THE HIGH COURT

[2022] IEHC 718

[Record No. 2011/740S]

BETWEEN

CAVE PROJECTS

PLAINTIFF

AND

PETER GILHOOLY, JOHN KELLY, JOHN MARONEY,

ROY O'BRIEN AND JOSEPH O'HARA

DEFENDANTS

JUDGMENT of Ms Justice Miriam O'Regan delivered on 21 December 2022.

Issues

1. In this action the plaintiff is seeking judgment as against the second named defendant John Kelly (hereinafter referred to as the defendant) in the sum of €11,407,826.90. The plaintiff previously entered into a settlement agreement with three of the original five defendants namely Peter Gilhooly, John Moroney and Roy O'Brien on 22 May 2013 and a notice of discontinuance was served by the plaintiff in respect of those defendants on 27 May 2013. On the second day of the within trial the plaintiff entered into an agreement with Joseph O'Hara and accordingly the claim now proceeds as against the defendant only

Background

2.

(a) By way of background all five defendants entered into a series of partnership agreements commencing on 27 November 2003. They subsequently purchased property in Athenry, County Galway with the assistance of an Ulster Bank loan in 2004. The said property was ultimately registered in the name of the five defendants in 2009.

(b) Insofar as the partners' arrangement with the Bank of Ireland is concerned same *inter alia* commenced with a facility letter of 14 October 2005 (which did not include any reference to Mr O'Hara) whereby the partners secured a facility in the sum of €5.2m subject to the terms and conditions therein contained. Such conditions included a condition precedent in respect of drawdown, namely, valuation reports were to be furnished, which were to be broadly in line with the values outlined in a recent submission. Security requirements were to be in place and details of the net worth of each individual borrower was to be in place.

(c) A portion of the advanced sum was to discharge the Ulster Bank loan on the Athenry property and ultimately a charge was registered in respect of this property on 20 February 2009 in favour of the Bank of Ireland. In this and subsequent facility letters it was provided that where an advance is granted in a personal capacity, to two or more persons, the liabilities to the Bank shall be joint and several. Where the expression "the borrower" refers to two or more persons these terms and conditions shall be construed as if they were in the plural mutatis mutandis and the covenants and agreements on the part of the

borrower shall have the effect as if they were joint and several covenants and agreements by such persons.

(d) Subsequently there were further facility letters comprising loan offers and acceptance by the partners with the loan amounts increasing in respect of each successive facility save for loan offer of 14 August 2007 and a loan agreement of 31 January 2008 which are not material to the instant proceedings. Furthermore, although a loan agreement was drawn up bearing date 26 November 2009 same was not executed by the defendant, on legal advice, and accordingly the latest relevant loan offer from the defendant's point of view is that of 5 September 2007 in the sum of €12,065,630.00 which was duly executed by all five partners.

(e) Insofar as loan amounts and outstanding balance is concerned same is comprised in loan account number 23794421 in the name of the five partners (this account is specifically referenced in the facility agreement on 5 September 2007).

(f) The facility of 5 September 2007 contained a condition precedent to drawn down and was to the effect that security be in place in the manner acceptable to the bank prior to drawn down of the facility. This facility incorporated an increase of funding to the partnership in the sum of €600,000 over the sum then due and owing on foot of the various prior facilities entered into between the bank and the partners. There was no condition precedent relative to valuations and it is common case that the valuations held by the plaintiff or copies thereof, all postdate the drawdown of the additional loan facility of €600,000 secured in the facility of 5 September 2007.

(g) By reason of an asserted default the bank made a demand for immediate payment of all sums due and owing in respect of the facility of 5 September 2007 by way of letter of 5 January 2011. The said letter indicated that there was due on foot of account number 23794421 the sum of €11,785,541.14. It is common case that there was no reply from the defendant to this demand.

Proceedings

3. By way of summary summons of 24 February 2011 the bank sought judgment against the defendants in the sum mentioned in the letter aforesaid of 5 January 2011.

4. By order of the Master of the High Court of 6 February 2013 Cave Projects Limited were substituted as plaintiff in the summary summons proceedings in lieu of the Bank of Ireland.

