UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 180
Record Number: 2018/22

Costello J.
Haughton J.
Power J.

BETWEEN/

ACC LOAN MANAGEMENT DESIGNATED ACTIVITY COMPANY

PLAINTIFF/
RESPONDENT

- AND -

EUGENE MCCOOL

DEFENDANT/
APPELLANT

JUDGMENT of Ms Justice Power delivered on the 24th day of June 2021

1. This is an appeal against an order of the High Court, made on 16 November 2017 wherein Reynolds J. granted summary judgment to the first named respondent (hereinafter 'the bank') against the appellant in the sum of €228,005.36 [2017] IEHC 704. The appellant claims that he had a number of arguable defences, which the trial judge rejected in error, and that the matter ought to have been remitted for plenary hearing. The issue in this appeal is whether he has established an arguable or *bona fide* defence to the bank's claim.

2. The appellant is a businessman of some experience. In addition to being the owner and Managing Director of *'McCool Controls and Engineering Limited',* he had business interests

in the property market in that he purchased, developed and sold many properties over the years. Some of these properties were rented out as student accommodation on the north side of Dublin. The appellant had several loans in respect of his various properties. For the purpose of these proceedings, there are four Dublin based properties and three corresponding loan accounts that are of particular importance. These are:

(i) 145 Howth Road—in respect of which there existed a loan account ending with the numbers 519;

(ii) 424 Clontarf Road—with a loan account ending in 811; and

(iii) two adjacent properties at 49 and 51 Shanard Road—in respect of which the appellant had a loan account ending in 815.

For ease of reference, I shall refer to these as the 'Howth Road', the 'Clontarf Road' and the 'Shanard Road' properties and, where necessary, will include, in brackets, the corresponding loan account numbers of (519), (811) and (815), respectively.

Background Facts

3. By letter of sanction dated 30 May 2006, the bank offered the appellant a loan facility in the sum of €630,000 repayable over a term of 2 years from the date of draw down, together with interest thereon. The heading of the letter was printed in bold capitals and it stated: '**LETTER OF LOAN SANCTION & AGREEMENT FOR BRIDGING FINANCE.***'* The letter expressly stated that the purpose of the loan facility was *'to restructure existing ACC Bank loan facilities, Reference Numbers 10002815 and 10000519'*. Those account numbers referred to the appellant's existing loan facilities on the Shanard Road (815) and Howth Road (519) properties (see para. 2).

4. It was expressly stated on the same letter that the bank's security for restructuring the existing loans was *'[a]n Extension of the Bank's First Legal Mortgage and Charge over*

properties located at 49 and 51, Shanard Road, Santry, Dublin 9.' One of the conditions precedent to the drawdown of the approved funding was that the appellant's loan facility in respect of the Clontarf Road (811) property would be '*cleared in full*'.

5. The appellant's acceptance of the aforesaid offer of the loan is recorded on a document entitled 'ACCEPTANCE OF BORROWER' which is dated 15 July 2006 and which the appellant signed. His signature was witnessed by a Mary O'Donnell. The document further records that the borrower's solicitors acting in the matter were O'Grady Solicitors.

6. The first and only drawdown of the loan (in the sum of €624,696.81) occurred on 15 August 2006. This is recorded in an '*Interim Statement of Loan Account*' dated 28 October 2015 and addressed to the appellant. It also records that the loan was drawn down into an account bearing the number 10037377 (hereinafter '377').

7. It is common case between the parties that the appellant did not repay the loan as per the terms of the letter of loan sanction. When the 2-year term came to an end in August 2008, the bank sought repayment of the loan. According to the appellant, *'a very bizarre incident'* occurred in that ACC Bank sent a direct debit demand for the full amount of the outstanding loan to the appellant's AIB account from which direct debits had, routinely, been paid to the bank.

8. The appellant claims that this direct debit demand was made without any notice to him. The first that he learned of it was when the AIB manager called him urgently on 18 August 2008 to inform him that AIB had received a demand for €628,289.40 from ACC Bank. A copy of an e-mail dated 18 August 2008 which the appellant then sent to the respondent bank is exhibited. The subject matter of the e-mail is entitled *'Demand for return of funds 49-51 Shanard Road 18-8-08'*. The e-mail states: -

"Pat

I have just received an urgent (sic) from the manager of AIB in the IFSC where I have my house accounts – he tells me that ACC have sent a Direct Debit demand for the immediate return of €628,289.40 which I assume is on the 49/51 houses.

This has alarmed the AIB obviously and is very embarrassing for me – can you advise what is happening with this account – obviously I do not keep that level of cash in my account and will need time to source new finance.

Please advice (sic).

Finn"

9. A few days later and in response to a request made by the appellant, the bank wrote to him on 21 August 2008 indicating its willingness to vary its original letter of loan of 30 May 2006. This 21 August 2008 letter stated that the bank was '*agreeable to your request to extend your bridging loan facility to 30th September 2008'*. It confirmed that in all other respects, the terms of the original letter of loan were reinstated and reaffirmed. The appellant signed his acceptance of this variation agreement on 27 August 2008. He did not repay the loan by the extended deadline of 30 September 2008.

10. There followed a second letter of variation sent by the bank on 6 October 2008, again in response to a request from the appellant. It stated '*[t]he bank is agreeable to your request to extend your bridging loan facility by a further 2 months. Your final due date will now be 30th November 2008.'* The appellant did not repay the loan by that further extended date.

11. A third letter of variation was sent by the bank on 14 July 2009 extending the term of the bridging loan by an additional 12 months, that is, until the 14th of July 2010. That letter confirmed that the interest rate payable on the loan facility would be increased from 2.00% per annum to 2.75% per annum over Euribor by reference to three-month interest periods. On 27 July 2009, the appellant signed his acceptance of this third variation of the term of the original letter of sanction. The document which he signed contained a warning, in bold print, to the following effect that: **'*[t]he entire amount that you have borrowed will still be outstanding at***

the end of the interest only period.' Once again, it is common case between the parties that the bridging loan facility was not repaid by the third extended due date of 14 July 2010.

12. On 23 September 2013, the bank wrote to the appellant. The heading of the letter stated, '*Letter of Loan Sanction and Agreement dated 30 May 2006 between (i) Eugene McCool and (ii) ACC Bank Plc. (the 'Loan Agreement') and Mortgage and Charge dated 19 November 2003 between (i) Eugene McCool and (ii) ACC Bank Plc. ('the Mortgage')*'. The letter confirmed that at the close of business on 19 September 2013, the total sum of €872,722.98 was owing by the appellant under the loan agreement. That sum was said to be comprised of the principal sum of €871,937,02 plus interest in the amount of €785.96. The bank demanded '*payment forthwith*' of the aggregate sum of €872,722.98. It also demanded payment of the '*interest accruing in accordance with the Loan Agreement to the date of payment of the said sum in full at the rate or rates provided for in the Loan Agreement*'. It recorded that '*[i]nterest on the Facility is presently accruing at the aggregate rate of €196.49 (...) per day.*' By that letter, the appellant was given notice that if the monies and interests were not paid '*forthwith*' then all or any of the bank's rights may be exercised without further notice or warning.

13. Two days earlier, on 21 September 2013, Mr. Stephen Tennant had been appointed as receiver in respect of the Shanard Road properties. He was discharged on 20 December 2013 and, on that day, Mr. Paul McCleary was appointed as receiver. Ultimately, the Shanard Road properties were sold by the receiver and in June and July 2015, the proceeds of sale were applied to the appellant's account. No further payments were made against the appellant's loan, thereafter.

Legal Proceedings

14. On 8 September 2015, the bank's solicitors, A&L Goodbody, wrote to the appellant referring to proceedings in the matter of *ACC Loan Management Limited v. Eugene McCool*

(High Court, Record Number 2015 1715 S) and enclosing by way of service upon the appellant what was stated to be '*a true copy of our client's plenary summons*'. In fact, the reference to a plenary summons was an error, as what was, in fact, enclosed was a summary summons, dated 3 September 2015.

15. Two days later, the appellant responded to the service of proceedings by sending an email to the bank and its then parent company (Rabobank). By this email, dated 10 September 2015, the appellant confirmed receipt of a court summons '*over an alleged debt arising from the properties at 49/51 Shanard Road*'. He went on state: -

> *"I am issuing this mail to you as there are no contact details on the Goodbody letter.*
>
> *This was a most surprising act by ACC LM particularly as this loan and the ill conceived receivership is now the subject of a complaint by me to the Financial Services Ombudsman's Bureau. It is my belief that any issue of Court proceedings should be suspended until the Ombudsman's process is completed.*
>
> *Another point is that Goodbody's cover letter states that they were issuing a plenary summons, which is the correct way that this should proceed. However the summons is a summary summons which is incorrect given that there is a strong defence against any claim by the bank and any alleged losses were self-inflicted by the banks (sic) handling of the account and the records show that the receivership was unwarranted in the first instance.*
>
> *In addition, I have a strong defence and counterclaim against this ill conceived decision by the bank to take such proceedings including the serious issues that arose during the receivership. I say this on the basis that my files dating back to 2003 on the matter and particularly the banks (sic) own files, show that the issues in dispute were a result of the banks (sic) handling of the account over many years. The summons claims that there (sic) issue in contention arose in 2006 however this is also incorrect and my complaints predate that stated in the summons.*

I advise that the bank should consider its position on this given the history of the account and what happened during the receivership and withdraw from this action. I had written to the banks agent on two occasions advising that the bank should accept the proceeds from the sale of the property as a settlement of the account. This is the sensible and logical solution given what has occurred. Alternatively I would agree to engage in a mediation or conciliation process to try to resolve this matter which is the fasted (sic), most effective and financially beneficial way to resolve this dispute. The other big issue which the bank is aware of from my statement of affairs is that I do not have any funds to make any payments and as I am now 65 it is unlikely that I will ever be in a financial position to do so and should the bank succeed with their action it would be a pyrrhic victory.

If the bank intends to continue with this proposed legal process I insist that it is undertaken by way of a plenary summons and I will use this correspondence to advise the Courts that this matter must proceed by way of plenary summons."

16. On 15 September 2015, the appellant wrote again to the bank, by email, attaching a copy of a *'Memorandum of Defence'* lodged in the High Court Central Office '*in response to your plenary summons as issued on the 8th September last'*.

17. The bank filed its Notice of Motion for an Order seeking liberty to enter final judgment on 28 October 2015 and the matter came on for hearing before the High Court on 3 November 2017.

Evidence

18. The trial judge had the benefit of four affidavits sworn by the appellant on 6 November 2015, 2 December 2015, 9 December 2016, and 21 April 2017, respectively. Affidavits were also sworn by the appellant's wife and by a former employee. There were four affidavits filed on behalf of the bank. Padraig Kiernan, one of the bank's deponent, swore affidavits on 21

October 2015, 3 December 2015 and 13 January 2013. The bank's other deponent, Paul Shaw, swore his affidavit on 28 February 2017. A brief outline of the evidence will suffice at this stage.

