THE HIGH COURT

[2021] IEHC 311

[Record No. 2017/696 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

JEREMIAH AHERN AND VERONICA ELLEN AHERN
(OTHERWISE VERONICA ELLEN O'REILLY)

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 6th day of May, 2021

Introduction

1. This is an application for summary judgment in the sum of €387,500.67, alleged to have arisen on foot of credit facilities which had been made available by the plaintiff to various accounts connected with the defendants and also pursuant to guarantees signed by the defendants in respect of the said accounts. The full breakdown of the constituent parts of the total sum claimed, will be dealt with later in the judgment.

2. The defendants were husband and wife, but have since divorced. The first defendant objects to summary judgment being marked against him on a number of grounds. He maintains that he has an arguable defence to the sum claimed by the plaintiff in these proceedings. He has submitted that the court should direct that the action proceed to plenary hearing.

3. In particular, the first defendant raises the following points in his defence:-

   (i) He maintains that there is no evidence that he accepted the terms of the credit facility allegedly afforded to him by the plaintiff, as set out in its letter to him dated 11th December, 2012 and in a further facility letter concerning an overdraft facility on one of his accounts dated 13th December, 2012;

   (ii) the first defendant maintains that the plaintiff's action against him in respect of one of the accounts is statute barred, because there is no evidence of any payment by him into that account in the six years prior to issuance of the summary summons on 19th April, 2017;

   (iii) the first defendant maintains that the particulars set out in the amended summary summons dated 25th November, 2020, are inadequate and do not comply with the requirements set down by the Supreme Court in *Bank of Ireland v. O'Malley* [2019] IESC 84.

4. In resisting this application, the second defendant has adopted the objections raised by the first defendant. In addition, she relies on the following grounds of defence to the plaintiff's claim against her:-

   (i) She states that a transfer into one of the accounts the subject matter of the claim, was from a joint account held by her and her former husband and was made without her consent;

(ii) it is maintained that the guarantees signed by her are not legally binding on her, due to the fact that she did not have independent legal advice prior to signing them.

5. On the basis of these matters, each of the defendants maintains that it is not appropriate to mark summary judgment in the matter because they have raised arguable defences to the plaintiff's claim against them. Instead, they have asked the court to make an order remitting the matter to plenary hearing.

The evidence

6. The plaintiff's application for summary judgment is grounded on an affidavit sworn by Mr. Brian McGuinness on 28th March, 2018. He is a manager employed by the plaintiff in its litigation management department. He stated that the plaintiff made available to the defendants, jointly and severally, a credit facility dated 11th December, 2012 in the sum of €150,000 in substitution of existing facilities on an account known as the "Evergreen Credit Line Account" bearing number 93543312131193 (hereinafter referred to as the '193 account'). He exhibited a copy of the facility letters dated 11th December, 2012, which had been sent to each of the defendants.

7. Mr. McGuinness went on to deal with a separate account. He stated that at all material times, the plaintiff provided banking and credit facilities for the defendant's company, Ahern Livestock Services Limited. The plaintiff made available to the company a credit facility dated 11th December, 2012 in the amount of €200,000 in substitution for the existing facilities on the account. This was subject to the terms and conditions of the facility, including letters of guarantee which had been signed by the defendants on 16th June, 2008 in respect of the indebtedness of the company on the said account. The credit facility was the subject of account number 93543311918160 (hereinafter referred to as 'the 160 account'). He exhibited a copy of the relevant facility letter.

8. By guarantees in writing dated 16th June, 2008 the defendants had guaranteed the existing and future indebtedness of the company to the plaintiff. The guarantees were subject to a limit of €250,000 together with interest at the plaintiff's lending rate from date of demand. A copy of the guarantees signed by each of the defendants was exhibited to the affidavit.

9. In respect of a third account, Mr. McGuinness stated that the plaintiff made available to the first defendant an overdraft facility dated 13th December, 2012 in the amount of €50,000 in respect of the first defendant's account bearing number 93543311878000 (hereinafter referred to as 'the 8000 account'). A copy of the facility letter was exhibited to the affidavit.

10. By a guarantee in writing dated 10th June, 2008, the second defendant guaranteed the indebtedness of the first defendant to the plaintiff on foot of the said account subject to a limit of €50,000, together with interest at the plaintiff's lending rate from the date of demand. A copy of the guarantee signed by the second defendant was exhibited to the affidavit.

