oral submission at the hearing. The evidence was wholly on affidavit and its material elements are set out in the course of this judgment.

13. The trial judge correctly identified the two questions that arise: the validity of the transfer from Ulster Bank to Promontoria, and the admissibility of the evidence of Mr. Harris as proof of the debt.

14. The respondent has not cross appealed the findings of Noonan J. that the transfer from Ulster Bank to Promontoria was established and therefore the sole matter that arises on the appeal is the admissibility and sufficiency of the proofs of the debt.

15. Two separate and not easily reconcilable threads of jurisprudence have evolved in the recent judgments of the superior courts and I consider that jurisprudence in the course of this judgment.

Proofs adduced

16. The application for summary judgment was grounded on the affidavit of Andrew Harris sworn on 11 December 2017. Mr. Harris describes himself as a senior asset manager employed by Link ASI Limited (formerly Capita Assets Services (Ireland)), "the Servicer", which administers debt collection on behalf of Promontoria. He deposes to his authority to make the affidavit for and on behalf of the plaintiff, and that he does so with its consent.

17. The grounding affidavit of Mr. Harris runs to eighty paragraphs and states the facts concerning the making of each of five facilities and the giving of four separate guarantees by Mr. Burns in respect of the liabilities of four named companies of which he or Mrs. Burns or either of them were directors and/or beneficial owners. He narrates descriptions of a series

of transactions since 2002 between Ulster Bank and Mr. & Mrs. Burns or one or both of them and with the companies.

18. Mr. Harris exhibits a number of documents in each case by reference to a copy, not described as a certified copy. He exhibits five facility letters, the earliest dated 9 December 2008, and the latest, 18 October 2010 and the letters of demand in respect of each facility, all made by separate letter on 29 August 2012. The facilities and the demands are with or by Ulster Bank and are dated before the assurance of the debt to Promontoria.

19. Likewise, he exhibits plain copies of guarantees, the earliest made on 23 October 2007 and three on 16 April 2010. The four letters of demand on foot of the guarantees, the earliest dated 19 November 2012 and the latest 28 January 2013, were all made by Ulster Bank.

20. In the final two paragraphs of his affidavit he avers as follows:

> "I am advised that the defendant has not a bona fide defence to the plaintiff's claim. I am advised that for that reason any Appearance that may be entered to the within proceedings has been entered purely for the purposes of delay."

21. He also says that he is advised and believes there is no other reason why the plaintiff would not be entitled to judgment.

22. The transactions are described more fully by the trial judge in the course of his judgment.

23. Mr. Burns swore a short affidavit in response in which he makes the following material averment:

> "I say and believe that the deponent Andrew Harris of Link ASI Limited…is not directly employed by the plaintiff and is not a party to the within proceedings and cannot make any averments on behalf of the plaintiff. He has no first-hand knowledge of any of the events to which he refers and is relying on hearsay. Hearsay evidence is no evidence."

24. In the affidavit Mr. Burns makes reference to the decision of Peart J. in *Bank of Scotland v. Stapleton* [2012] IEHC 549 which I return to below.

25. At para. 4 of his affidavit he denies that there exists any debt between the plaintiff and himself. Mr. Burns essentially has put the plaintiff on full proof of the debt and in my view the trial judge correctly interpreted the averment at para. 4 as amounting to an assertion that no evidence exists of any debt owed by him to the plaintiff.

26. Mr. Harris swore a supplementary affidavit on 21 February 2018 and makes the obvious point that the matters raised by Mr. Burns are matter of law and for legal argument of the hearing. That affidavit does not advance the evidence.

27. The trial judge concluded that the evidence of Mr. Harris was inadmissible hearsay, that no reference had been made by him to the books and records of plaintiff, and that the position was "several steps removed" from that consider4ed by Barniville J. in *Promontoria (Arrow) Limited v. Burke & Ors.* [2018] IEHC 773 where demands had been made by the parties which subsequently issued proceedings. At paragraph 49 he says the following:

> "It is therefore difficult to see how Mr Harris's position is, in substance and fact, any different from any person who was given authorisation by the plaintiff to swear an affidavit. The fact that the plaintiff authorises him to swear the affidavit is of no materiality in the context of whether it is hearsay or not."

28. Following delivery of his written judgment, and in the light of his observations made at para. 52 thereof, the trial judge gave the plaintiff an opportunity to put further evidence before him, in particular as the defendants had made no more than a "bare denial of the debt" and had not contested any of the factual averments in the affidavits made on behalf of the plaintiff. He sensibly concluded that to remit the matter to plenary hearing might not be a prudent approach as the evidential difficulty he had identified might be capable of "ready

resolution by the Court" and where a plenary hearing would likely be substantially more costly than a resolution at summary stage.

29. In that context, Promontoria furnished two further affidavits, one of Mr. Harris and the other of Mr. Pendiville, regarding the source of knowledge of Mr. Harris.

30. In Mr. Harris' further affidavit sworn on 27 February 2019 he avers that he had access "at all material times" to the books and records of Promontoria "having relevance to these proceedings" and has made his affidavit from facts within his own knowledge and from a perusal of those books and records.