19. Essentially, the appellant's position as set out on affidavit is that the bank made a mistake when it set up the loan, the subject matter of these proceedings. He claims that the bank erroneously created a short-term investment loan for the Shanard Road properties even though it had been advised by him at the outset, that the loan which he required was a long-term loan for a residential investment property. He said that the Shanard Road properties had formed part of his wife's original family home. The loan on this property did not date from 30 May 2006 (the date of the loan facility) but, rather, dated back to 2003. An error had occurred when the bank, mistakenly, cancelled the long-term loan and set up a short-term facility for these properties. As a result of what he describes as '*the bank's internal automated procedures*', the original loans on the Shanard Road properties were terminated without notice to him some eighteen months after they had been created. These then had to be '*urgently re-instated*'. The error was repeated, once again, when the bank set up a new loan but with yet another short-term facility.

20. To compound the problem, the bank, according to the appellant, applied much higher interest rates on his loan account and then, when these short-term facilities ended, applied further surcharge interest rates of 21%. These rates, he claims, were neither stopped nor refunded despite his protests to the bank about this error.

21. The appellant also complained about the bank's appointment of a receiver and the subsequent management of the Shanard Road properties. The decision to appoint a receiver, was taken on foot of the allegedly overdue sums of accumulated high interest and surcharge interest rates and, in the appellant's view, was totally unwarranted. The true value of the properties would have cleared the outstanding loan balance.

22. The appellant claims to have suffered loss, including, the use of a separate storage facility at the rear of the Shanard Road properties, by reason of the bank's action. He also suffered loss of rental income for the 2-year period of the receivership. He claims that the bank's agent removed, approximately, €25,000 worth of his furniture and contents from the two Shanard properties, without notice.

23. Finally, the appellant complained about the sale price of the properties. The properties were sold and on 16 June 2015 and the sum of €239,649.85 was applied to the appellant's account in respect of the proceeds of sale of 49 Shanard Road. On 27 July 2016, the sum of €243,533.48 was applied to the appellant's account in respect of the sale of 51 Shanard Road. The appellant contends that the true value was not reflected in the sums received. He claims that the bank failed to mitigate its loss during the sale process on the basis that it could sue him for any shortfall arising from what he described as *'the fire sale of the houses'*.

24. In her affidavit of 5 September 2016, the appellant's wife, Denise McCool, alleged that the bank had *'acted maliciously'* when in 2006 it terminated a 20-year mortgage that had been in place since the property on Shanard Road was purchased. The bank replaced this mortgage with a 2-year temporary loan which terminated, abruptly, in 2008. She testifies to a meeting that her husband had with the bank in 2006. She claims that the appellant had asked that the funds from the refinancing of the Howth Road property be added to an existing 20-year loan in respect of the Shanard Road properties. She was shocked in August 2008 when she discovered that, instead of what had been agreed, ACC had cancelled the 20-year mortgage and had changed the loan to a 2-year temporary loan.

25. In an affidavit sworn by Mary O'Donnell on 5 September 2016, she averred that she had worked with the appellant since 1998 as an administrator and a Director of '*McCool Controls & Engineering Limited*'. She also worked as an administrator of the appellant's student accommodation properties in Clontarf, Santry and Glasnevin. She avers that she had attended

a meeting with ACC when the transfer of funds from the Howth Road property to the Shanard Road properties was requested. She claims that it was agreed that the monies from Howth Road would be added to the 20-year Shanard Road mortgage. There was no mention of cancelling the 20-year mortgage and reducing the loan to a 2-year temporary facility, particularly, given the planned construction work that was about to take place in the Shanard Road property. She could not believe it *'when it was discovered in 2008 that ACC had cancelled the twenty-year mortgage in 2006'.*

26. Finally, the appellant took issue with the title of the proceedings as, in his view, his loan was with ACC Bank and not the named applicant, ACC Loan Management DAC.

27. The bank's deponent, Padraig Kiernan, swore the affidavit to ground the bank's application for liberty to enter final judgment. He averred that no payment had been made by or on behalf of the appellant since 27 July 2015 (when the proceeds of the sale of the second Shanard Road property were applied to the appellant's account). Thereafter, the sum of €522,146.39, together with continuing interest accruing thereon from 3 September 2015, remained due and owing. This sum was calculated by subtracting the net proceeds of the sale of the Shanard Road properties from the principal sum plus interest.

28. Although, initially, the bank's application for liberty to enter final judgment was in the sum of €522,146.39, the bank, as of February 2017, proceeded to seek judgment only in the sum of €228,005.36 together with interest. Mr. Shaw explains how the reduction in the sum originally claimed by the bank came about. In response to the appellant's contention that the bank had imposed '*punitive surcharge interest rates'*, Mr. Shaw averred that pursuant to Clause 4.6.6 of the General Terms and Conditions applicable to the facility in question (hereinafter, the 'terms and conditions') the bank was entitled to impose such surcharges. However, following an exchange of affidavits between the bank and the appellant, the bank had restricted its claim before the High Court to judgment in the principal sum plus standard interest which

had accrued on the facility. Surcharge interest was, therefore, not pursued before the High Court.

29. The bank's position throughout the proceedings has been that the appellant has no valid defence to its claim for summary judgment. It acknowledges that its solicitors referred, erroneously, to the service of a plenary summons in its letter of 8 September 2015. However, this error, it claimed, was immediately apparent, as the words '*Summary Summons*' appeared on the face of pleadings.

30. The bank's evidence was that while the properties were under the receiver's control, rent was collected from the tenants, and that on 26 May 2014, the sum of €8,877.10 was applied to the appellant's account in respect of the rent received. The bank denies that the appellant suffered the losses alleged.

The High Court Judgment

31. Having set out the facts, the trial judge noted that the defendant sought liberty to defend on the basis that he had established arguable grounds of defence in respect of:

(a) the proper construction of the facility letter of May 2006 in circumstances where the defendant alleged that the loan was erroneously described as having a 2-year term as opposed to a 20-year term;

(b) the inclusion of surcharge interest to the account and the alleged miscalculation of the sum due and owing; and

(c) the alleged unwarranted appointment of the receiver over the properties and the wrongful actions of the receiver.

32. The trial judge recalled the settled legal principles in an application for summary judgment as set out by the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 and in *Harrisgrange Limited v. Duncan* [2003] 4 I.R. 1. She noted that in order to succeed

in defending a claim for summary judgment, a defendant must satisfy the Court that he has a fair and reasonable possibility of establishing a real or *bona fide* defence.

33. On the first issue, the trial judge observed that the defendant's case was that the bank had erroneously set up a short-term investment loan in May 2006 in circumstances where he indicated that his requirement was for a long-term commercial facility. In her view, it was clear from the terms of the facility letter that the purpose of the loan was to restructure two existing facilities for a term of 2-years, the security for which was an extension of the first legal mortgage and charge over the Shanard Road properties. There was no dispute that the defendant had executed the facility letter, the terms of which were clear on its face. Thereafter, he had executed three letters of variation restructuring the facility. The defendant's contention that he had neither read the terms of the loan facility nor taken any legal advice in relation thereto, although he did have solicitors acting for him in respect of other commercial transactions, was noted. Reynolds J. considered it notable that the defendant had taken no steps to point out the alleged error to the bank when he became aware of it but, instead, had proceeded to execute three further letters of variation. She acknowledged the bank's reliance upon the decision of Clarke J. (as he then was) in *ACC Bank plc v. Kelly* [2011] IEHC 7. The trial judge found that in signing the facility letter and the further letters of variation, the defendant must, in the words of Clarke J., *'accept the consequences'*.

34. On the second issue, Reynolds J. noted that whilst the bank had originally sought to recover surcharge interest in respect of the loan account, it had abandoned that aspect of its claim in the application for summary judgment. She observed that the defendant took issue with the manner in which the bank had calculated the outstanding sum that was due and owing. However, she considered this complaint to be no more than *'a bald assertion'* and that it had not been raised at any stage in the defendant's lengthy and comprehensive affidavits. The trial judge was satisfied that the manner in which the outstanding sum had been calculated was set

out '*in considerable detail*' by the bank's deponent and that the defendant had not '*engaged*' in any meaningful way with that evidence. On the second ground, she held that the appellant had not established any real or *bona fide* defence.

35. As to the third asserted defence upon which the defendant sought to rely, the trial judge acknowledged his contention that the appointment of the receiver was wrongful and *'totally unwarranted'*. She recalled that following the appointment of the receiver, the properties had been sold and the proceeds had been applied to the defendant's account. She noted his assertion that the receiver had failed to engage in proper procedures and practices by facilitating, what the defendant called *'a fire sale'* of the properties. She also observed that he had complained about the removal of valuable furniture and contents from the properties.

36. Reynolds J. was satisfied that the defendant had taken no steps at the time the receiver was appointed to address the issues he had raised. She noted the bank's position that his complaints as to the value of the properties were *'wholly unsubstantiated'*. The bank had exhibited contemporaneous independent valuations of the properties which showed that they had, in fact, been sold above the market value. Despite an assertion that he had made '*numerous complaints to the bank'*, the trial judge noted the defendant's failure to exhibit any documentation in this regard. The bank, on the other hand, had exhibited several letters written to the defendant inviting him to remove his belongings from the secured properties prior to sale. Observing that the defendant had failed to take any steps at the relevant times, in respect of the issues of which he complained, Reynolds J. found it difficult to attach credibility to his claims.

37. As to the defendant's allegation that the receiver had been wrongfully appointed, the trial judge noted that the original mortgage from 2003 made provision for such appointment and she was satisfied that it was, at all times, open to the bank to appoint a receiver to realise its security in respect of said mortgage. As to the timing of the sale of the properties, she was

satisfied that it was within the bank's power to decide when to act, citing, in particular, *ACC Bank plc v. McEllin & Ors.* [2013] IEHC 454. The trial judge was satisfied that the matter should not go to plenary hearing as the evidence adduced by the defendant failed to raise any *bona fide* defence to the claim advanced by the plaintiff. Summary judgment was, therefore, entered against the defendant.

The Appeal

38. In a lengthy Notice of Appeal, the appellant sets out several grounds of appeal, which he develops further in his extensive written submissions. He complains that the trial judge failed to test and conscientiously examine the evidence he had provided, including, the large number of documents he had exhibited on affidavit. He contends that *'not one piece of evidence'* contained in his documents had been acknowledged or taken into account by the trial judge. He submits that the trial judge failed to recognise that a high threshold for summary judgment must be crossed.

39. Further, the appellant complains about the fact that the plaintiff in the named proceedings was not, in fact, the bank with whom he had contracted the loan. He also disputes the way his accounts had been handled over the years. He criticises the receiver and the manner in respect of which his properties were disposed. He points to photographic evidence he obtained to show the *'very obvious fire sale of the property'*. He refers to his intention to join the receiver and to mount a counter-claim as reasons why the proceedings should be remitted for plenary hearing.