11. In paras. 12 – 16 of the affidavit, Mr. McGuinness set out the demands that had been made by or on behalf of the plaintiff in respect of repayment of each of the credit facilities afforded to the account holders. He also set out the demands that had been made for payment on foot of the guarantees. Each of the demand letters was exhibited in the affidavit.

12. At para. 17 he exhibited the statements of account in respect of the 193, 160 and 8000 accounts. He concluded the affidavit by stating that the sum of €387,500.67 remained due and owing by the defendants as of the date of swearing of the affidavit. He stated that he believed that appearances had been entered to the summons by the defendants solely for the purposes of delay and that they did not have a *bona fide* defence to the plaintiff's claim against them.

13. On 12th June, 2018, the first defendant swore an affidavit in response to the plaintiff's application for summary judgment against him. In that affidavit, he pointed out that the company had been incorrectly named in Mr. McGuinness's affidavit and that the wrong account number had been given in respect of the 8000 account. These grounds of objection have subsequently been withdrawn.

14. The first defendant went on to state that he had never accepted the terms of the credit facility letter dated 11th December, 2012. He did not believe that the second defendant had accepted its terms either. He went on to state that he did not believe that the former credit facility was replaced by the terms of the credit facility dated 11th December, 2012. He stated that having reviewed all of the paperwork which he had to hand, he did not believe that he or the second defendant had ever made any payment towards the 193 account in the six years immediately prior to the issuance of the within proceedings on 19th April, 2017. In these circumstances he believed that the plaintiff's action on foot of his alleged indebtedness on the 193 account was statute barred. He stated that as the company named in the plaintiff's grounding affidavit did not exist, the plaintiff's claim in respect of that account must also fail. He requested the court to strike out the plaintiff's claim against him.

15. In a replying affidavit sworn by Mr. McGuinness on 10th October, 2018, he clarified that he had made an error in relation to the name of the company in his first affidavit; wherein it had been referred to as "Ahern Livestock Limited", which should have read "Ahern Livestock Services Limited". He also accepted that the 8000 account had been incorrectly described in the summary summons, wherein it had been referred to as ending in the numbers "800", rather than "8000". However, the correct account number had been referred to in his affidavit sworn on 28th March, 2018. Mr. McGuinness went on to exhibit a true copy of the current account statement for that account, which at all times was in the name of the first defendant's company and was described as the "Prime Farm Current Account".

16. In relation to the non-acceptance of the facility letter dated 11th December, 2012, Mr. McGuinness stated that as that facility was a rolling facility, no acceptance or signature was required. He also exhibited a true copy of the account statements for the 193

account, which showed transfers in and out of the account in the years leading up to the issuance of the summons. With regard to the assertion that the plaintiff's claim for some or all of the monies were statute barred, he stated that it was clear that the default on the relevant accounts and the demands thereafter in 2014 and 2016, were within six years prior to the issuing of the proceedings on 19th April, 2017.

17. The second defendant swore three affidavits in the proceedings. The first of these was sworn on 25th October, 2018. In that affidavit, she confirmed the content of the affidavit sworn by the first defendant on 12th June, 2018 and stated that she would reply upon the content of that affidavit in support of an application on her behalf to have the proceedings remitted to plenary hearing. She went on to state that in relation to the guarantees relied upon by the plaintiff and exhibited to Mr. McGuinness's affidavit of 28th March, 2018, she did not receive independent legal advice before signing the guarantees, nor was she advised that she should receive such advice. She went on to state that she had been divorced from the first defendant for the previous four years. She stated that she had a *bona fide* defence to the plaintiff's claim. She prayed the court for an order remitting the proceedings to plenary hearing.

18. In her second affidavit sworn on 21st November, 2018, the second defendant stated that the credit facility referred to at para. 6 of Mr. McGuinness's affidavit was imposed unilaterally by the bank, without any offer, acceptance, or consideration in relation to the said credit facility letter. She stated that she was advised that in the absence of these matters, the plaintiff was not in a position to treat the facility letter as a contractual document upon which it could rely. She stated that she believed that the document was prepared for internal bank purposes and did not involve a drawdown of funds.

19. The second defendant stated that in the documents exhibited at BMcG 14 of the affidavit sworn by Mr. McGuinness, the transfers shown therein were as a result of funds which were taken from her account by the bank without her consent from another account which she held with the plaintiff. She stated that the funds were not willingly given to the plaintiff. She stated that having regard to the matters deposed to in that affidavit, the matter should be remitted to plenary hearing.