5. By order of the High Court of 16 January 2015 Mr Justice Noonan refused the plaintiff's application for summary judgment, remitted the matter for plenary hearing and provided that costs of the summary judgment application would be costs in the cause.

6. By way of statement of claim delivered on 16 April 2015 the plaintiffs set out the background aforesaid, identified that the event of default in respect of the facility letter of 5 September 2007 was the failure of the defendants to pay interest and the sum ultimately claimed in the statement of claim was the figure incorporated in the letter of demand of 5 January 2011 reduced by €300,000 representing funds received

by the plaintiff from three of the defendants in 2013 in or about the settlement between the plaintiff and those three defendants.

7. The defendant delivered a defence bearing date 19 November 2015 where he expressed himself to be a stranger to the facility letters or the letter of offer, the extent of the alleged loan, the capacity in which the loan was advanced, the failure to pay interest, an event of default and any other breach. In a number of paragraphs commencing at para. 13 there is an assertion to the effect that NAMA or its group entities never acquired the benefit of the facilities or charges by reason of an assertion that Bank of Ireland granted the charges to the Central Bank of Ireland on or about 15 February 2008. Further a counterclaim is incorporated to the effect that there was a common and/or mutual mistake or in the alternative a unilateral mistake in respect of the facility letters to the effect that it was the intention of the defendants as known to the Bank of Ireland that recourse of the lender would be limited to certain specific assets only. It is asserted that any agreement between Bank of Ireland and the defendant was *void ab initio* or alternatively the defendant was entitled to rescind as he in fact did or in the alternative he has suffered loss, damage and inconvenience. There is a claim that the Bank of Ireland breached certain express or implied terms and conditions of the agreement including a failure to carry out conditions precedent in respect of valuations. It is also asserted that the defence has been gravely prejudiced by reason of the delay on the part of the plaintiff.

8. Insofar as the issue of asserted delay is concerned it is the case that the defendant maintained an application before the High Court seeking to strike out the plaintiff's proceedings for want of prosecution and/or for delay and/or pursuant to the

inherent jurisdiction of the court which application was refused by order of Mr Justice Meenan on 7 July 2021. The defendants' appeal in respect of that order was unsuccessful before the Court of Appeal.

Evidence Before the Court

9. The following witnesses tendered evidence to the court and were duly cross-examined with the salient points being made as follows: -

Melvin Smith Solicitor

10. Mr Smith was a practising solicitor who acted on behalf of the five partners between 2005 and 2007 in relation to the various facilities secured and security afforded to the Bank of Ireland. In all Mr Smith identified seven different folios relevant to Land Registry property in counties Clare and Limerick in respect of which he arranged to perfect the security for the bank in accordance with the facility letter of 5 September 2007 a copy of which was furnished to him on 19 September 2007. He attended to the execution of the original deed of charge by the partners which is dated 7 December 2007. He furnished: -

(1) seven Family Home Protection Act declarations;

(2) relevant certificates of title in respect of each of the properties the subject matter of the security arrangement;

(3) undertakings in respect of the partners' commitment to provide security

and he received a portion of the funds payable on foot of the facility of 5 September 2007.

He was satisfied that once his undertakings to the bank were complied with he did not have any further involvement as between the bank and the partners. He had no connection with any one of the five partners prior to October 2004 when they were first represented by Mr Smith's superior in Messrs Wallace Reidy Solicitors.

Cathal De Barra

11. Mr De Barra gave evidence that prior to commencing work for NAMA in 2010 he was a solicitor with A&L Goodbody. In 2012/2013 his role was legal due diligence in respect of loan transfers. He did execute the loan sale deed however he was not involved in the transaction and was unable to say the exact date although indicated that it was common to sign one or two days in advance of closing. He indicated that he saw a number of documents as to the date of closing including a scanned copy of the bank account in respect of which the deposit and ultimately the balance of €1.8m was paid on 22 January 2013 and he also authorised letters of 22 January 2013 to be dispatched to each of the five defendants advising them of the sale of the loan assets to the plaintiff. He confirmed that it was his signature on the transfer of loan with a date of 22 January 2012 however he indicated that this was a typographical error and it should read 22 January 2013. Mr De Barra confirmed that he was contacted in September 2022 and agreed to attend as a witness and furnish a freshly sealed certificate under s.108 of the NAMA Act, 2009 by reason of the lack of seal on the original certificate.