40. During the course of the hearing of the appeal, the appellant argued that he had available to him three grounds of defence. These were, essentially, the same defences he had asserted in the course of the High Court proceedings and may be summarised as follows:

(i) that there was an error on the part of the bank whereby it converted a 20-year mortgage on the Shanard Road properties into a 2-year bridging loan facility;

(ii) that this error led to several years of surcharge interest being applied to the appellant's outstanding loan and that there was a general '*mismanagement*' of his accounts; and

(iii) that in appointing a receiver over the appellant's properties, the bank caused a deterioration in his financial situation such that he suffered a loss which, in his view, constitutes a counter-claim to the bank's claim for summary judgment.

According to the appellant, the matters in issue between him and the bank are such that their complexity warrants the adjournment of the bank's application to a plenary hearing.

Relevant Legal Principles

41. Order 37 of the Rules of the Superior Courts is intended to provide what Collins J. describes as *'a relatively expeditious and inexpensive mechanism for recovering judgment for debts or liquidated demands which are clearly due and owing'.* In *Promontoria (Aran) Limited v. Burns* [2020] IECA 87, he noted (at para. 4) that it is obviously in the public interest and in the interest of creditors that there should be such a mechanism and that it should operate effectively. He stated: -

> *"It is not in the interests of the public – or in the interest of the parties – that straightforward claims for debt or liquidated demand should require to be determined by plenary hearing, with the additional delays and costs that such a hearing involves and the additional burden thereby placed on the resources of the justice system."*

42. The same point was emphasised again by this Court in *Allied Irish Bank plc v. Sean Cuddy* [2020] IECA 211. Noting the limits placed upon a defendant in an application for summary proceedings, including being deprived of a full hearing on the merits, Collins J.—citing *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, para 9(ix)—stressed that the O. 37

procedure is justified and proportionate "*where – and only where – 'it is very clear that there is no defence'".* Collins J. observed that a long line of authorities has emphasised that *'summary judgment should not be granted where there is any 'arguable' defence'*, adding that there is no requirement to show either a *prima facie* defence, or that a defence will probably succeed at trial (at para. 28). He confirmed that what is expected of a defendant in order to resist summary judgment cannot be conflated with what is expected of a defendant in a plenary hearing. Noting that it may take more than a bare statement to displace the assumption that the terms of a written agreement are binding and enforceable, Collins J. recalled (at para. 64) the judgment of Barniville J. in *Promontoria (Arrow) Ltd v Burke* [2018] IEHC 773 wherein it was stated (at para. 113) that the courts: -

> "*are sceptical of defences sought to be raised on the basis of oral representations which are not supported by contemporaneous documents and which are inconsistent with the express terms of a written contract signed by the parties."*

Collins J. observed (at para. 28) that the decision of the Supreme Court in *Irish Bank Resolution Corporation (in special liquidation) v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749 reaffirms the continuing vitality of the principles enunciated in *Harrisrange.* It is in the light of those principles that the three grounds of defence asserted by the appellant fall to be assessed.

The alleged error in setting up the loan facility

The appellant's submissions

43. What the appellant contends is his first 'arguable defence' rests on his assertion that the bank made an error in the setting up of the 2006 loan facility, which is the subject matter of these proceedings. He claims that the bank, erroneously, and in breach of an agreement he had with the bank, terminated a 20-year mortgage on the Shanard Road properties. He submits that

instead of transferring the loan balance due on the Howth Road property to the Shanard Road 20-year mortgage, as approved and agreed, the bank cancelled the 20-year mortgage account and set up a completely new 2-year temporary bridging loan. This new loan was given a separate account number ending in 377. This, he contends, was in total contravention of his instructions to the bank and a repudiation of an agreement which was put in place when he met with the bank on the issue.

44. The appellant says that, initially, he thought that the setting up of a new bridging loan facility in 2006 was '*a very serious error*' on the part of the bank. However, he later came to the view that the cancellation of the 20-year mortgage was '*a deliberate act*' of bad faith on the part of the bank in response to his having switched some of his accounts to Bank of Scotland because of the exorbitant arrangement fees which ACC bank had been imposing. The bank's action in cancelling the 20-year mortgage and in setting up the new loan facility led to very serious financial damage to him and his wife.

45. It is the appellant's case that it was not until 2008 that he became aware of what had happened in 2006. He says that he cannot explain how he did not '*spot*' the bank's cancellation of his 20-year mortgage and its substitution of a 2-year temporary loan. He had signed the loan document without getting advice from his solicitor. He was confident that it would be in accordance with what he had requested. He trusted that the bank had drawn up the document on the specific terms that had been agreed, namely, a simple 'topping up' of an existing loan facility. Having dealt with the bank for several years, he had developed what he described as '*a level of comfort*' which led him to accept the *bona fides* of the documents with which he was presented.

46. The appellant claims that he was extremely naive not to have scrutinised the document and to have placed so much trust in the bank. However, he explains that 2006 was a year of *'manic activity'* in his business life. His company was involved in High Court litigation with

a large U.S. multinational company and he had to take the lead for the company in this regard. To compound matters, he says, he had tried to buy a site for development on Seafield Road, Clontarf, and when that venture did not proceed, he found himself the subject of litigation.

47. The appellant emphasises the importance of the Court appreciating the factual background to the case and asserts that the document he signed in 2006 *'was a modification to an existing twenty-year mortgage'*. In his view, the bank was fully aware of the reason why he had requested such a modification. The agent of the bank (a Mr. P.A.) with whom he had dealings for many years had assured him that the document presented to him was based on what he had requested. If granted a plenary hearing, the appellant claims that he can provide witnesses who could verify his statements concerning these events.

48. In support of his claim that the bank made an error in setting up the 2-year bridging loan, the appellant refers to his plans for the Shanard Road properties. He had issued a Building Commencement Notice to Dublin City Council and had received approval for the same on 30 May 2006. He had intended to build a very large extension and to use it as a storage facility. His application for planning for major extensions to the Shanard Road properties, just weeks before the 2006 loan agreement was signed, demonstrates, he says, his intention to develop these properties. The bank had accepted his business model for developing Shanard Road. It was to become his principal property base and was to be used as a storage facility thus eliminating rental costs for storage space in connection with his student accommodation business.

49. The appellant points to an email of 5 December 2005 to the bank, which he claims demonstrates his intention to keep the Shanard properties in circumstances where he was prepared to sell others. This was because Shanard Road was in his wife's family since the mid-1950s and it was always his intention to maintain the Shanard Road account as a long-term loan.

50. The appellant accepts that following the direct debit incident (see paras.7–8 above), he signed variation letters dated 21 August 2008, 06 October 2008 and 14 July 2009. However, he submits that he did so under '*extreme protest and duress*'. He was '*exasperated*' and had his '*back to the wall*'. He points to a sample of emails between himself and the bank which, he states, demonstrates his reluctance to sign the variation letters but does not specify which, if any, actions on the part of the bank constituted duress.

51. Finally, to further support his claim that the bank made an error, the appellant refers to correspondence dated 14 September 2010 from the bank's legal representative to his former solicitors. The letter makes reference to an undertaking regarding the appellant's properties at Shanard Road and requests that the mortgage dated 19 November 2003 in respect of those properties '*be stamped to a maximum of €630 in accordance with [the] undertaking'*.

52. All of the above, in the appellant's view, supports his contention that a major error occurred when the bank cancelled a 20-year mortgage and replaced it with a 2-year bridging facility in circumstances where bridging finance was neither intended nor requested by him.

The bank's submissions

53. The bank submits that there is no evidence before this Court of any agreement on its part to '*top up*' an existing 20-year mortgage. In its view, it is not credible for the appellant to suggest that he misunderstood the terms of the 2-year loan facility which was offered to him on 30 May 2006. On the first page of the facility letter, under the heading *'Term',* it states clearly that *'the term of the loan facility is two years from the date of drawdown.'* Moreover, the bank argues that it is not credible for the appellant to say that he signed the said facility letter without seeking legal advice in circumstances where, on the acceptance part of the loan facility letter, he specifically identified O'Grady Solicitors as his solicitors acting in the matter To the extent that the appellant seeks to raise a plea of *non est factum*, such a plea, in the bank's

view, does not avail him. The facts of the case, in the bank's submission, are entirely different to those considered by McGovern J. in *Bank of Ireland v. Curran* [2015] IEHC 819.

54. The bank submits that the appellant's contentions are wholly undermined by the fact that he executed and accepted three further letters of variation in 2008 and 2009 which extended the original 2-year term of the loan facility in question.

55. It is the bank's position that the appellant has not raised any matter, whether by evidence or submission, which could be said to constitute an arguable defence based on his claim of an alleged error in the loan facility that was granted to him and executed by him in May 2006. In the bank's view, the trial judge was correct to find that the appellant must accept the consequences of his agreement to the terms of the loan facility and the subsequent variations thereto.

The Court's assessment

56. For several reasons, I have come to the view that the appellant's contention that an error was made in the creation of the bridging loan facility of 30 May 2006 and/or that what he signed was a '*top up*' of his 2003 mortgage cannot be sustained.

57. First, his assertions are manifestly inconsistent with the facts that appear on the face of the letter offering the loan facility in question. In large, bold and capital letters, the heading of the facility is stated to be '**LETTER OF LOAN SANCTION & AGREEMENT FOR BRIDGING FINANCE'**. Bridging finance is a common facility offered by banks to borrowers in circumstances where a borrower awaits receipt of other funds. As the term suggests, such a loan is a bridge between sources of financing. Such facilities, by their nature tend to be short-term. A Business Investment Plan exhibited by **t**he appellant in his third Affidavit shows that he was an experienced and successful businessman, well-versed in the purchase, refurbishment and sale of several properties for significant profit. It demonstrates,

for example, that he had refurbished and sold a property on the Howth Road for €1.7 million and that he was interested in acquiring a site on Seafield Road, Clontarf, with planning permission for four houses for a value of approximately €6.4 million. This was in or about 2006 (see para.46 above). In these circumstances, it is not unreasonable to assume that bridging finance was a matter with which the appellant was well familiar.

58. Second, on the face of the letter of loan offer which the appellant accepted, the words '**BRIDGING FINANCE**' were clearly printed in bold capitals. Under the heading *'Term',* again in bold, it is recorded that the loan facility is for 2-years from the date of drawdown. Under the heading *'Purpose',* the letter of loan states that the facility is *'to restructure'* existing ACC bank loan facilities, reference numbers 10002815 (Shanard Road) and 10000519 (Howth Road) respectively. In terms of the security that was required by the bank for its offer of bridging finance, the face of the document states that such security was to be *'an Extension of the Bank's First Legal Mortgage and Charge over properties located at 49 and 51 Shanard Road, Santry, Dublin 9.'* Thus, without reading any of the details contained in the rest of the letter, the essential terms of the loan facility were clear on its face. The idea that a bridging finance agreement set out in such clear terms could be misunderstood as a 'top up' to a long-term loan agreement is implausible.