20. In response to the second affidavit sworn by the second defendant, an affidavit was sworn on 19th December, 2018 by Mr. Kenneth McCutcheon a manager of the plaintiff bank at its bank centre premises in Ballsbridge, Dublin 4. He reiterated the averment that was made by Mr. McGuinness in his affidavit sworn on 10th October, 2018, that as the facility in question was a rolling facility, no acceptance or signature was required.

21. In relation to the assertions made by the second defendant regarding transfers into and out of the 193 account, as exhibited at BMcG 14, the transfers out of the 193 account were transfers to the first defendant's current account. In this regard he referred to a true copy of the accounts statement for the 8000 account, which showed the transfers into the first defendant's current account. He exhibited the relevant account statements for the 8000 account.

22. On 9th December, 2019, the plaintiff obtained an order from the High Court giving it liberty to amend the special endorsement of claim on its summary summons. That application was moved so as to ensure that the summons complied with the requirements of the *O'Malley* decision. By order dated 16th November, 2020, a consent order was made by the High Court extending the time for the plaintiff to amend its summons. On 25th November, 2020, the plaintiff issued the amended summary summons herein.

23. In an affidavit sworn on 11th December, 2020, the first defendant stated that he did not believe that the plaintiff had complied with the requirements of the *O'Malley* judgment in its amended summary summons. He stated that para. 22 of the amended summons only gave a partial breakdown of the figures claimed across the three accounts. However, no such breakdown was provided in any of the affidavits sworn on behalf of the plaintiff. The only evidence that was proffered on behalf of the plaintiff was that set out at para. 18 of the affidavit of Mr. McGuinness, wherein he had averred that the sum claimed remained due and owing by each of the defendants. The first defendant stated that Mr. McGuinness had given no breakdown as to how that figure was arrived at between the three accounts.

24. The first defendant went on in that affidavit to set out the particulars of principal and interest which he maintained had not been furnished with sufficient particularity in respect of each of the three accounts. Having set out the alleged deficiencies in this regard, the first defendant stated that he did not believe that the plaintiff's claim could succeed at the summary stage, as it had not provided sufficient particulars, or evidence to support its claim.

25. In a short affidavit sworn on 16th December, 2020, the second defendant adopted the matters that had been raised by the first defendant in relation to the lack of particulars furnished by the plaintiff in relation to its claim against the defendants. She stated that on this account, she too believed that the plaintiff's claim could not succeed at the summary stage, as it had not provided sufficient particulars or evidence to support its claim.

26. On 31st March, 2021, an affidavit was sworn by Mr. Éadaoin Jackson, solicitor, on behalf of the plaintiff. He made the affidavit on behalf of the plaintiff due to difficulties in having the affidavit sworn by a representative of the plaintiff due to the ongoing Covid-19 restrictions. He stated that the three amounts of interest for the three respective accounts, being €7,285.37 in respect of the 193 account; €9,784.68 in respect of the 160 account and €360.09 in respect of 8000 account, constituted the interest amounts accrued but not applied to the three accounts respectively up to 4th August, 2016, for which the plaintiff was seeking judgment as per the amended summary summons, which date of 4th August, 2016 was the date as referred to in the original summary summons issued on 19th April, 2017.

27. Mr. Jackson referred to a true copy of the full account statement for the 160 account, which had previously been furnished to the defendants by delivery from time to time of the bank account statements and he exhibited same.

28. Finally, Ms. Marie Moylett, a manager of the plaintiff at its premises at 10 Molesworth Street, Dublin, swore an affidavit on 8th April, 2021, in identical terms to that which had been sworn by Mr. Jackson. It also exhibited the same documentation.

Submissions on behalf of the defendants

29. The first point raised on behalf of the first defendant, which was also adopted by the second defendant, was that the plaintiff was not entitled to proceed on foot of the facility letters dated 11th and 13th December, 2012, due to the fact that there was no evidence that the terms thereof had ever been accepted by the defendants. It was submitted that it was a fundamental principle of contract law that in order for there to be a binding contract, there had to be an offer, an acceptance of the offer and consideration passing between the parties. It was submitted that there was no evidence of acceptance of the terms of those letters by the defendants.