31. He goes on to say that in his capacity as senior asset manager with the Servicer he is responsible for "overseeing the day-to-day management of the loans and related security of the defendant owed by the plaintiff".

32. An affidavit of Albert Pendiville, a director of Promontoria, sworn on 27 February 2019 supports this supplemental affidavit, and confirms that the Servicer provides loan administration and asset management services to Promontoria in respect of the material loans, and that Mr. Harris was authorised to swear his affidavits on behalf of the plaintiff "in circumstances where he is responsible for the day-to-day management of the loans and related security".

33. Mr. Pendiville goes on to say that the Servicer holds all the books and records including all hard copy and electronically stored record of the plaintiff "having relevance to these proceedings" as a consequence of being responsibility for the day-to-day management of the loans.

34. Mr. Burns then swore a further replying affidavit in which he avers that neither Mr. Harris nor Mr. Pendiville has any first-hand knowledge of any of the events and are relying on hearsay.

35. That is the totality of the evidence that was before the High Court.

36. Noonan J. did not thereafter prepare another judgment but a brief note of counsel shows that when the matter came back before him, and noting that three additional affidavits had been filed, two from the plaintiff and one jointly from Mr. & Mrs. Burns, Noonan J. said that he was not satisfied that the evidential difficulty he had identified had been dealt with and gave leave to defend on the issue of the admissibility of the evidence only, or as was recorded in the perfected Order "whether the plaintiff has led admissible evidence" and noting that the plaintiff could lead any evidence it wished at the hearing.

The Trial Judge's Analysis

37. The trial judge analysed the then current jurisprudence concerning the proof of debt by lending institutions starting with the judgment of Clarke J. in *Moorview Developments Limited . v. First Active plc* [2010] IEHC 275 and the caselaw derived therefrom and the judgment of Peart J. in *Bank of Scotland v. Stapleton* [2012] IEHC 549 [2013] 3 I.R. 683 on which the defendant relies almost exclusively. He also considered the judgment of Finlay Geoghegan J. in *Bank of Scotland v. Fergus* [2012] 4 I.R. 428, [2012] IEHC 131 and that of Ryan J. in the High Court in *Bank of Ireland v. Keehan* [2013] IEHC 631 and of O'Malley J. in *Ulster Bank Ireland Limited v. Dermody* [2014] IEHC 140.

38. The trial judge also considered the decision of this Court in *Ulster Bank Ireland Limited v. Egan* [2015] IECA 85 and crucially the decision of the Supreme Court in *Ulster Bank (Ireland) Limited v. O'Brien* [2015] 2 I.R. 656 and the three judgments delivered by MacMenamin, Laffoy, and Charleton JJ.

39. The most recent judgment referred to in the judgment of the trial judge was that of Barniville J. in *Promontoria (Arrow) Limited v. Burke & Ors.* which he analysed in some detail.

40. As noted above he considered that the evidence was inadmissible hearsay and did not come within the exceptions identified in the authorities. He considered himself bound by

Dermody and *Stapleton* which had not been expressly overruled by the Supreme Court in *Ulster Bank v. O'Brien*. I return later to this judgment.

41. The jurisprudence has developed since and the Supreme Court has delivered judgment in *Bank of Scotland v. Beades* [2019] IESC 61 and later in *Bank of Scotland plc v. Fergus* [2019] IESC 91 on appeal from the judgment of Finlay Geoghegan J. in which different approaches were taken by Charleton J. (who delivered the majority judgment of the three-judge court) and by McKechnie J. The crucial difference is that between Charleton J. (with which McGovern J. agreed) and McKechnie J. regarding the role of the hearsay rule and of the exceptions to the admission of hearsay evidence, or what is referred to as the admissibility dispute.

42. That judgment was delivered after the hearing of the present appeal, but the principles explained in the majority judgment are those already established.

43. McKechnie J. considered that Finlay Geoghegan J. was wrong to accept the evidence and preferred the line of authority from *Dermody* and *Stapleton.* Charleton J. disagreed and preferred to deal with the case by reference to the "course of dealings" between the parties which he considered was sufficient to permit a court to draw an inference as to the credibility of the evidence on which the plaintiff relied and where the defendants had not expressly denied the debt but rather put the plaintiff on proof.

The appeal

44. Promontoria appeals on the ground that the trial judge was incorrect in fact and in law in his conclusion on the admissibility of the evidence led by Promontoria in support of its application for summary judgment and in particular in his conclusion that the affidavit evidence of Mr. Harris was inadmissible hearsay. It argues that the trial judge erred in failing to consider whether the documents exhibited in the affidavits of Mr. Harris constituted hearsay evidence rather than original evidence, and in failing to have regard to the supportive

corroborative affidavit of Andrew Pendiville as sufficient to address the evidential deficit. Specifically, it is said that the trial judge erred in fact and in law in holding that neither deponent could "swear positively to the facts" averred to. This is the language of Order 27, r.1 of the Rules of the Superior Courts and it is central to an understanding of the kind of evidence required to support an application for summary judgment.