59. Third, the appellant's acceptance of the offer of bridging finance is clearly signed and dated 15 July 2006 and records the name of the solicitors who were acting for him in the matter, yet again undermining his contention that what he signed was a 'modification' or a 'top up' of a 20-year mortgage.

60. I am also sceptical about the appellant's alleged shock in August 2008 upon his discovery of the bank's alleged error. It is evident from his email of 18 August 2008 that the Direct Debit demand for repayment sent by the bank was not met with surprise or shock on the part of the appellant. On the contrary, he '*assumed*' it was for the Shanard Road properties. He did

not '*keep that level of cash*' in his account and needed '*time to source new finance*' (see para. 8).

61. Moreover, the record indicates that the notification of the closing of the Shanard Road 20-year mortgage account was not something which came 'out of the blue' in August 2008. As early as June 2007, the appellant was informed of the fact that this (815) loan account had been closed in 2006. He himself exhibited a bank statement dated 26 June 2007 in connection with the Shanard Road (815) account. The statement records that the original loan start date was 18 December 2003 and that the final due date was 01 January 2024. However, the third last entry on that statement is dated 15 August 2006 and refers to a payment of €361,569.81 into that account. The final entry on that statement is dated 31 December 2006 and it states: *'To Close'.* The closing balance is recorded as €0.00. This bank statement undermines the appellant's submission that he was shocked to learn in August 2008 that the mortgage on the Shanard Road (815) account had been closed in 2006.

62. The absence of legal advice when signing the bridging finance agreement is suggested as a reason for the appellant not 'spotting' the bank's error until 2008. He stated that he simply relied on the *bona fides* of the documents with which he was presented. This contention is undermined by the fact that the appellant's acceptance letter expressly records O'Grady Solicitors as the firm of solicitors who were acting for him in the matter. Moreover, shortly after he had accepted the loan offer, his solicitors wrote to him on 28 June 2006 enclosing a copy of the agreement. The letter begins '*RE: 49 & 51 Shanard Road*' and goes on to state: -

> *"I refer to the above and enclose for your attention copy Letter of Sanction which we have received from ACC.*
> *We understand that you signed the original of same however in order to comply with the undertaking I would be obliged if you would arrange to sign the extension of the Solicitor's Undertaking, the ACC Direct Debit Mandate Form and Authority in respect*

of the Funds Requisition in order that we may clarify all matters in this regard and on your behalf.

Trusting the enclosed is to your satisfaction."

Assuming, as one might reasonably expect, that the appellant read the letter that he received from his solicitors, there is nothing to indicate that he was in any way surprised by its contents or that he had considered that a serious mistake had been made. I am not convinced that the absence of legal advice contributed to the appellant's acceptance of the bank's alleged error in offering him bridging finance.

63. If, as the appellant contends, he did not receive what he had requested in 2006 then one might have expected that on his first becoming aware of the alleged error he would 'raise a flag', so to speak, and alert the bank and/or his solicitors as to the mistake that had been made. The appellant did no such thing. When informed that the 2-year term of the loan had expired, and the bank had demanded repayment, he did not dispute the creation or existence of the bridging finance facility. As noted, he said he would need time to source other funding and, thereafter, he signed three letters of variation extending the term of the loan (see paras. 9 - 11 above). Again, when served with proceedings for summary judgment some years later, he did not, in his e-mail to the bank of 10 September 2015, make any reference at all to an error on the bank's part in creating the bridging loan facility. He urged the bank to accept the proceeds of sale as a settlement of the account and indicated his willingness to engage in mediation.

64. In his affidavit of 6 November 2015, the appellant attempts to characterise the letters of variation as the bank's repetition of its original error. He says that despite notification of the long-term loan requirement *'the bank did not rectify their error'* and that it was *'the bank's internal automated procedures'* that terminated the loan which then, he contends, had to be '*urgently reinstated'*. His characterisation of what transpired, however, does not withstand scrutiny. It fails to deal with the fact that on each occasion the bank confirmed to him, in

writing, that he had '*requested'* that the short-term loan facility be extended and that, on each occasion, he had accepted and signed his agreement to the three extensions offered by the bank in response to his requests.

65. During the course of the appeal, however, the appellant shifted his position on the variation letters somewhat. Whilst, on the one hand, he contended that they were repeated errors on the part of the bank, he also sought to characterise his signing of those letters as a response to duress, submitting that he only signed them because he was under pressure to do so. In this regard, he referred to emails he sent to the bank objecting to the sale of his Shanard Road properties. He also refers the level of '*manic activity'* in his business life around that time (see para. 46 above). Whilst I can sympathize with the appellant's position and the various financial pressures under which he found himself in 2008 and 2009, those pressures, in themselves, cannot absolve him from the responsibility he must take for his actions. Nor do they provide him with an arguable defence to the bank's claim. As the judgment of Charleton J. in *ACC v. Dillon & Ors* [2012] IEHC 474 demonstrates, duress, as a legal defence, is to be distinguished from the ordinary pressures that are associated with the cut and thrust of commercial and business life. In the aftermath of the economic downturn of 2008, ACC in *Dillon* had sought judgment against the first and second defendants for personal loans extended to them and personal guarantees they provided for a company of which they were directors. Before the High Court, the defendants claimed that they were not bound by the personal guarantees because *inter alia* they had been obtained under duress. Charleton J. observed (at para. 5.1) that: -

> *"The doctrine of duress is not part of the law in order to interfere in the context of an imbalance in bargaining powers where that want in balance is merely the result of a difference in commercial bargaining power in negotiations conducted at arms (sic) length."*

He continued: -

> "*It (sic) also more than difficult to see that the defence of duress would ever be established simply because of an allegation that one side took apparent advantage of the weariness of the other at a stage in negotiation. The law must allow a measure of appreciation to the stresses of commercial negotiation.*"

On the facts of *Dillon*, Charleton J. concluded that duress was not in issue. There was no allegation of overbearing conduct or of the defendants having been subjected to interrogation-type pressures.

66. Similarly, there is nothing in the instant case to establish that the appellant was the victim of duress or that he had been subjected to anything beyond the ordinary pressures of commercial life in what were, undoubtedly, challenging times, economically. I accept that he experienced mounting financial pressure arising from the significant borrowing he had made and that he was going through a difficult period of personal '*manic activity*' all in the context of a national economic downturn within a global financial crisis. However, his circumstances cannot be considered to extend beyond the stresses associated with standard commercial activities nor can the bank's behaviour be construed as constituting anything approaching oppressive. In that sense, the defence of duress does not arise.

67. The appellant placed significant emphasis on his development plans for the Shanard Road properties as proof of his intention to keep those properties given their history as part of his wife's family home. I have carefully considered his submissions in this regard together with the correspondence to which he points in support thereof. The argument he appears to advance is that a clear intention on his part to develop the Shanard Road properties would be inconsistent with allowing those properties to form part of a short-term loan arrangement. Such reasoning is unpersuasive. There is no inconsistency between an intention to develop a particular property and a decision to allow it to be used as security for a short-term loan. It may well be that the

appellant planned to develop and retain the Shanard Road properties and had no intention of selling them. However, that in itself does not in any way detract from the fact that he entered into an agreement whereby he obtained bridging finance and agreed that those properties were to be used as security for that loan. It was only when he failed to honour the terms of the bridging loan that the bank sought to realise its security. The appellant's asserted development plans provide no defence to the bank's entitlement in this regard nor its entitlement to recover the outstanding balance due on the foot of the loan it extended to the appellant.

68. Nor do his development plans support the appellant's claim that the bank had agreed to a 'top up' loan rather than a bridging finance facility. The appellant claims that if granted a plenary hearing, he could provide witnesses who would verify his account of what, in fact, had been agreed with the bank. He does not, however, indicate who these witnesses might be, let alone produce evidence on affidavit as to what they are in a position to say. The only affidavits furnished in support of his claim are those of his wife, Denise McCool, and his employee, Mary McDonnell. Having considered the contents of both affidavits it is clear that they do not assist in establishing the existence of any alternative agreement between the appellant and the bank. Mrs. McCool's affidavit repeats many of the assertions made by her husband. She states that *'ACC agreed to this request'* (for a top up mortgage), but she is not in a position to testify to this as she did not attend the meeting with the bank nor could she indicate with whom the alleged agreement had been made.

69. Similar observations apply to the affidavit of Mary O'Donnell. She avers to having attended a meeting where a transfer of funding from the Howth Road (519) account to the Shanard Road (815) account *'was requested'* by the appellant. She also states that *'it was agreed'* that the money from the Howth Road property would be added to the Shanard Road mortgage but she does not say with whom such agreement was made. Whereas she says that there was '*no mention*' of cancelling the 20-year mortgage and reducing it to a 2-year

temporary loan, she gives no evidence as to who attended the meeting apart from the appellant nor does she say where or when this meeting took place. In any event, her averments in respect of what was, allegedly, agreed are wholly inconsistent with the clear terms of the letter of loan sanction which the appellant accepted and signed and which she witnessed. To my mind, there is nothing in the affidavits of either Mrs. McCool or Ms. O'Donnell which supports the appellant's assertion that he had a 'top up' agreement with the bank and/or that an error had occurred such as would afford him an arguable defence to the bank's claim that it was entitled to summary judgment in the amount of €228,005.36.

70. Finally, it is true that the correspondence exhibited by the appellant indicates that in September 2010 the bank wrote to his former solicitors enclosing the 2003 mortgage on the Shanard Road properties and requested that they arrange for that mortgage to be stamped to a maximum of €630. The bank has not explained why it waited some four years after the restructuring of the 2003 mortgage to seek to have it 'stamped up'. I do not propose to speculate on this beyond observing that unpaid stamp duties remain due and owing notwithstanding the passage of time. The delay in this regard does not support the appellant's claim that the 2006 bridging loan was the result of an error.

71. In summary, whereas the appellant may well have requested a '*top up*' on a 20-year mortgage, that is not what he was offered nor was it what he agreed to accept. All of the evidence points to the fact that he entered into a bridging finance loan agreement for a 2-year term which, at his request, was extended on three subsequent occasions. Having considered, carefully, the extensive papers submitted by the appellant in support of his claim that an error occurred on the part of the bank, I am bound to conclude that his claim in this regard is not sustainable. Accordingly, his assertion that he has an arguable defence to the bank's claim on this ground must fail.

The alleged imposition of surcharge interest and the mismanagement of accounts

The appellant's submissions

72. The appellant's contentions concerning what he considers to be his second arguable defence can be dealt with somewhat more briefly. He complains that punitive surcharge was applied to the accounts for Howth Road (519) and Clontarf Road (811); that his accounts were mismanaged; that a document was lost and that there was a mix up by the bank between two of his accounts.