30. Furthermore, it was pointed out that the plaintiff had not established the original terms, in respect of the credit facilities which had existed prior to 2012. Therefore, it was not known in what regard the credit facilities had changed by virtue of the letters issued in December 2012. Nor was there any evidence that such changes in the credit facilities as may have been imposed by the said letters, had been accepted by the defendants.

31. Secondly, it was submitted that in respect of the 193 account, the defendants were advancing the claim that the plaintiff was statute barred from making any claim on that account. Counsel pointed out that at para. 8 of his first affidavit, the first defendant had stated that he never accepted the terms of the credit facility letter dated 11th December, 2012. He did not believe that the second defendant had done so either. She had adopted the averments made by the first defendant in this regard. The first defendant had gone on to state that he did not believe that the existing facility was ever replaced by the terms of the credit facility dated 11th December, 2012. He had also stated that having reviewed all of the paperwork which he had to hand, he did not believe that either he, or the second defendant, had made any payment towards the 193 account in the six years prior to the issuance of the proceedings by the plaintiff.

32. It was submitted that in response to those assertions, the plaintiff's deponents had only stated that as the facility was a rolling facility, no acceptance or signature was required. The deponent had then exhibited an account statement for the 193 account and had submitted that that showed "transfers in and account [sic] of this account". In these circumstances, the plaintiff had merely stated in evidence that the 2012 facility was in substitution of an existing credit facility. If there was to be a variation of the terms of an already existing facility, it was necessary to have acceptance thereof and consideration to support that. It was submitted that there was no evidence of either of these matters.

33. It was stated that in response to the assertion made on behalf of the defendants that there had been no payments made into the account by them in the six years prior to the issuance of the summons, the plaintiff had merely chosen to exhibit the account statement. The plaintiff had not challenged the first defendant's evidence in any way.

There was no sworn evidence that any payments had been made by either of the defendants in the six years prior to the issuing of the proceedings.

34. It was submitted that the first defendant's evidence regarding there being no acceptance of the new facility and the assertion that there had been no payment for a period in excess of six years, had not been countered by any cogent evidence on behalf of the plaintiff. In these circumstances, it was submitted that having regard to the provisions of ss. 11 and 65 of the Statute of Limitations 1957 (as amended), there was an arguable defence to the effect that the plaintiff's action on the 193 account was statute barred.

35. In this regard, counsel referred to the judgment in *Promontoria (Arrow) Limited v. Burke* [2018] IEHC 773 and in particular to the dicta of Barniville J. at paras. 85, 88 and 89.

36. It was submitted that the plaintiff had not provided any sworn evidence as to what payments, if any, had been made by the defendants between 19th April, 2011 and 19th April, 2017 in respect of the 193 account. It was further submitted that even if the court were to find in favour of the plaintiff in respect of the indebtedness allegedly due in respect of the remaining accounts, the issue in relation to whether the claim on foot of the 193 account was statute barred, should be remitted to plenary hearing. That would mean that €146,392.04 of the total sum claimed should be remitted to plenary hearing.

37. The defendants also raised the defence, that having regard to the decision of the Supreme Court in *Bank of Ireland v. O'Malley*, and notwithstanding the amendment of the summary summons herein, the pleadings were still deficient in respect of the particulars that the plaintiff was obliged to provide in respect of the alleged debt the subject matter of its claim. In particular, it was submitted that the amended summary summons was deficient in the following respects: there was no evidence showing the breakdown between interest and principal for any of the accounts; the amended summons set out that the amount due on each account was made up of principal and interest accrued but not yet applied. No particulars were given of whether the principal figure due was made up of any interest charged throughout the lifetime of the loans; the figures in the amended summons setting out the interest not yet accrued differed from the figures provided in the bank statements for interest not yet accrued. No reason was given for this difference, or how the amount was calculated and the demand letter suggested that there was a surcharge interest of 12%, but the summons set out that there was no surcharge interest. There was no explanation for the inconsistency.

38. It was submitted that having regard to the cases dealing with the level of particulars that had to be furnished in debt collection proceedings following the *O'Malley* judgment, it was clear that the pleadings herein and the evidence tendered, did not comply with the requirements of the law. In this regard counsel referred to the decisions in *Bank of Scotland v. Fergus* [2019] IESC 91; *AIB Mortgage Bank v. O'Brien* [2020] IECA 191 and *Havbell v. Harris* [2020] IEHC 147.