45. The respondents again rely on the decision of Peart J. in *Bank of Scotland v. Stapleton* and on the argument that the provisions of the Bankers' Books Evidence Act 1879-1959 were not met (the Act was, in fact, amended by the legislature of 1989 but this is not stated) and made reference to the judgment of the Supreme Court in *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168.

46. It is important to note at this juncture that the sole defence on which Mr. & Ms. Burns rely is the admissibility of the evidence adduced by Promontoria in support of its application for summary judgment. There was, for example, no argument made by them that they might have a defence on the merits or that they had an arguable basis on which that defence ought to be referred to plenary hearing.

47. Mr. Burns did swear three affidavits in the present case, two of which are relevant to the debt claim and the third after the written judgment was handed down by Noonan J. and further evidence was adduced on behalf of the plaintiff. The affidavits contain for the most part general statements of legal principle and the only direct engagement with the claim for debt is para. 4 of his first affidavit sworn on 23 January 2018 where he denies "any debt as existing between the plaintiff and myself". He in that paragraph goes on to say, "there is no evidence before the Court of any debt as existing".

48. The averments and the affidavit are either bald assertions as understood in the authorities or statements of propositions of law.

49. The issue on this appeal then is a net issue of the admissibility and sufficiency of evidence, a point which has given rise to considerable differences and differences of emphasis in the leading recent judgments of the Supreme Court.

The rule against admission of hearsay evidence

50. The backdrop to the question of the admissibility and sufficiency of evidence to prove a claim in debt is the general principle that hearsay evidence is inadmissible to prove a fact. To describe hearsay evidence as being inadmissible in such broad general terms would be to ignore the extent to which exceptions, both statutory and common law, have evolved to deal with what McKechnie J. described in his recent judgment in *Bank of Scotland v. Fergus* as "a level of dissatisfaction" by reason of the unnecessarily burdensome obligations imposed by "an over rigid application" of the test (para. 73). As he said the purposes of the hearsay rule is to "help ensure the integrity of evidence that might be tendered in court proceedings", an integrity preserved by requiring a person to give direct evidence of a fact, both because that person is amenable to cross-examination and because the evidence is more reliable if given by a person with direct knowledge howsoever gained.

51. The rule has been modified both by statute and by exceptions which have developed in the common law, and O'Malley J. in *Ulster Bank v. Dermody* noted that the modifications made by legislation in the United Kingdom in relation to both civil and criminal law has as she put it "significantly affected the rigidities of those rules" (para. 46). No such legislative changes have been made in this jurisdiction

52. The starting point must be that the rule against the admission of hearsay evidence remains part of our law and, to borrow the language of McKechnie J., is an important aspect of the "integrity" of evidence. An overly harsh rule causes a number of problems, not least of which is cumbersome and unduly long civil or criminal litigation, the costs of which cannot be justified in the interest of the administration of justice. In cases where costs are

awarded against an unsuccessful defendant in a bank claim the defendant is often not in a position to discharge the costs and may already be under pressure of insolvency or more broad financial pressure.

53. The present dispute relates to the difficult and as yet not fully settled question of whether an alternative route exists from which a court may accept evidence of a claim for debt. The last three judgments of the Supreme Court have been given by a three-judge panel and an authoritative decision of the full court is awaited and needed.

Bankers' Books Evidence Act 1879 as amended

54. The Act provides a means by which a bank as defined may establish proof of a debt whether on behalf of a third party or, since the amending legislation, in a claim for judgment for monies due to itself. That created an important, and often used, exception to the hearsay rule in respect of the receivability of documents and evidence adduced on the part of a bank, both for the purposes of litigation in which the bank is a party, or where the bank gives evidence on behalf of a third party.

55. The purpose of the Act has been described in a number of legal judgments and I do not propose to rehearse the analysis here, save to say that the exception created a convenient and cost effective means by which evidence contained in "bankers' books", including physical ledgers and other books and documents and, since the amendment in 1989, data stored electronically, may be admissible in evidence without the production of the physical book or record, and evidence sufficient to prove the document and their contents on a *prima facie* basis can be given by "a partner or officer of the bank" whether orally or by affidavit.

56. The statutory exception to the hearsay rule created by the Bankers' Books Evidence Act is not engaged in the present case as the plaintiff is not a "bank" as defined in the Act and no argument was made to the contrary. This case relies on a common law exception to the hearsay rule, namely that the witness for Promontoria has inspected and analysed its

books and records and it is argued could give positive evidence of the debt from those records.

57. The exception sought to be engaged by the plaintiff in the present case relies on the analysis in recent judgments in particular in the Supreme Court and is a wholly common law development suggesting a less rigid approach to hearsay evidence.

Ulster Bank v. O'Brien

58. The three-judge panel of the Supreme Court delivered its judgment in a claim by Ulster Bank against a customer and in circumstances where the defendants did not deny the debt and relied on an argument that the affidavit grounding the motion for summary judgment was hearsay, and therefore inadmissible, evidence.