73. The appellant accepts that it has been many years since he has gone through the exercise of looking through an Excel spreadsheet, exhibited in Mr. Shaw's affidavit, and matching it to his statements of account. He submits that fairness requires the appointment of an independent banking expert to analyse and verify the accounts. He also takes issue more with the fact that the spreadsheet is on blank paper with no company name or title rather than the actual details of the figures set out therein**.**

74. The appellant's depiction of the how and why the bank had imposed surcharge interest on his accounts is as follows. He claims that the accounts relating to the Howth Road (519) and Clontarf Road (811) properties were short term loans which were due to expire on 1 February 2006. He had requested a 6-month bridging facility to extend the 2-year term of those loans. In response the bank sent him an offer for a short-term loan of €1.067m on 5 December 2005 (Exhibit 18 of his third affidavit). He said that he had accepted this offer and signed his acceptance on a document dated 30 January 2006 but, he alleges, that this document was lost by the bank.

75. Consequently, he claims, when the term of the 2-year loans on the Howth Road and Clontarf Road properties expired in February 2006, the bank, wrongly, imposed surcharges at an exorbitant rate of 21%. He says that the bank continued to impose this surcharge interest, even though his solicitors, in April 2006, reissued his earlier signed acceptance of the 5

December 2005 offer. However, by this stage, he says, that the two properties in question were close to being sold and so the 6-month bridging facility was never drawn down. The punitive surcharge interest rates had been applied, he claims, even though the fault lay with bank. The appellant contends that his version of these events is corroborated in the bank's own records and he refers, in particular, to page 6 of a Credit Memorandum dated 16 May 2006 (hereinafter 'the Credit Memorandum'). This document shows that accounts 519 (Howth Road) and 811 (Clontarf Road) were listed as maturing on the 1 February 2006 and that account 815 (Shanard Road) was listed as maturing on 1 January 2024. This same report shows that interest was accruing at 21%.

76. The appellant hypothesises that as a part of its general mismanagement, the bank mixed up accounts 811 (Clontarf Road) and 815 (Shanard Road). He contends that it was this mix-up which resulted in the alleged error discussed earlier in this judgment. The Credit Memorandum records a request for a bridging facility in the sum of €630,000 over a 2-year term at 2% interest and notes that there was to be a restructuring of the loans in respect of Shanard Road (815) and Howth Road (519). This, he submits, is where the error occurred. In his view, it should have referred to a restructuring of Clontarf Road (811) and Howth Road (519). This error was, he claims, then carried over into the letter of loan sanction and agreement for bridging finance dated 30 May 2006.

77. Referring to the 6-month bridging loan that was granted in December 2005 in respect of the Clontarf Road and Howth Road properties, but which was never drawn down, he says that:

> *"It may have been the case that this document of December 2005 was then edited to make up the 30th May 2006 document for Shanard Road and the error occurred in the editing of this document due to the close similarity of the account numbers, same commencement date and the purpose of the offers."*

78. Finally, the appellant further submits that as he was using a number of different solicitors in respect of the 519, 811 and 815 accounts, this may have contributed to the confusion.

The bank's submissions

79. The bank's position is that the trial judge correctly found that the appellant's claims regarding over charging amounted to nothing more than a bald assertion. It contends that insofar as any surcharge interest was charged, it was applied to his account in accordance with the 'terms and conditions'. Such charges were ultimately returned or credited to the account and thus the actual judgment sum sought and obtained in the summary proceedings does not include any claim for surcharge interest.

80. Before this Court, the bank has produced the general conditions applicable to commercial credit facilities that governed the loan in question. It submits that any interest or surcharge interest applied to the appellant's account in respect of the facility at issue in these proceedings (the 2-year bridging finance agreed in 2006) was applied as *per* the bank's 'terms and conditions', the terms of the relevant facility letter and the terms of the letters of variation.

81. The bank emphasises that its deponents have explained on affidavit how the interest had been applied and that they have provided statements of account to corroborate their averments (see paras. 27 – 28 above). The first occasion on which surcharge interest was applied in respect of the loan facility in issue in these proceedings, was on 30 September 2008 when the initial term of the facility which had been extended to 30 September 2008 had expired. Thereafter, the appellant was in default until he signed the variation of facility letters on 6 October 2008 (extending the facility until 30 November 2008) and 27 July 2009. Moreover, the bank contends that it was entitled to charge surcharge interest in the period prior to July 2009, since the second variation facility had expired on 30 November 2008 and that it was not until 27 July 2009 that the defendant executed the third letter of variation dated 14 July 2009.

82. Mr. Paul Shaw, on affidavit, explained in significant detail how the surcharge interest issue was dealt with by the bank. Notwithstanding the bank's entitlement to claim such interest and the fact that in the summary summons such interest was included, the bank did not, in the final analysis, claim any surcharge interest. Mr. Shaw averred that: -

> *"Although the plaintiff was contractually entitled to charge surcharge interest on the facility at issue in circumstances where the Defendant failed to pay sums payable on the appropriate due date, I say that on this application for liberty to enter final judgment, in light of the affidavits which have been exchanged the Plaintiff shall limit its claim on the application for judgment to the total sum due and owing for principal and standard interest only. The sum outstanding for surcharge interest will not be pursued at the summary stage."*

83. Mr. Shaw's exhibit demonstrates that, initially, surcharge interest had been applied to the 377-loan account (the account associated with the loan in issue) on a compound basis. The bank, he explains, had to remove the surcharge interest to calculate the principal sum and standard interest only. To do this, it was necessary to reconstitute the account from the commencement of the facility, with the commencement being the drawdown date of 27 August 2006. In this regard, he referred to an Excel document which had been prepared for the purpose of reconstituting the account. He averred: -

> *"I say that I personally have carefully reviewed this document and confirm that (a) each of the credits applied to the account as shown on the relevant statements of account have also been applied in the Excel document for the reconstituted account and (b) the Excel document contains an accurate calculation of the Plaintiff's (sic) indebtedness to the Defendant (sic) on the facility at issue when restricted only to principal and standing interest, reflecting the interest rates applicable as indicated on the relevant statements of account."*

84. Mr. Shaw explains what is addressed under the various headings of the columns listed as (a) to (h) on the Excel document. This spreadsheet records all instances of surcharge actually

applied to the account together with the recalculated transaction amounts on the facility, had no surcharge interest been applied. Ultimately, the total amount pursued consisted of the principal and standard interest outstanding as of 10 February 2017 which amounted to €228,005.36. This figure was comprised of a stated balance on the account of €227,408.41 as of 10 February 2017, together with further interest of €595.95 which had accrued on the account up to that date. It was this sum of €228,005.36 which was the judgment sum entered against the appellant by order of Reynolds J.

85. As to whether surcharge had been applied to the appellant's other accounts, namely, the 519 (Howth Road) and 811 (Clontarf Road) accounts, the bank accepts that it appears that high surcharge rates had, initially, been applied to the loan facility for the Howth Road property (519). The bank, however, in recognition of this, applied a credit adjustment in the sum of €6,819.82 on 25 August 2006 and it exhibited a printout of a statement for the 519-account showing this credit. It was when the Howth Road property (519) and Shanard Road property (815) became the subject of a restructuring loan, that the surcharge rates which had been applied on the Howth Road property (519) were corrected by the aforesaid credit to the 519 account.

86. Further, Mr. Shaw accepts that in the bank's Credit Memorandum of 16 May 2006, which is exhibited by the appellant, there is a note stating that interest was accruing at 21% on accounts 811, 519 and 815. He states that he cannot explain such references in the Credit Memorandum but stresses that they are not borne out in the actual account statements.

87. Finally, Mr. Shaw acknowledges that there is a reference to surcharge interest in the Incident Report prepared by the bank dated 29 May 2006 and exhibited by the appellant (hereinafter the 'Incident Report'). That document refers to surcharge interest accruing in respect of loans outstanding on the Clontarf Road (811) and the Howth Road (519) properties. Mr. Shaw avers that notwithstanding such references, surcharge interest on loans 519 and 811

was not charged (noting the above-mentioned credit adjustment that was applied) and thus any figures referring to surcharge in the Incident Report are not reflected in the bank's statements for those accounts.

The Court's assessment

88. Before analysing the details of the respective claims made by the parties, an important background history as to how the restructuring facility in issue in these proceedings came about is to be found in the last mentioned document referred to as the Incident Report of 29 May 2006. That report sheds light on the appellant's complex business dealings and discloses that a dispute had arisen between him and the bank. which was ultimately resolved by reaching an agreement that was offered by the bank and accepted by the appellant the following day, 30 May 2006.

89. The Incident Report discloses that the appellant's debt in respect of the Howth Road property was '*c.€651k*' and that he also had an (unspecified) outstanding debt on the Clontarf Road property. A 6-month bridging facility of €1.067m to cover both debts had been agreed with the defined repayment source being the sale of Clontarf Road.[1] However, for several reasons, that €1.067m facility was never drawn down and when the loans on Clontarf Road (811) and Howth Road (519) expired in February 2006, surcharge interest started to accrue. This is what gave rise to the dispute because the appellant contended that he had already accepted approval for an extension of the loans over those properties until 1 May 2006 (see para. 74 - 75 above).

90. When the Clontarf Road property eventually sold on 26 May 2006, the Incident Report notes that the bank's Business Unit took the following actions: -

[1] This property had, in fact, been sold some days earlier and the appellant's solicitor was in funds.

(1) *"Obtained approval to provide a €630k facility to [the appellant] … against [his] existing security held at 49 and 51 Shanard Road valued at €1.05M. This funding was inclusive of restructuring €263k of the debt outstanding on 145 Howth Road.*

(2) *The Bank issued settlements . . . in respect of . . . [the] loan facilities on 10000519 [Howth Road] and 10002811 [Clontarf Road], but these were not redeemed as [the appellant] was not willing to pay any surcharge interest. [His] Solicitor and accountant have advised him to go to the Ombudsman. However, [he] would prefer to resolve the matter now*."

91. The Incident Report confirms that the dispute was resolved by the bank granting a request for approval to write off the surcharge interest that had been applied to the Clontarf Road and Howth Road loans. That approval, however, was conditional on the appellant repaying in full the outstanding loan on Clontarf Road and an agreed amount on the Howth Road loan facility. The Report states: '*i.e. approval is held to restructure €263k of the Howth Road debt against security held for … Shanard Road'.* The Incident Report ends with noting that '*if the surcharge interest is resolved … [the appellant] will repay all mounts (sic) now due*.' The last line of the Report states: '*Interest has not been applied when applied should be written off . . .'.*

92. What is evident from that Incident Report is that the bank's decision to restructure the appellant's loans and to write off the surcharge interest it had applied was, clearly, a commercial one. It recognized that applying surcharge would not be in the best interests of the bank because it was jointly responsible for '*the irregular arrears profile*' and that action to recover same '*could result in costly legal action*.' What is also clear from the Report is that the appellant cooperated with the bank and '*wanted to resolve the matter as soon as possible*'. He was recognised as a *'successful developer in the prime Dublin 3 area'.* He had been

involved in several business dealings with the bank in respect of different properties over the years and the bank regarded him as providing *'future business development potential'*.