39. It was submitted that in essence, the judgments established that in a motion for summary judgment, not only must a plaintiff provide sufficient particulars, but it must

also proffer cogent evidence setting out precisely how it had calculated the sum of money it claimed was due. It was submitted that when one considered the particulars that had been furnished by the plaintiff in the proceedings herein, it was clear that adequate particulars as required following the *O'Malley* decision, had not been provided and on that basis, the plaintiff should not be entitled to mark summary judgment against the defendants.

40. In addition to adopting the foregoing grounds of defence, the second defendant also relied on the following additional grounds: firstly, she stated that insofar as the account statements referred to by Mr. McGuinness in his grounding affidavit, showed payments into and out of the 193 account, the payments out had been made without her consent. Secondly, it was submitted that the guarantees relied upon by the plaintiff against the second defendant were unenforceable, as she had not obtained independent legal advice prior to signing them.

41. It was submitted on behalf of both defendants that having regard to the matters raised by them in response to the plaintiff's claim, and having regard to the low threshold provided for in the cases *Aer Rianta v. Ryanair Limited* [2001] 4 IR 607 and *Harrinsrange v. Duncan* [2003] 4 IR 1, it was appropriate to allow the defendants to defend the proceedings and have the matter remitted to plenary hearing.

Submissions on behalf of the plaintiff

42. In relation to the alleged lack of acceptance of the facility letters, it was pointed out that it was not necessary to have any formal acceptance of same, as this was merely a rollover or extension of a pre-existing credit facility on each of the relevant accounts. Furthermore, neither of the defendants had specifically stated that they did not receive the letters of 11th and 13th December, 2012. It was also noteworthy that from a perusal of the accounts, it was clear that payments had been made into the account, so as to adhere to the credit limits on each of the accounts. Thus, by their conduct, it was clear that the defendants had availed of the credit facilities and had adhered to their terms. By their conduct the defendants had clearly accepted the terms of the rollover of the credit facility on each account.

43. In relation to the statute of limitations point, it was submitted that in the credit facility letters, it was clearly stated that the credit facility would be a continuing facility, but would be repayable on demand. The demands, had been made in 2014 and all of the relevant demand letters had been exhibited in the affidavit sworn by Mr. McGuinness. Accordingly, the cause of action only accrued once the facility became repayable, which only occurred when a demand for repayment was made. It was submitted that the cause of action had accrued on the making of the demand for repayments and the failure by the defendants to repay the sums demanded, all of which was clearly within six years prior to the issue of the summary summons. Accordingly, it could not be argued that the plaintiff's claim against the defendants was statute barred.

44. Furthermore, it was stated that there was no substance in the allegation that there had been no payment on the relevant account in the six years prior to the issuance of the

summons, because from the account statements, it was clear that payments in had been made by the defendants in the relevant period.

45. In relation to the *Promontoria v. Burke* case, it was pointed out that in that case the plaintiff had accepted that the cause of action accrued on the expiry of the two-year loan term, which had occurred in February 2011. That was a loan facility, whereas in the present case the plaintiff was suing on foot of ongoing credit facilities or overdrafts, which had been made available to the account holders. Accordingly, it was submitted that the position in the two cases was totally dissimilar.

46. Counsel stated that it was clear that in relation to credit facilities generally, they were held to be repayable on demand. In this regard counsel referred to Donnelly "The Law of Credit and Security" (2nd Ed) at para. 7-93 and *IBRC Limited v. Cambourne Investments* [2014] 4 IR 54 at p.79.

47. In relation to the assertion that the amended pleadings did not give sufficient particulars as required by the decision in *Bank of Ireland v. O'Malley*, counsel referred to para. 5.5. of the judgment delivered by Clarke C.J., wherein it had been stated that the court was entitled to take into account in assessing the adequacy of the manner in which a debt claimed was particularised, any documentation which had been sent to the defendant in advance of the commencement of the proceedings. In this regard, counsel pointed out that account statements had been furnished to the defendants on a periodic basis from the date of inception of the account right through to the 4th August, 2016, being the date in respect of which the sum claimed was calculated, and indeed beyond that. Counsel submitted that para. 8.1 of the judgment made it clear that the court could rely on the documentation that had been made available to the defendant including bank statements and that it was appropriate for a plaintiff to refer to same in its summons. It was submitted that that had been adequately done at para. 22 of the amended special endorsement of claim on the summary summons herein.