59. Each of MacMenamin, Laffoy, and Charleton JJ. delivered a judgment approaching the question of proof from somewhat different angles. The bank did not seek to rely on the Bankers' Books Evidence Act 1879 ("the 1879 Act) and the judgment of Laffoy J. distinguished but did not overrule the judgments of Peart J. in *Bank of Scotland plc v. Stapleton*, and that of O'Malley J. in *Ulster Bank Ireland Limited v. Dermody*, but relied on the approach in *Moorview* and *Bank of Ireland v. Keehan*. MacMenamin J. agreed and made separate observations.

60. The difficulty identified by O'Malley J. and Peart J. where the deponent was not an officer of the bank did not arise for consideration, and in both cases the plaintiff had relied on the provisions of s.4 of the 1879 Act by which the evidence was required to be given by an officer or employee.

61. The judgment of Laffoy J. dealt with the type of evidence which may be sufficient to discharge the obligation of a financial institution to establish debt on an application for summary judgment. Her judgment considered in some detail the provisions of O.37, r.1 of the Rules of the Superior Courts, the requirement that the deponent of a supporting affidavit

should "swear positively to the facts". This, she said, meant that an affidavit of a person other than the plaintiff is sufficient, provided that deponent can swear positively to the relevant facts. The fact that affidavit evidence could be cross-examined without leave of the Court by the simple procedure of serving a notice to cross examine, and that accordingly the weight and credibility of the evidence can be properly assessed, means a defendant has ample procedural protections

62. A number of material observations can be made regarding her judgment. The deponent of the affidavit was a "senior relationship manager" with the restructured Ulster Bank Group and averred that she had responsibility for the daily management of the loan facilities of the defendants and went on to say that she made her affidavit from a perusal of the bank's books and records which she believed to be true and accurate. Laffoy J. took the view that the combined averments were sufficient to comply with O.37, r.1 and that the deponent had "sworn positively" to the relevant facts to establish the claim. She noted that the deponent had specific responsibility for managing loan facilities and was a senior official of the bank.

63. It is also of significance for the present appeal that the documents exhibited supported or corroborated the averment in the affidavit. The deponent was a co-signatory of the demand letters and Laffoy J. noted that the content of the letter of demand was "wholly consistent" with the bank's claim as set out in the pleadings and consistent with the facts in the affidavit. The deponent also swore that there remained due and owing by the defendant to the bank the sum identified in the pleadings.

64. Also of relevance for the present appeal is that the deponent had exhibited a statement of account in the form of a print off of an electronically maintained statement of account and that Laffoy J. said it was possible to draw proper inferences from those statements and relate the statements to the specific accounts referable to the facility letter.

65. As a consequence of the fact that the plaintiff in *Ulster Bank v. O'Brien* was not relying on the 1879 Act Laffoy J. adopted an alternative route to the admissibility of evidence in the light of the judgment of Clarke J. in *Moorview*, namely that a plaintiff could sue on foot of a contract by reference to books and records and where it was possible to infer the reliability of the records from a course of dealings, and the prima facie credibility and reliability of evidence from business records.

66. MacMenamin J. in his judgment in *Ulster Bank v. O'Brien,* having noted that there was no conflict on the facts and no affidavit filed by the defendants, accepted the argument that the letter of demand exhibited in the affidavit was evidence of the actions of the deponent, a co-signatory on the letter, and in the absence of a denial a court was entitled to draw an inference from the evidence. The deponent was the author of the letter of demand.

67. It is important too to note that MacMenamin J. observed that the bank had to establish its claim on a *prima facie* basis which, if not denied, entitled a court to grant judgment.

68. Charleton J. concluded that a failure to respond in the face of the demand, and where an answer would have been expected in the normal course, while this would not be definitive, might in the context of evidence of a prior relationship between the parties, be sufficient to establish the claim. The solemn nature of the letter of demand and the fact that what was contained in the letter was not a "bare allegation" might in a suitable case be sufficient to permit a court to draw an inference that failure to respond can be treated at least *prima facie* as an admission. Having regard to the solemnity of the procedure, the fact that the claim was supported by a sworn affidavit evidence, duly served, together its form and content and the supporting exhibits amounted to "sufficient indications of reliability". He also considered that the matrix of fact established a relationship from which the obligation to repay a debt "is properly referenced and exhibited".

69. The context of a business relationship was taken up again by Charleton J. in the most recent judgment on the admissibility of evidence in *Bank of Scotland v. Fergus*. The evidence comprised statements of account and the witness who gave evidence for the bank was able to compare the statements with the electronic records kept by the bank for the purposes of ascertaining the amount due. No specific element of the record was challenged.

70. Charleton J. regarded the course of dealings as sufficient to enable him to draw an inference in the absence of a denial. He said the loans and guarantees were:

> "…effected in consequence of an on-going and close relationship between the company and the bank and Charles Fergus" (para. 12).