93. A restructuring of the appellant's loans was thus agreed on the basis that approval had been obtained to provide a €630,000 loan facility to him against his existing security held at the Shanard Road properties (then valued at €1.05m). This funding was inclusive of restructuring the outstanding debt on the Howth Road property. The terms of the agreement set out in the 29 May 2006 Incident Report were reflected in the letter of loan facility that issued the following day, that is, on 30 May 2006.

94. I have carefully considered the various aspects of the appellant's complaint concerning the application of surcharge interest and the alleged mismanagement of his accounts in order to see whether they could form the basis of an arguable defence to the bank's claim for summary judgment. Having reviewed all of the documentation exhibited by the parties to this appeal, I am satisfied, for the following reasons, that the appellant's contentions on both fronts are not sustainable.

95. Whilst the bank maintains that it was contractually entitled to charge surcharge interest and the appellant accepted the terms of the loan facility dated 30 May 2006 (which expressly incorporated the bank's 'terms and conditions' applicable to Commercial Credit and Facilities as set out in its Booklet dated January 2005), it is evident from the record that its actual claim on application for summary judgment did not include surcharge and was limited to the principal sum plus standard interest that had accrued as of the date of the application for summary judgment.

96. The appellant has failed to rebut the bank's very clear explanatory Excel spreadsheet in which Mr. Shaw set out comprehensively how the sum actually claimed had been established. This spreadsheet demonstrates that the bank conducted a recalculation of the interest and that the surcharge interest which had initially been applied was removed. I accept that Mr. Shaw

has averred that he cannot explain references to surcharge in the 16 May Credit Memorandum. However, it is clear from the account statements exhibited in respect of the properties at Howth Road (519) and Clontarf Road (811) that surcharge interest was not applied. Indeed, the later Incident Report of 29 May ends, expressly, with the statement: '*Interest has not been applied when applied should be written off'*. Moreover, the complete bank statement exhibited in respect of the Shanard Road (815) properties makes it clear that no surcharge interest was charged on this account. In these circumstances, I am satisfied that the appellant's claim in respect of the incorrect application of surcharge interest to his accounts must fail.

97. As to his complaint about the alleged mismanagement of accounts, it has to be observed that his contentions in this regard are inextricably linked to his claim that an error was made in creating the loan facility offered on 30 May 2006. As noted above, he complains that the bank, when setting up the 2006 bridging facility, 'mixed up' the Shanard Road (815) and the Clontarf Road (811) properties because of the similarity of the account numbers. This claim of a mix up is not sustained, for two reasons.

98. First, if as the appellant contends, the restructuring of his accounts was supposed to involve only the Howth Road and Clontarf Road properties and *not* the Howth Road and the Shanard Road properties, then on this conjecture, the Shanard Road properties were out of the equation altogether and ought to have had nothing whatsoever to do with the restructuring of his various accounts. But if the appellant is correct in this regard, then this proposition is entirely inconsistent with what he says about an agreement that the outstanding balance on the Howth Road would be transferred by way of a '*top up*' to the Shanard Road properties. The appellant cannot have it both ways. Either the Shanard Road loan was intended to be in the equation in the 2006 restructuring arrangement or it was not. If it was, then his claim of a mix up between its account (815) and the Clontarf Road account (811) resulting in the wrongful inclusion of Shanard Road in the restructuring arrangement must fail. If it was *not* intended to

be included, then his claim that its loan account was to be '*topped up'* must also fail. The evidence does not support the contention of a mix up in the accounts. It seems to me that at all material times the Shanard Road properties were intended to be part of the equation when the appellant's loans were being restructured and that those properties were to be held as security for the €630,000 facility extended to the appellant.

99. The second reason why the appellant's claim of a mix up between accounts 815 (Shanard Road) and 811 (Clontarf Road) does not withstand scrutiny is as follows. He asserts that it was only the Clontarf Road and Howth Road loans that were supposed to be restructured and that Shanard Road was, erroneously, included because of the similarity between its loan account number (815) and Clontarf Road loan account number of (811). However, on his own evidence, Clontarf Road had been sold just days before the 30 May 2006 restructuring arrangement and part of the agreement was that its loan (811) would be '*cleared in full'* (see para. 91 above). Thus, there cannot have been any question of restructuring the Clontarf Road loan. In these circumstances, the contention that the Clontarf Road loan was supposed to be part of the restructuring loan facility in issue in these proceedings is inconsistent with the facts.

100. The appellant not only contends that the bank mixed up two loan accounts, he also claims that it confused two facilities, namely, the 6-month facility offered in December 2005 and the 2-year bridging facility of May 2006. On this contention, I am not at all persuaded. The Incident Report distinguishes, clearly, between the 2005 offer of €1.067m which was never drawn down and the 2006 offer of €630,000 which was. The purpose of each loan offer was different—with the former being to extend the due date of loans on Howth Road and Clontarf Road from February 2006 to May 2006 and the latter being to restructure existing loans on Howth Road and Shanard Road with a 2-year bridging facility from August 2006 to September 2008. The stated security for each loan facility was also different. The former included the

Clontarf Road property as security whereas the latter did not—the obvious reason being that it had just been sold prior to the bridging finance agreement.

101. The appellant's assertion that the six-month bridging facility of €1.067m offered in December 2005, accepted in January 2006, but subsequently 'lost' and never drawn down, had somehow morphed into a two-year bridging facility of €630,000 offered and accepted in May 2006 is not supported by the evidence. To my mind, it is highly unlikely that the letter of 30 May 2006 offering a bridging finance facility was an edited version of an earlier 2005 document, as the appellant contends.

102. In light of the above considerations, I am satisfied that the appellant's complaints in respect of the application of surcharge interest and the alleged mismanagement or 'mix up' of accounts and facilities are ill conceived and do not constitute grounds for an arguable defence to the bank's application for summary judgment.

The alleged counter-claim for losses allegedly incurred

The appellant's submissions

103. The third arguable defence contended for by the appellant arises from the alleged losses he allegedly sustained as a result of the acts and omissions of the receiver who, in his view, was invalidly appointed. He refers the Court in this regard to *McCleary v. McPhillips* [2015] IEHC 591. He claims that the receiver and the bank worked in tandem to off-load his properties '*in a careless and disgraceful manner*'. He avers that the receiver refused to take any instruction from him, and indeed, worked '*actively*' against him.

104. Disputing the valuation provided to the Court, the appellant submits that the bank's estate agent only carried out a '*drive-by valuation of the property*', prior to furnishing a valuation report. There are, he claims, significant differences in the values of properties in the Santry area depending on the particular location and that Shanard Road properties are on the higher

end of the market. His properties were put on the market for only €220,000, when, in his view, the average price for similar houses in the area was closer to €300,000. He exhibited examples of prices taken from the *myhome.ie* website. He contends that his valuations were both accurate and achievable and that the houses were sold at a '*massive undervalue*'. Had the receiver worked with him, he submits, he would have been able to present the properties in an optimum state. Instead, they were maintained in appalling conditions. He acknowledges that a '*token effort*' was made to clean up the properties following a complaint he made to Rabobank's Head Office, but he insists that the situation was not resolved satisfactorily and that the houses were sold in a '*fire sale*'. He says that local estate agents had complained about the impact which the low sale prices of his properties had on other houses in the neighbourhood. He claims that at a plenary hearing, he could call witnesses to verify his claim in this regard.

105. On a separate front, the appellant complains that the receiver removed, approximately, €25,000 worth of his furniture and contents from the properties without notice to him.

106. The appellant also submits that he had not been aware that it was his responsibility to sue or join the receiver in legal proceedings. If the matter were to go to plenary hearing, he could join the receiver as a party to these proceedings.

The bank's submissions

107. The bank asserts that the appellant's complaints about the receiver are without merit. It refers to the trial judge's observation that the properties were actually sold in excess of the market value. The sale proceeds were then applied to the benefit of the appellant's account.

108. In reply to the appellant's claim that there are differences in the value of Santry properties depending on their precise location, the bank points out that the printout from *myhome.ie* which the appellant exhibited, actually lists properties being sold by GWD Auctioneers on Shanliss

Road and Shanard Avenue (which is perpendicular to Shanard Road) at exactly the same price of €295,000.

109. As to the appellant's complaint about the receiver, the bank contends that summary judgment proceedings are not the appropriate forum for such complaints to be ventilated. If the appellant wanted to challenge the appointment of the receiver or to impugn his conduct, then first, he had ample opportunity to do so and did not and, second, the party in respect of whom such complaints should be pursued is the receiver and not the bank. In this regard the bank relied on the observation of McDermott J. in *Danske Bank A/S v. Gillic* [2015] IEHC 375 where he stated (at para. 16): -

> "*The issue of the appointment of a receiver is entirely irrelevant to the issues in this case. If the second defendant wished to challenge the appointment of a receiver he had ample opportunity to do so but did not. If he has any grievance in relation to the appointment or actions of the receiver or the decisions taken by him or any failure of duty on his part, he should properly pursue that matter with the receiver*."

The Court's assessment

110. The nature of the third ground of defence asserted by the appellant is, essentially, in the form of a cross-claim for losses allegedly incurred by reason of the conduct of the bank. Where such a cross-claim is made in an application for summary judgment, the court enjoys a discretion as to how matters should proceed. In *Moohan and Bradley trading as Bradley Construction v. S. & R. Motors (Donegal) Limited* [2007] IEHC 435, [2008] 3 I.R. 650, Clarke, J. (as he then was) referred to *Aer Rianta* and reviewed the relevant law in this area. Where a defendant does not establish *a bona fide* defence but nevertheless maintains that he has a cross-claim, then the Court should consider whether the asserted cross-claim would give rise to a defence in equity (*Prendergast v. Biddle* (Unreported, Supreme Court, 31st July 1957)). If the cross-claim derives from the same set of facts as the application for summary judgment (such

as a contract), then an equitable set off is available so that the debt arising may be discounted to the extent that the cross-claim has been made out. In such a case, where a *prima facie* set off is established, then a defendant should have liberty to defend the entire claim (or have it referred to arbitration as the case may be).

111. However, where the cross-claim derives from different facts or circumstances and is, as such, an independent claim in its own right, then, in principle, a plaintiff's claim for summary judgment may be allowed with the question of whether the execution thereof should be stayed (pending the resolution of the counter-claim) being a matter for the discretion of the court. If, in due course, a defendant is in a position to establish a counter-claim then such a claim may, in whole or in part, be set off against the plaintiff's claim.