48. In relation to the assertion that the defendants had not been provided with adequate particulars of the interest charged, it was pointed out that in the account statements, the interest that was charged from time to time was clearly stated and any change in interest was also clearly highlighted. In addition, once the limit of the facility had been exceeded, the amount of interest accruing thereafter, had been clearly highlighted in a separate box on the right hand side of each of the statements. It was submitted that the plaintiff had furnished more than adequate particulars to the defendants as to how the sums claimed had been calculated.

49. In relation to the assertion made by the second defendant that a payment had been made out of one of the accounts without her knowledge; that payment out from a joint account held with her husband, had been made directly into the first defendant's current account. In relation to the assertion by the second defendant that she had not obtained legal advice prior to signing the guarantees; it was pointed out that in a box at the top of the first page of each guarantee, the following was clearly stated: "Before you sign this guarantee you should get independent legal advice".

50. Counsel also referred to the decision in *ACC Bank plc v. Connolly* [2015] IEHC 188, as authority for the proposition that not having legal advice was not a defence in Irish law.

51. It was submitted that the defendants had not raised any arguable defence to the plaintiff's claim in these proceedings. Accordingly, it was submitted that the court should grant the plaintiff summary judgment in the amount sought in the summons.

Conclusions

The applicable legal test

52. Summary judgment procedure is only suitable when there is a clear *prima facie* legal entitlement on the part of the plaintiff to the sum claimed. Usually when such applications are being moved, the plaintiff has a very strong case that money is owed to him by the defendant and the real question before the court is whether the defendant has established sufficient evidence in his affidavit to cross the threshold that he has at least an arguable defence to the plaintiff's claim, such that he should be allowed to resist judgment being marked against him in a summary manner and should be allowed to have the matter remitted to plenary hearing.

53. The approach which the court should take to an application such as this, is well settled in law. The relevant test was set down by the Supreme Court as far back as 1996 in *First National Commercial Bank v. Angli*n [1996] 1 I.R. 75. In that case Murphy J., giving the judgment of the court, endorsed the following test laid down in *Banque de Paris v. DeNaray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank PLC v. Daniel* [1993] 1 WLR 1453:-

> *"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or* bona fide *defence."*

54. The test set down in the Anglin case has been applied in a number of cases in the intervening years. The appropriate test was more recently set out in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 in which case Hardiman J. stated as follows at page 623:-

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

55. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J. having analysed the relevant case law, set out a helpful summary of the relevant principles. It is not necessary to set these out in this judgment, as they are very well known. The court has had regard

to all of these cases and to the principles set out in Harrisrange in reaching its determination herein.

56. The court has also had regard to the dicta of Moriarty J. in *Allied Irish Banks v. Killoran* [2015] IEHC 850, where he warned that the court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. He advised that courts must be alert to defendants who seek merely to defer the evil day on the basis of arguments that do not pass muster, and must remain mindful of the de minimis rule in assessing summary judgment applications; see paragraph 56 of the judgment.

Alleged lack of evidence of acceptance of the facility letters by the defendants

57. It is clear from the terms of the facility letters that there were pre-existing credit facilities in respect of the relevant accounts. That was conceded by the first defendant; where at para. 9 of his first affidavit he stated "I do not believe that the already existing facility was ever replaced by the terms of the credit facility dated 11th December, 2012". This is also borne out by the account statements which have been exhibited to the various affidavits. These clearly show that there were credit facilities in place from as far back as 2008.

58. There is no evidence that the defendants did not receive the relevant facility letters in December 2012. Neither defendant has averred that he or she did not receive them. The court is satisfied that the defendants did receive the letters.

59. If either, they did not know to what the letters referred, or if the they did not agree with the terms thereof, it is reasonable to assume that they would have contacted the plaintiff by letter, or email, to query the terms of the bank's correspondence. However, there is no evidence that either of the defendants did that.

60. Instead, two things are clear from the account statements: Firstly, the defendants availed of the credit facilities that were provided for in the letters of December 2012, and secondly, up to 2014, they were careful to adhere to the limits provided for under the respective facilities.

61. Looking at the totality of the evidence before it, the court is satisfied that this was a rollover of a pre-existing credit facility, meaning that it was an extension thereof and as such, it did not need any specific further acceptance. Even if acceptance was required, the court is satisfied that the actions of the defendants subsequent to December 2012, clearly show that they had accepted the terms of the credit facilities as set out in the facility letters of December 2012. Accordingly, the court is of the view that the defence put forward on behalf of each of the defendants that there was no evidence of acceptance of the terms of the facility letters of December 2012, is without substance.