71. Promontoria relies on the course of dealings between Mr. and Mrs. Burns and its predecessor in title, on the fact that Mr. Harris has sworn his evidence from his examination of the books and records of Promontoria and argues that the evidence is supported by a statement of account.

72. I propose turning now to examine the argument that reliable and admissible evidence can be given which permits inferences to be drawn when there is shown to be a course of dealings and business records from which certain conclusions should follow.

A" course of dealing"

73. The earliest analysis of a possible exception deriving from the nature of business or banking records is one of the numerous judgments of Clarke J. in the *Moorview* litigation. This judgment of Clarke J. definitively influenced the development of the now established common law admissibility of certain classes of business records in the context of a relationship. The judgment concerned an action by First Active plc on a guarantee entered into by Mr. Brian Cunningham in respect of the liabilities of some of the Cunningham Group companies. The relevant part concerns the admissibility and sufficiency of evidence adduced on behalf of First Active by a Mr. John Collison who gave detailed evidence of the

relevant liability of the companies in the Group and the basis of the calculation of that indebtedness. Mr. Collison was personally familiar with the portfolio of loans and produced a series of lever arch folders which contained vouching documentation, and evidence of a personal inspection of entries in the books and records of First Active, which together supported and explained the evidence of debt and no challenge was made to any particular entry or any of the calculations.

74. Clarke J. concluded that the evidence was reliable and credible and was given by a person who personally and directly was in a position to prove the records. The evidence was of business records kept by the bank in the ordinary way as part of the bank's records, and records of that type are *prima facie* evidence of the course of dealings between the parties, although, a party is free to challenge the accuracy of any such records. Another element of the evidence in that case was that the mortgage debentures contained a clause providing that a certificate of an authorised officer or employee of the bank as to the amount of liabilities was binding on the company for all purposes, save for manifest error.

75. The analysis in *Moorview* led to a rather convoluted line of case law concerning the means by which a bank could prove its debt. Finlay Geoghegan J. expressly followed the decision of Clarke J. in *Bank of Scotland v. Fergus* [2012] IEHC 131. In that case the evidence was of a former officer of the bank, and, at the time of the evidence, a manager in a service provider which itself was not a bank for the purposes of the 1879 Act. That witness averred to having checked the electronic records of the bank and gave evidence of the sums due from his personal analysis of those records. Finlay Geoghegan J. regarded the evidence as admissible and *prima facie* sufficient evidence of the liability of the company to the bank. Again, no challenge was made to the veracity of the records or to the correctness of the calculations.

76. Ryan J. in *Bank of Ireland v. Keehan* [2013] IEHC 631 approved this approach and expressed a view that "courts have to take judicial notice of the obvious and commonplace facts and circumstances of ordinary life". He considered that computer records were *prima facie* evidence of debt subject to the proviso that should the defendant contest the liability in whole or in part, further evidence might be required to prove the case depending on the issues raised. He went on to say as follows:

> "If a matter is not disputed, there is no need of proof. Where a party chooses to stay silent in face of a claim, prima facie proof is sufficient."

77. In the judgment of Barniville J. in *Promontoria v. Burke* the deponent averred that she had accessed the plaintiff's books and records relating to the liabilities of the defendant and Barniville J. having considered the decision of the Supreme Court in *O'Brien* thought that arguably was not sufficient to justify the entry of summary judgment. He concluded by granting judgment on the basis that the defendants had relied on the facilities letters for the purpose of seeking to make out a defence on the Statute of Limitation and that fact was sufficient to make those documents admissible.

The line of authority from *Ulster Bank (Ireland) Limited v. Dermody*

78. Mr. and Mrs. Burns rely on the judgment of O'Malley J. who declined to follow the then High Court authorities in *Ulster Bank (Ireland) Limited v. Dermody* as they were inconsistent with the Supreme Court decision in *Criminal Assets Bureau v. Hunt.*

79. The Supreme Court considered that the documents should not have been admitted in evidence unless the Act of 1879 as amended or the Criminal Assets Bureau Act 1996 could be called in aide. O'Malley J.'s decision was that the three judgments of the High Court I have outlined above could not bind her in the light of the Supreme Court authority.

80. Counsel for the plaintiff suggest that O'Malley departed from what he called "orthodox approach", but I am unable to accept that characterisation as in fact *CAB v. Hunt* was not

referred to in any of the three judgments which she declined to follow and her reasoning in the light of precedential importance of the Supreme Court judgment cannot be faulted.

81. Further, Laffoy J. expressly declined to overturn the decision in *Ulster Bank v. O'Brien*. That suggests to me that there will be cases where the principles explained by O'Malley J. may still be relevant, usually where a course of dealings cannot be established or where the reliability of documentary evidence can otherwise be safely inferred.

82. Mahon J. in *Ulster Bank (Ireland) Limited v. Egan* [2015] IECA 85 distinguished the decision in *CAB v. Hunt* because it was not a claim by a bank seeking to prove a debt from a customer. Evidence was given on affidavit by the recoveries clerk employed in the debt recovery department of the bank and from access to the computer and other bankers' books and records of the plaintiff bank relating to the accounts and liabilities of the defendant.