112. On the facts of the instant case, the appellant's asserted cross-claim relates to losses he allegedly incurred by reason of the acts and/or omissions of the receiver. As such, it cannot be said to be derived from the same set of facts giving rise to the bank's claim for summary judgment on foot of an unpaid loan. The question that must be considered is whether the appellant has persuaded the Court that he does, in fact, have a counter-claim such that the Court should consider whether to exercise its discretion and stay the execution of the judgment entered, pending the resolution thereof.

113. Having carefully reviewed the papers and having heard the submissions of the appellant, I have come to the view that the evidence does not support his contentions in respect of his asserted counter-claim. First, there is no evidence to show that his Shanard Road properties were negligently sold below the market value. Whilst he complains that his houses were on the market in November 2014 '*at ridiculously low prices*' (€220,000), his own exhibit of average property prices in the Santry area at the time shows that they ranged from €165,000 to €365,000. He pointed, in particular, to two houses in close proximity to his being valued by GWD at €295,000. It must be observed, however, that in contrast to the appellant's properties,

both of those houses were described as having been 'extended'. Of course, the appellant may well be correct when he claims that property prices will vary depending on precise location. However, the bank's Estate Agents, DNG, provided a valuation report dated 28 November 2013 which discloses no significant discrepancy between the bank's valuation of the appellant's properties and prices realised for another property on the same road and, indeed, for properties in the vicinity thereof. They valued 49 Shanard Road at €242,000 and 51 Shanard Road at €235,000, noting that some months earlier a house on the *same* road had sold for €240,000. Whereas the advertised price of the appellant's properties may have been a strategic decision on the part of DNG, the record shows that the appellant's property at No. 49 sold for €239,649.85 and his property at No. 51 sold for €243,533.48 (both well in excess of the advertised price). There is, therefore, no evidence before the Court to support the appellant's claim that his properties were sold below the market value at the relevant time and thus no loss has been established on foot of his claim in this regard.

114. The appellant's asserted '*counter-claim*' based on the alleged loss of his personal property in the amount of €25,000 is equally without merit. The evidence before this Court shows that on at least four occasions, the receiver wrote to the appellant in relation to his personal belongings. By letters dated 1 November 2013, 12 November 2013, 13 June 2014 and 11 August 2014, the appellant was invited by the receiver to remove such belongings and the house contents from the properties in question. Despite these repeated opportunities to remove his property from the premises prior to sale (and thereby mitigate any alleged loss he asserts he suffered) it is common case that he failed to do so. Ultimately, the contents of the Shanard Road properties were disposed of by the receiver prior to sale. Whereas the appellant avers that he left the contents *in situ* to facilitate the continued rental use of the houses, the reality is that he failed to engage with the receiver by accepting his invitations to remove his belongings from the properties. On the basis of the evidence available, I am left to conclude

that if the appellant has suffered any losses arising from the disposal of such personal property, and there is no vouched evidence before the Court to support such losses, then the appellant must be deemed to be the author of his own misfortune in this regard.

115. I am, therefore, satisfied that the appellant has not established that he has an arguable counter-claim based on the conduct of the receiver. That being so, there is no question of the Court being required to exercise its discretion to stay the execution of the judgment entered in favour of the bank pending the resolution of the appellant's asserted counter-claim.

116. Finally, insofar as the appellant seeks to have the matter remitted to plenary hearing for the purpose of his joining the receiver to the proceedings, I am satisfied that this is not an option available to him in this appeal. First, he has had ample opportunity since 21 September 2013 to challenge the appointment of the receiver(s) and this is something which he has failed to do. Moreover, he cannot use the mechanism of an appeal from an order of the High Court entering summary judgment against him, to now mount a challenge in this regard.

Decision

117. Whereas, initially, the bank in its summary summons sought judgment in the sum of €521,146.39, it has explained, on affidavit, that following a series of exchanges between the parties, the bank, ultimately, sought judgment only in the sum of €228,005.36. The principle that a bank in summary judgment proceedings should particularise its claim was confirmed by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84. In *O'Malley*, Clarke CJ. states at para. 6.7: -

> *"[…] 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."*

118. Clarke CJ. further explained 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. He states at para 6.7: -

> *"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."*

119. *O'Mallley* was considered recently by this Court in *Allied Irish Banks v. O'Callaghan*, [2020] IECA 318. Haughton J. confirmed (at para. 65) that the appellants were entitled to have particulars of the revised interest calculations verified on affidavit, sufficient to discharge the onus of proof on the respondent to satisfy the court that not only was there no surcharge included in the final figures in respect of which judgment was sought, but also that the surcharges did not lead to compounding of interest.

120. I am satisfied, firstly, from a review of the summary summons that it sets out in sufficient detail the relevant particulars in respect of which the claim for summary judgment arose. It refers to the agreement dated 30 May 2006 between the bank and the appellant, and it stipulates the principal sum together with the term of 2-years over which the loan facility extended. It also sets out the terms in respect of interest payable for the said loan and refers to the three letters of variation executed thereafter (see paras. 9 - 11 above). Importantly, the summary summons confirms that despite demand and in breach of the loan agreement, the appellant failed to repay the loan and the interest which had accrued thereon.

121. Moreover, I am satisfied that the bank has explained the circumstances pertaining to the reduction in the sum it initially claimed (see paras. 81 – 84 above). It has, provided the

appellant with particulars of the revised interest calculations, verified on affidavit, and has, therefore, discharged the onus of proof to satisfy the court that not only was no surcharge included in the final figures in respect of which judgment is sought, but also that the surcharges did not lead to compounding of interest (see *O'Callaghan*).

122. In view of the foregoing, I find that the bank has adequately particularised its claim, such that the Court can form an assessment as to whether the debt arose on a *prima facie* basis. It has described how the initial sum of €522,146.39 accrued and remained outstanding and how rental income and monies received on foot of the sale of the appellant's properties were credited to the outstanding loan. It has also confirmed that since 27 July 2015, no payment had been made by the appellant despite a letter of demand having been sent to him.

123. I am satisfied that the appellant was aware of the manner in which the sum sought had been calculated. Having complained about the application of surcharge, those charges were not pursued. The final sum then sought by the bank was clearly due and owing by the appellant. In these circumstances, where there is no denial by the appellant that he accepted the loan facility dated 30 May 2006 and where there is no denial that there has been a default on his part in the repayment of the monies so loaned, the bank, in my view, was entitled to seek and obtain liberty to enter final judgment against the appellant. For the reasons set out above, none of the issues raised by the appellant amount to an arguable defence such as would warrant the adjournment of the bank's application to a plenary hearing.

Application to add a party to the proceedings

124. For the sake of completeness, one final matter requires to be addressed. Before commencing the hearing of this appeal, an application was made by counsel for the bank to have Cabot Financial (Ireland) Limited added as a co-plaintiff / co-respondent to these proceedings.

125. On 27 November 2020, the bank filed a Notice of Motion seeking an order pursuant to O. 17 r. 4 of the Rules of the Superior Courts. The bank's application was grounded on an affidavit of Tom Dillon, a Director of Cabot Financial (Ireland) Limited (hereinafter 'Cabot Financial') sworn on 20 November 2020. A supplemental affidavit correcting certain deficiencies in his affidavit was sworn by Mr. Dillon on 2 December 2020.

126. Mr. Dillon testified to the fact of a transfer of loans from ACC Loan Management DAC (hereinafter referred to as 'ACC') to Cooperative Rabobank U.A (hereinafter 'Rabobank') and a subsequent transfer of loans from Rabobank to Cabot Financial.

127. In respect of the first transfer, Mr. Dillon exhibited a Mortgage Sale Deed from ACC to Rabobank dated 31 October 2018.[2] Whereas he had omitted to exhibit the Schedule to the aforesaid Deed in his first affidavit, the Schedule was exhibited in his supplemental affidavit sworn on 2 December 2020. In addition to the Mortgage Sale Deed from ACC to Rabobank Mr. Dillion exhibited an Irish Law Deed of Transfer dated 17 December 2018.[3]. In para. 4 of his supplemental affidavit, Mr. Dillon avers: -

> *"I exhibited a Mortgage Sale Dated 31 October 2019 (sic) whereby ACC Loan Management Designated Activity Company agreed to assign to Cooperative Rabobank U.A., inter alia, the legal and beneficial ownership of certain debts and their related rights, including the Defendant's facilities as identified in the Schedule to the Mortgage Sale Deed*
>
> *[….]*
>
> *I say that the Loan Reference for the underlying loan the subject matter of these proceedings is '10037377' (…) I say that on page 26 of the Schedule at column 5 and row 23 the account the subject matter of these proceedings is identified as forming part of the transfer the subject matter of Mortgage Sale Deed dated 31 October 2019 (sic) and Irish Law Deed of Transfer dated 17 December 2019 (sic) "*

[2] The affidavit of Mr. Dillon incorrectly refers to the date of 31 October 2019.
[3] This Deed of Transfer is mistakenly referred to by Mr. Dillon as being dated 17 December 2019 instead of 2018.

128. In respect of the second transfer, that is from Rabobank to Cabot Financial, Mr. Dillon exhibited a Global Deed of Transfer dated 5 July 2019. By that Deed, Rabobank agreed, *inter alia*, to grant, convey, assign and transfer to Cabot Financial, the legal and beneficial ownership of all its right, title, interest, benefit and obligation in respect of debts and related rights as identified in the Schedule thereto. Mr. Dillon avers that by a Portfolio Acquisition Deed dated 12 April 2019 (which he exhibits) Rabobank agreed to assign to Cabot Financial the legal and beneficial ownership of certain debts and related rights as identified in the Schedule to the Global Deed of Transfer. Included in the Schedule thereto was the appellant's facility, the subject matter of these proceedings.

129. Mr. Dillon also exhibited (in his second affidavit) correspondence dated 16 October 2018 advising the appellant of the first transfer of interests from ACC to Rabobank. In his first affidavit, he avers that the appellant was notified of the transfer of the loan facilities, security, obligations and related rights from Rabobank to Cabot Financial and in that regard, he exhibits a letter dated 19 July 2019.

130. As noted earlier in this judgment, the bank's claim of surcharge interest was abandoned, without prejudice to its entitlement, pursuant to the 'terms and conditions' of the aforesaid loan, to pursue such charges at a later stage. Mr. Dillon averred that, if successful in the application to add Cabot Financial as co-plaintiff / co-respondent to the proceedings, Cabot Financial would a adopt the same approach as has been adopted by the bank. Counsel for the bank confirmed to the Court that Cabot Financial was limiting its claim to the principal sum plus standard interest.