Whether the plaintiff's action on the 193 account is statute barred

62. The court is satisfied that the defence put forward by the defendants to the effect that the plaintiff is statute barred from proceeding on foot of the 193 account due to the fact that

there was no evidence of payments into that account by the defendants in the six years prior to the date of issue of the summons herein, is without substance.

63. Even if a facility letter is silent in relation to the credit facility being repayable on demand, the court is satisfied that in general credit facilities which are in the nature of an overdraft facility, are repayable on demand. In *IBRC v. Cambourne Investments*, Charleton J stated as follows at p.79:-

> *"In general, unless the behaviour of the parties shows that they intended a different bargain, monies lent on overdraft are repayable on demand: Williams and Glyn's Bank Ltd v Barnes [1981] Com LR 205. This was a loan for a project. The project was to proceed on terms of diligence by Cambourne, as separately guaranteed by a document apart from the facility letters by Peter Curistan. There is nothing in this case which establishes a contrary intention to repayment on demand. Insofar as it might be argued that the expectation of the parties might have been that the borrowings should have been allowed to continue until the market improved, such a contention is so vague as to lack commercial reality."*

64. A similar statement of the law is given by the learned author of "The Law of Credit and Security" (2nd Ed) at para. 7-93, wherein the learned author also refers to the decision of the Court of Appeal of England and Wales in *Lloyds Bank plc v. Lampert* [1999] 1 All ER (Com) 161, as authority for the proposition that credit facilities are repayable on demand

65. The court is satisfied that in respect of the 193 account, the plaintiff's cause of action only arose once it had made a demand for repayment of the credit facility, which it did by letter dated 31st July, 2014 and when there was a failure by the defendants to repay the amount owing on foot thereof. That demand was subsequently repeated by a letter from the plaintiff's solicitor in the same terms on 7th October, 2016. Accordingly, there is no basis on which it can be asserted that the plaintiff's cause of action on foot of the non-payment of the credit facility arose more than six years prior to the issue of the original summons on 19th April, 2017.

66. Furthermore, the court is satisfied from the account statements that have been exhibited, that there were payments into the account by the defendants within the six years prior to issue of the summons herein.

67. In relation to the point made by the second defendant in relation to the transfers from the joint account, which she alleges were made without her consent, the court accepts the evidence on behalf of the plaintiff that such transfer was made from that account into the current account held by the first defendant. Accordingly, if the second defendant has any cause of action in respect of any transfers out of a joint account owned by her with her husband, such cause of action is against the first named defendant and is not a defence to the plaintiff's claim against her in these proceedings.

Alleged want of particulars of claim

68. The original summons herein was issued in April 2017. Following the handing down of the *O'Malley* decision, an amended summons was issued in November 2020. That summons refers to the bank statements, which the defendants had received on a regular basis over the years and which had been furnished again in the course of these proceedings.

69. The decision in *Bank of Ireland v. O'Malley* dealt with two distinct questions. The first concerned the level of detail that must be included in order for a special endorsement of claim to be compliant with the Rules of the Superior Courts in a case involving a claim for debt arising out of what is said to be a lending arrangement. The second concerned the evidence which must be put forward in order to justify the grant of judgment on a summary basis within the confines of a motion for judgment.

70. In respect of the former, the court held that the defendant to a summons was entitled to have sufficient particulars to enable him "to satisfy his mind whether he ought to pay or resist". The court went on to hold that when it came to the second question, which concerned the evidence which was required to be placed before the court when the plaintiff was seeking summary judgment, there was an obligation on a plaintiff to produce prima facie evidence of their debt, if they wished the court to grant summary judgment.

71. The court is satisfied having regard to the dicta of Clarke C.J. at paras. 5.5 and 8.1 of his judgment in the *O'Malley* case, that it is appropriate for a plaintiff to furnish particulars as to the breakdown of various sums claimed by it, by reference to various account statements, which are specifically referred to in the summons itself. The court is satisfied that in this case, the plaintiff at para. 22 of the amended summary summons has adequately referred to the bank account statements in respect of the three relevant accounts, so as to incorporate them as particulars of its claim against the defendants.