83. The appeal in that case therefore proceeded on the basis that evidence had been adduced by a bank official who was in a position to directly refer to his perusal of bank records. It is well within the provisions of the Act of 1879, as is clear from para. 27 of the judgment of Mahon J. with whom the other two judges agreed.

84. The decision of O'Malley J. in *Ulster Bank v. Dermody* does not avail Mr. and Mrs. Burns as Promontoria relies on the caselaw which accepts evidence of business records and a course of dealings as sufficient and reliable evidence of a *prima facie* obligation to pay. I do not require for the purposes of the present appeal to further consider that judgment, in the light of my conclusions on that argument.

Bank of Scotland v. Stapleton

85. Mr. and Mrs. Burns also rely on the decision of Peart J. in the High Court in *Bank of Scotland v. Stapleton.* That was an application for possession, to which arguably different considerations may apply, but irrespective of that observation, I find no assistance from the judgment of Peart J. who was considering the question of who might be permitted to give

evidence of a debt and security and did not go on to further consider the separate line of authority regarding evidence of a course of dealing. Again, because of my conclusions in the present appeal. I do not propose to further consider that judgment.

Current state of the law

86. It is difficult to discern a clear line of authority from this short summary of the current law. However, I conclude that the present state of the law is that in order to rely on evidence which does not come within the Act of 1879 because the plaintiff is not a bank, a claim in debt can be established by credible evidence emanating from a course of dealing, from the nature of business records that show that dealing and which carry indications of reliability, especially if those records are in the form of statements of account sent from time to time in the course of a lending transaction, which, taken together with evidence from an authorised person of an analysis and inspection of books and records, whether documentary or electronic, can in the absence of a denial or challenge which is more than a mere bald assertion, be sufficient to establish a claim.

87. I will examine the evidence in the present case which the trial judge found not to be sufficient to establish the claim but before doing so I wish to comment briefly on the argument that there may be a difference of approach when a case is heard on affidavit or on oral evidence.

Oral or affidavit evidence?

88. Some of the cases in which judgment was awarded in favour of a bank were heard on oral evidence including *Moorview* and *Bank of Scotland v. Fergus*. Summary judgment was given on affidavit in *Bank of Ireland v. Keehan, Ulster Bank v. Egan* (appeal to the Supreme Court), and *Ulster Bank Limited v. O'Brien* (appeal from the High Court to the Supreme Court where the judgment of Hedigan J. was upheld).

89. It does not appear from the authorities that any principled distinction is to be made between the admissibility of evidence on affidavit or that heard orally and Laffoy J. at paras. 34 and 38 of her judgment in *Ulster Bank v. O'Brien* expressed this in clear terms. McKechnie J., albeit he was dissenting on the result, in *Bank of Scotland v. Fergus*, admittedly a case heard on oral evidence, made no distinction between the types of cases (para. 51).

90. There is nothing in the case law that suggests any different approach to evidence tendered on affidavit or orally, and in my view, there is no reason in principle why the approach to the evidence should be different, save that argument may be raised in a suitable case as to the weight to be given to evidence not tested by cross examination, or from the failure of a defendant to seek to cross examine otherwise *prima facie* credible evidence.

Application to the facts: Are the documents admissible and sufficient?

91. Counsel for the appellant argues that the trial judge fell into error in coming to a determination that the documents exhibited in the affidavit of Mr. Harris were inadmissible hearsay evidence. From that flowed the rest of his conclusions.

92. The first proposition relies on the judgment of Edwards J. in *The Leopardstown Club Limited v. Templeville Developments Limited* [2010] IEHC 152 at para. 5.13 where Edwards J. explained how certain documents may be admissible not as evidence of their truth but to show that statements were in fact made. Some documents can be admitted as original evidence where the making of a statement is the fact in issue, or "where the document contains a statement using words said to have a particular legal effect". The examples included are operative words in a deed which have legal effect merely on account of the existence of those words in the document. A deed is a classic example of such a document, and may be tendered as evidence of the assurance of property, for example, without producing the person who executed it, unless what required to be proven is execution. The

document is a conveyance by deed of the land. Counsel for the appellant argues that the facility letters and guarantees are documents which in themselves have legal effect and are therefore original documents rather than hearsay evidence.

93. I am prepared to accept, at least on a *prima facie* basis, the argument that the guarantees are evidence of the creation of a guarantee, as the guarantees were created by deed and carry therefore the solemnity of that process, and the guarantee is *made*, not merely evidenced, by deed. But the present case is not concerned with the validity of the guarantees but rather with whether there is sufficient proof of the underlying debt.

94. For the same reason I think the trial judge was correct to accept that the Global Deed of Assignment of 12 March 2015 by which Promontoria became entitled to all of the assets of Ulster Bank Limited, including the loans, is a document the proof of which by production is not hearsay evidence.