131. In support of his application to join Cabot Financial as a co-plaintiff / co-respondent to the proceedings, counsel for the bank referred to an *ex tempore* ruling given as part of the procedural history in *ACC Loan Management v. Deacon* [2020] IECA 338. On 6 December 2019, Costello J. had ordered Pepper Finance Corporation (Ireland) DAC as a new party in

substitution for the Plaintiff, pursuant to Order 17 Rule 4 RSC and had further ordered that the new title of the proceedings be duly entered in the Court of Appeal Office. I pause to observe that as neither the facts of the case nor the reasons for the ruling of Costello J. were before the Court, it cannot be regarded as having a precedential value. However, counsel pointed to similarities between the application in this case and the one that was made in *Deacon* to support his submission that it was appropriate to join Cabot Financial as a co-plaintiff / co-respondent to these proceedings. An order similar to the one made in *Deacon* was being sought.

132. Counsel reasoned that given that appeals take some time to progress, it is not surprising that some loans may be sold between the time the High Court delivers a judgment and a hearing before the Court of Appeal. Appeals prosecuted after such a loan transfer should not be tainted by the fact of the transfer and, he submitted, defaulting debtors should not be at an advantage simply because a loan, which they failed to repay, has been transferred. Counsel for the bank submitted that ACC may remain as a party to the proceedings, it being the original creditor, and that its remining presence in the appeal would be based on the review nature of the application in issue.

133. The appellant objected to the application to join Cabot Financial as a co-plaintiff / co-respondent to the proceedings. He swore an affidavit on 4 December 2020 claiming that he had '*discovered issues which require further investigation*'. He avers that Cabot Financial has no entitlement to be added as co-plaintiff. He pointed out that the dates to which Mr. Dillon refers in his affidavit are different to the dates in the documents he exhibited, thus rendering the documents '*defective and unusable*'. He claims that the assignment of interests from Rabobank to Cabot Financial was invalid because Rabobank did not have the authority to assign the facilities in question. The problem, he claims, stems from the invalid assignment from ACC and Rabobank.

134. In the appellant's view, for an absolute and unconditional assignment to be valid, the

assigning bank could have no further interest in loan facilities assigned and yet, ACC continued to act as a plaintiff in Irish facilities litigation, including, in the instant case. This, he claims, renders the assignment to Rabobank invalid.

135. The appellant averred that ACC LM DAC withdrew from the Irish market and was dissolved on 28 June 2019—that is, at a time prior to the assignment from Rabobank to Cabot Financial. He contended that the bank could not ask this Court to allow a non-entity (ACC LM DAC) to remain as a plaintiff with power to assign the case. He also submitted that Rabobank should have had itself named as plaintiff in the High Court proceedings but failed to do so. Because of this, Rabobank was not in a position to assign his loan to Cabot Financial. He found it '*puzzling*' that Cabot Financial had waited for one and a half years before bringing its application. The appellant contended that the application should be refused, and the Court should strike out the proceedings in their entirety.

136. In reply to the appellant, counsel for the bank submitted that the test to be applied in such an application was a low one in that the Court does not have to determine the correctness of the transfers in question nor the finality thereof. Rather, the question to be addressed is whether there is sufficient evidence before the Court to show that *prima facie* Cabot Financial is entitled to the benefit of the facility underlying the claim. That is the test applicable to the application before the Court.

137. Moreover, counsel submitted that the Deed exhibited showed that the transfer between ACC and Rabobank was an absolute and unconditional assignment and transfer of rights. Similarly, in the Deed between Rabobank and Cabot Financial, there is a recital as to the purchase and sale being an absolute unconditional transfer.

138. In support of the application, counsel for the bank referred the Court to *Irish Bank Resolution Corporation Limited v. Halpin* [2014] IECA 3 in which Finlay Geoghegan J., having cited the clause which recorded the absolute transfer from IBRC to Kenmare, stated (at

para. 28) as follows: -

> *"Kenmare has put before the court evidence on* ***a prima facie*** *basis that pursuant to the Deed of Transfer of the 23rd May, 2014, it is entitled from that date to the benefit of the facilities underlying the claim against Mr. Halpin as guarantor in these proceedings and also to the judgments obtained by IBRC against Mr. Halpin in October 2012 and November 2013. As such it is a person with a material interest in the outcome of the two appeals before this Court. Hence it is in the interest of justice that Kenmare be added as a party to the proceedings and permitted to participate as a respondent in the hearing of the appeals but confined to any argument advanced by IBRC in the High Court or which it may properly advance on the appeal in reliance upon the evidence before the High Court on the respective dates."*

139. Counsel for the bank further noted that in *Halpin*, Finlay Geoghegan J. identified the clause from the Deed which recited the absolute transfer from IRBC to Kenmare. He submitted that the Court had, clearly, found it appropriate to leave IRBC as plaintiff in circumstances where there had been an absolute transfer—just as there had been in this case. Moreover, he argued, that when Reynolds J. delivered her judgment, ACC was still a '*live body*' with the transfer to Rabobank occurring before it had withdrawn from the Irish Market and reverted to its parent company.

140. In response to a question raised by the Court, counsel for the bank confirmed that Cabot Financial was entitled to advance arguments on behalf of the bank but stressed that the obligation on Cabot Financial was to confine itself only to matters raised by the bank before the High Court. If the application were to come before the High Court for the first time, counsel submitted that it would be an application for substitution of a party and a *de novo* examination of the claim. However, as an appeal before this Court is in the nature of a review, it is procedurally more correct to leave ACC as a co-respondent to the proceedings.

141. Counsel confirmed that the application and order sought remained in the nature of an interlocutory application. If this Court were to dismiss the appeal, it would, by its review

nature, be affirming the High Court judgment in favour of ACC. In such circumstances, if the application to join Cabot Financial as co-plaintiff / co-respondent were granted by this Court, the bank would still be obliged to bring an application under O. 42, r. 36 RSC seeking leave to execute the judgment in the name of Cabot Financial. Counsel confirmed that such a motion seeking leave to execute would have to be brought on notice to the appellant. Further, he gave an undertaking to this Court that Cabot Financial would not seek to execute the High Court judgment absent an application pursuant to Order 42. To attempt to do otherwise, he submitted, would constitute a breach of the rules of the Rules of the Superior Courts.

The Court's assessment

142. The record shows that at the time when ACC assigned its interest to Rabobank it existed as a legal entity. This Court requires to be satisfied that there is *prima facie* evidence of the transfer of an interest. Once so satisfied then the requisite threshold for making the order is met. In the application before it, the Court is not determining, as such, the validity of the assignments in question but is, rather, concerned with the correct conduct of the proceedings, going forward.

143. On the basis of the evidence set out in the grounding affidavits of Mr. Dillon in support of the application to join Cabot Financial, I am satisfied that a *prima facie* case has been established to show that Cabot Financial has an interest in the judgment sum obtained by the bank. Consequently, under the principles articulated by this Court in *IBRC v. Halpin* [2014] IECA 3, I am satisfied that it is appropriate that it be joined as a co-plaintiff and as a co-respondent to these proceedings.

144. Of course, as co-plaintiff, Cabot Financial cannot advance the *bank's* position before this Court in circumstances where it was not a party to the proceedings before the High Court. To that extent, it may only act as co-respondent in this appeal. However, there are valid reasons

why it should, nevertheless, be joined as co-plaintiff to the proceedings. First, if there is a judgment against the appellant at the end of this appeal, it would remain in favour of the bank. Further procedural steps would be required in order to have that judgment executed. In such circumstances, Cabot Financial, as a party with an interest in the judgment sum, could not take steps to have that judgment executed unless it were joined as co-plaintiff. Second, whilst, in principle, a separate application to be joined as co-plaintiff could be brought before the High Court, obliging the parties to incur the additional expense of having to bring such an application would not be appropriate in circumstances where this Court already has sufficient evidence before it to meet the threshold for joining Cabot Financial as a plaintiff.

145. Moreover, the appellant is not prejudiced by this Court making the order requested pursuant to O. 17 r. 4 of the Rules of the Superior Courts. If and when an application to execute the High Court order is brought on behalf of Cabot Financial, the appellant will be in a position to raise before the High Court the substantive issues he raises in respect of the assignment of the loan and the security by the bank to Rabobank and by Rabobank to Cabot Financial in his objection to the bank's joinder application.

146. For these reasons, the Court will join Cabot Financial as co-plaintiff and as a co-respondent to these proceedings. The issues of costs in relation thereto will be dealt with at the end of the appeal.

Conclusions

147. In reviewing the discretion exercised by Reynolds J., I am obliged to consider whether she was entitled to conclude that it is '*very clear*' that the appellant has no case. The threshold for establishing a defence sufficient to have the dispute remitted to plenary hearing is a low one and the Court must be cautious before deciding this case in summary fashion. That caution must be balanced against the desirability of ensuring that the courts' valuable time and scarce

resources are not wasted on a plenary hearing where, on any objective analysis, there is no *bona fide* arguable defence to the claim (*LSREF III Stone Investments Limited v. Edward Sweeney* [2015] IEHC 713).

148. The appellant's claim that an error occurred when the bank established a 2-year bridging finance facility is not supported by the record and is incompatible with the history which gave rise to the loan agreement in issue and with what is written in the letter of loan and the variation letters. His contention in respect of the alleged error is punctuated by inconsistencies. I am equally unpersuaded as to the merits of what the appellant posits as his second arguable defence. Whereas surcharge interest was, initially, applied to his account, it is clear from the records exhibited that such charges were deducted and have not been pursued in these proceedings. Furthermore, the appellant has not established the existence of a valid counter-claim such as would warrant either the remittal of these proceedings to plenary hearing or a stay upon the High Court order pending the resolution of such a counter-claim.

149. In varying the repayment date of the original loan, the bank acted reasonably and afforded the appellant every opportunity to comply with the terms of its original facility letter. The debt has not been discharged and none of the issues raised by the appellant amounts to an arguable defence to the bank's claim. Accordingly, he has failed to meet the test set out in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 and *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, a test which has been confirmed and applied by this Court in *Danske Bank A/S trading as Danske Bank v Fox* [2017] IECA 121; *Kelly v McNicholas* [2019] IECA 283; *Allied Irish Banks Plc v. Fanning* [2020] IECA 112; and *Allied Irish Bank plc v. Sean Cuddy* [2020] IECA 211.

150. For the reasons set out in this judgment, I would dismiss the appeal.

151. In view of the fact that the respondent has succeeded on all issues raised in defending this appeal, I can see no basis upon which he might avoid the usual rule as to costs in this Court and in the Court below. This, I should stress, is my provisional view. If the appellant wishes

to argue for an alternative order in this regard, he may apply within seven days to the Office of the Court of Appeal to have the matter listed for a short hearing in relation to costs. If, however, a hearing on costs is requested and if, having heard the parties, the Court makes the order it has, provisionally, indicated, then the appellant may be at risk of having to pay the additional costs incurred as a result of the hearing.

152. As to the costs of the motion to join Cabot Financial (Ireland) Limited as a party to these proceedings, I would make an order in favour of the appellant limited to the expenses incurred by reason of his response to that application.

153. As this judgment is being delivered electronically, Costello J. and Haughton J. have indicated their agreement with the reasoning and the conclusions reached in respect of this appeal.

Unapproved.