72. When one has regard to the essence of the decisions in the *O'Malley*; Fergus and *O'Brien* cases, the rationale for the requirement that the creditor should provide adequate particulars of the debt, is to enable the person sued to know precisely what sums are being claimed from him or her; how such sums are calculated and armed with that information, the defendant will be in a position to know whether he or she has either a merits based defence to the sum claimed, or may have a defence based on the fact that the plaintiff may have made an error in its calculations. The essential requirement is that the defendant is given adequate information to enable him or her to know whether such defences are open to them.

73. However, it is not necessary that the matter be pleaded in minute detail in the summons itself. That is made clear in the *Havebell v. Harris* case, where Humphreys J. stated as follows at para. 21:-

> *"The need for the claim to be sufficiently particularised is stressed in Bank of Ireland v. O'Malley (see paras. 5.5 to 5.9 in particular). The particularisation may be done indirectly by referring to another identified document which provides the necessary information (see para. 5.6)."*

74. The same approach was adopted by Meenan J. in *AIB Mortgage Bank v. Hayden* [2020] IEHC 442.

75. Having regard to the matters pleaded in the amended summons and to the fact that the facility letters and the relevant account statements were furnished to the defendants from time to time during the lifetime of the accounts and having regard to the fact that in the account statements, the rate of interest charged was clearly identified; changes in interest were clearly identified and once the facility limit was exceeded, the amount of interest accruing, but not applied to the account, was clearly stated in a separate box; the court is satisfied that the defendants were given adequate particulars of both the principal sums claimed and the amount of interest constituted therein, together with the amount of interest that had accrued since 4th August, 2016.

76. Insofar as the defendants submit that there was a slight difference between the amount of interest accrued but not applied to the account as stated in the final account statement prior to 4th August, 2016 and the amount for such interest claimed in the summons; that small discrepancy in the order of €55/60, is explicable by the fact that interest accrued on a daily rate and that represented the difference between the figure stated in the account statement of 29th July 2016 and the date claimed in the summons, being 4th August, 2016. There is no substance in the objection taken by the defendants in this regard. The court is satisfied that the plaintiff has satisfied the two stage test as set down by the Supreme Court in the *O'Malley* decision.

Lack of legal advice in respect of the guarantees

77. The second defendant does not deny that she signed the relevant guarantees. She alleges that the guarantees are unenforceable against her, due to the fact that she did not have independent legal advice before signing them. The court is satisfied that there is no substance in this ground of defence raised on behalf of the second defendant, for two reasons.

78. Firstly, in a box at the top of the first page of each guarantee the following was clearly stated:-

> *"Warning: As guarantor of the credit facilities you will have to pay off the credit facilities, the interest and all associated charges if the Borrower does not. Before you sign this guarantee you should get independent legal advice".*

79. Secondly, in ACC Bank plc v. Connolly, the second defendant had entered into a guarantee in respect of a loan advanced by the plaintiff to the first defendant, who was his son. In resisting an application for summary judgment brought by the plaintiff, it was submitted on behalf of the second defendant that he had had no independent legal advice when signing the guarantee and that there was nothing before the court as to the circumstances of the signing of the guarantee. Fullam J. stated as follows at para. 11.1:-

> *"Not having legal advice is not a defence in Irish law. If there was evidence of undue influence exerted by the first defendant on the second defendant, and in this*

case there is no such evidence, it might afford a defence (Ulster Bank v. Roche and Buttimer [2012] IEHC 166 Clarke J). In this regard, the second defendant, having been given time by the court to swear a replying affidavit has failed to do so."

80. The court is not satisfied that the second defendant has raised an arguable defence that the guarantees are unenforceable against her.

Decision of the court

81. The court is satisfied that the plaintiff has established in evidence that the defendants are indebted to it in respect of the sums claimed in the amended summary summons.

82. The defendants have not persuaded the court that they have an arguable defence to the plaintiff's claim, or to any portion thereof, even having regard to the low threshold applicable to applications resisting summary judgment. In failing to persuade the court that they have even an arguable defence to the plaintiff's claim herein, the defendants have not satisfied the tests set down in the *Aer Rianta* and *Harrinsrange* cases.

83. The court is satisfied that the plaintiff is entitled to summary judgment against the defendants, jointly and severally, in the sum of €387,500.67.

84. As this judgment is being delivered electronically, the parties will have two weeks within which to make brief written submissions in respect of the final order, and on costs and on any ancillary matters that may arise.