95. But I do not consider that the letters of demand or the facility letters prove their contents. What is required to be proved by Promontoria is that monies were advanced on foot of certain agreements for repayment and subject to certain conditions, including a condition providing for the payment of interest, and that the monies fall due for payment. The content of the letters is relevant to show that demand was made but not whether the debt was due, or by whom and in what amount.

96. The documents are not in my view documents of the type to which Edwards J. referred in *Leopardstown* and they cannot in themselves be said to be documents which have a particular legal effect or to contain a statement which has a particularly legal effect. This is not a case where the making of a *statement* or where the document themselves created a contractual arrangement. The documents of loan offer cannot be said to be anything other than part of the chain of activity leading to the completion of a contract by acceptance of its terms, and there is no statement in the letters of offer which have a legal effect without proof

of acceptance. Further, the letters of demand, at best, taken alone do not prove more than the making of a demand. They do not prove the debt.

Application to the facts: nature of the documents exhibited

97. In my view the authority of Mr. Harris cannot seriously be doubted, and he had authority to swear the affidavit on behalf of the plaintiff and that authority was subsequently, and after his reserved judgment was delivered by Noonan J. supported by the affidavit of Mr. Pendiville.

98. However, Mr. Harris does not say that he has possession of the books and records of Ulster Bank or that he has had an opportunity to examine these and give evidence from them. His source of knowledge therefore was not identified save with respect to the specific documents he exhibited.

99. He does not say that when the assets were transferred to Promontoria following the sale from Ulster Bank that Promontoria took possession of the books and records of Ulster Bank, where these are maintained, and that he himself inspected and drew conclusions from them. He does not say how he obtained possession of the copies of the documents he exhibits nor can be confirm that the copies are true copies of the original.

100. The affidavit of Mr. Harris avers that the Servicer held all of the books and records "of the plaintiff" and a similar averment has been made by Mr. Pendiville, albeit it came very late and after the reserved judgment was delivered. Combined, the affidavits of Mr. Harris and of Mr. Pendiville establish that Mr. Harris has access to the books and records, including what he described as "hard copy and electronic stored records" of the plaintiff "having relevance to the proceedings". That phrase must be seen as carefully chosen and one must presume that the deponents are referring to the documents exhibited being the guarantees, the facility letters and the letters of demand.

101. Neither has said that the evidence is drawn from an analysis of the historic books and records of Ulster Bank, nor whether the original or any certified copies are held by Promontoria or by the Servicer which acts as agent for the collection of the debts.

102. This is to my mind not likely to be an accidental omission and it is precisely one type of mischief the rule excluding hearsay evidence seeks to avoid. The veracity or reliability of evidence is the key to the general objection to hearsay evidence, and the exceptions made have at their root the balancing of the inconvenience and onerous nature of a rigid application of the rule as against the requirement that evidence be reliable and dependable.

103. I cannot therefore ignore the omission of a simple averment in the numerous affidavits sworn on behalf of the plaintiffs that the originals of the various documents are held by or on behalf of Promontoria and that the documents exhibited are true copies, or that the deponents have examined the books and business records of Ulster Bank relating to the loans.

Evidence of a course of dealings?

104. It is with regard to the proof of the quantum of the claim that I have most difficulty. There are no bank statements of the type sent on a regular basis from a bank to a customer which carry indications of reliability and can be seen as part of a course of dealings, or evidence of a contractual nexus from which a court could draw an inference from a failure to respond.

105. It is noteworthily in that context that there are no statements from Ulster Bank exhibited in any of the plaintiff's affidavits. Indeed, service of bank statements has not been shown, and because the affidavits sworn on behalf of the plaintiff are carefully crafted, service that might show a course of dealings cannot be presumed

106. Mr. Harris does not exhibit any bank statements at all but rather the final figure is taken from the letters of demand sent by Ulster Bank. Exhibit AH27 of Mr. Harris's grounding

affidavit sworn on 11 December 2017 exhibits statements of an account showing an amount described as an opening balance calculated after the purchase of the loan and thereafter interest debited from time to time. From the date of the statement it has the appearance of having been prepared for the purpose of the litigation.

107. In his third affidavit sworn 27 February 2019 Mr. Harris again exhibits a second bundle of statements of account bearing the date 20 February 2019. These statements also seem from their dates to have been prepared for the purpose of updating the figures for the hearing. They are not statements updating the figures due on a loan account of the type said to warrant a reply or evidence of a course of dealings suggestive of acceptance of liability.

108. There is no averment that the statements were sent to the defendants.

109. It must be assumed therefore that Mr. Harris did not examine the books and accounts of Ulster Bank or which of the historic records were handed over to Promontoria when the loans were sold, and notwithstanding that he swore three affidavits, the evidence commences with the figure calculated at 25 April 2016, after the Global Deed and after Ulster Bank assured its interest in the loan facilities and guarantees to the plaintiff. At best the evidence of Mr. Harris is evidence of the amount Promontoria was told was due by the respondents on foot of the debt at the date the sale of the debt closed. It is classic hearsay, a statement of what the deponent was told by someone else.

110. The evidence is quite different from that adduced in *Bank of Scotland v. Fergus* where there was direct evidence of a drawdown of the loans by the companies and the court had available to it an analysis of the history of the relationship between the bank, the company and the defendant. From the recital of the evidence available to the High Court set out in para. 13 of the judgment of Charleton J. it would seem that periodic statements of the ongoing financial situation of the company whose debts were guaranteed were sent to the defendant. Charleton J. placed particular store on this and on the fact that the purpose of the

records was to show where matters stood at a particular time and that the communication between the bank and its customer or between the bank and the guarantor of the customer's liabilities was part of the "course of dealings" (para.15).

111. The sentence at the end of para. 20 of this judgment sets out the core of the majority judgment of the Supreme Court in the case:

> "But letters written by a party, documents signed by a party as setting out that party's obligation, or admissions by a party of the existence of a debt, do not engage the hearsay rule whether in banking or in commercial transactions where those exchanging information are plaintiff and defendant."

112. There is to my mind insufficient evidence of a course of dealings between the parties or of statements or other correspondence supportive of the claim and shown to have been sent to the defendant, which in the light of the caselaw and in particular the judgments of Laffoy J. and Charleton J. in *Bank of Ireland v. O'Brien* which if not denied could give rise to an implication or an entitlement to draw an inference as to the veracity of the document as to the stateability or sustainability of the claim.

113. The evidence in *The Bank of Scotland v. Fergus* was from a perusal of the electronic records of the bank of the company and the accounts and evidence was also adduced of "spot checks" on the company's accounts for the purposes of identifying that there were no unusual transactions and that the rate of interest charged was in accordance with the amount specified in the relevant facility letter. The reliance was on the electronic records, but that did not give rise to any great difficulty. Finlay Geoghegan J. accepted that the witness who gave oral evidence who was a former official of the bank was entitled to give evidence of the records in relation to the indebtedness of the company to the banks including the electronic records and that this was *prima facie* evidence. The evidence in *Moorview* of Mr.

Collison was of a similar type and was described in general by Clarke J. as "business records" sufficient to establish the amount due.

114. What is striking in the three affidavits of Mr. Harris is what is not said by him. He relies on the letter of demand from the bank in each case dated 27 August 2012 and in each case his evidence is carefully stated not to say that his perusal of the books and records of the bank show that that was owed, but rather that the bank made the demand and thereafter no payment was made to the plaintiff. The link between the facility letters, the amount claimed in the letter of demand and the documents on which Mr. Harris relies is missing, as are some of the essential classes of documents which the Court had available to it in the judgment in the recent caselaw.

115. The third affidavit of Mr. Harris, the affidavit sworn after the written judgment was delivered by Noonan J. says that the affidavit was made from a perusal of the books and records "previously mentioned" being the letters of loan offer and the statements of account dated only days before his affidavit was sworn. The evidence therefore is not reliable as an indicator of a course of dealings between the defendant and the plaintiff, nor it seems to me could it be said that the evidence shows a reliable and credible chain of evidence obtained from a perusal of the relevant books and record of the companies whose debts were guaranteed or of the on the personal accounts of the defendants.

116. The evidence in the present case falls far short of that evidence found to be sufficient in *Moorview* and the caselaw derived therefrom.

Dissenting judgment McKechnie J.

117. In his strong dissenting judgment McKechnie J. was reluctant to extend the principle explained in *Bessela v. Stern* (1877) 2 C.P.D. 265 relied on by Charleton J. in *O'Brien* and noted certain other case law including the recent judgment of the High Court of England and Wales in *Killick v. Pountney* [1999] All E.R. (D) 365. He pointed to the fact that there may

be a number of reasons why a defendant may have chosen not to participate in proceedings many of which are unrelated to the possibility of liability and *ipso facto* not reliant indicators of liability. He also noted the "notorious" fact that the relationship between banker and customer is not always or often based on an equal footing, and that bank statements may not be readily understood by a customer. He expressed the view that for reasons of fear or ignorance or a willingness "to face up to reality" a person may ignore a letter of demand (para.104). He was not prepared to accept the inference drawn from non-response or silence.

118. The analysis of McKechnie J. is strong and reasoned and he notes the protective nature of the rule against hearsay evidence in the special position of customers of banks where there may not be equality of arms.

119. However, as the argument in the present appeal did not address that reasoning because the appeal was heard only days before it was delivered, and because I consider that the appeal may be dismissed on an analysis of the jurisprudence opened to the Court I do not propose to consider it any further.

Conclusion

120. For the reasons stated it seems to me that the trial judge was correct, and there is insufficient evidence of the type of business records carrying indications of reliability, nor evidence sufficient to establish a course of dealings between Promontoria and the defendant to engage the recent authorities which recognise that a court may draw an inference when in the context of an established business relationship a defendant does not deny or otherwise dispute in a concrete and credible way the evidence adduced in proof.

As this judgment is delivered electronically, Whelan J. has in advance indicated her agreement with its contents and Collins J delivers a concurring judgment.