The witness explained that in October 2010 because of the slow nature of the process until then it was decided, under the direction of the Minister for Finance, to acquire loans in bulk. In this regard banks listed loan accounts to be acquired but this

didn't include details of individual loans identifying all credit facilities and securities. It was effectively a two-tier system with a subsequent adjustment of the valuation certificate once due diligence had been undertaken.

The witness identified that the within loans came within tranche six of the bulk and on review was able to satisfy himself that two loan accounts were included including loan account 23794421 and was satisfied that these loan accounts referred to three facilities letters and accordingly was in a position to authorise a certificate under s.90 of the 2009 Act which was served on 6th October, 2011 and a copy of the s.90 schedule including the loan accounts mentioned by the witness were served on 7 October 2011.

Under cross-examination the witness acknowledged that the certificate, purportedly under s.108, of 5 October 2022, was prepared for the purposes of this litigation as a certificate of 22 January 2013 was not under seal. He acknowledged that the retrospective sealing was unusual however he confirmed NAMA's ownership of the assets was on the date given in the document of 5 October 2022 and he had no difficulty providing that statement. The choosing of a case manager would be determined at executive level and generally they would engage with borrowers to ascertain whether a strategy could be worked out to see if it was feasible to implement a strategy.

Kevin O'Donovan

12. Mr O'Donovan confirmed that he was a former employee with Bank of Ireland and swore the affidavit of 24 August 2011 in the summary summons application to enter final judgment. Between February 2010 and October, 2011 he was

temporarily appointed for twenty months in respect of non-performing loans. He was based in Limerick. He indicated that the events under scrutiny were eleven years previously and he had very light memory of same. He believed he handled possibly thirty files during the relevant period. Because of his lack of recall as to detail he was invited to refresh his memory by reviewing his affidavit of 24 August 2011 and in particular para. 6 to 9 thereof which paragraphs set out the sequence of facility letters commencing with the loan offer of 16 December 2005 identifying the circumstances in which the loans increased over time. The relevant paragraphs also included reference to a letter of 12 January 2006 identifying the circumstances by which the facility of 16 December 2005 signed by four of the five defendants was subsequently transferred into account number 23794421 in the name of all five defendants.

In respect of all details the witness indicated that the information would have been taken from file notes and he believed the information was true and accurate at the time as he would have read the file notes and assumed they were correct. The witness confirmed that when he became involved the loans were in default and the bank was attempting to recover monies. He confirmed that he believed the letters of 5 January 2011 being letters of demand despatched to each of the five defendants, by reason of the fact that there was reference to these letters in his affidavit which he signed was in his view a true reflection of the status notwithstanding that it was one Teresa Murphy who signed the letters of 5 January 2011 rather than the witness. He confirmed that the amount demanded in the letter of 5 January 2011 would have been capital interest and possible surcharges taken from the computer system with reference to the relevant account on that date. Insofar as exhibit “I” in his earlier affidavit is concerned, being a statement of transactions on the relevant account, he indicated that this would have been printed from the computer system.

In cross-examination he confirmed that he did not prepare the affidavit however did confirm that he was responsible for providing the relevant figures in that affidavit to the solicitors preparing the affidavit. He indicated that he was the file manager and it was his responsibility to gather the information and he believed that the figures in his affidavit were correct. He confirmed that interest would be included on a quarterly basis in the statement however is actually calculated on a daily basis. He further confirmed that he didn't monitor the computer system and assumed it was correct.

Daniel Cashman

13. Mr Cashman confirmed that he has been a solicitor for twenty-three years and has acted for NAMA in respect of the instant loan assets acquired by NAMA from the Bank of Ireland. He confirmed he represented NAMA in the proposed sale in 2013 and confirmed that the completion of the transaction occurred on 22 January 2013. He held the original loan assets sale deed on file. He believed that as there were numerous iterations of the document before completion and this would explain the error of recording the transfer document as being 22 January 2012. He confirmed that the deposits of €200,000 was lodged by Mr Kelly Solicitor to NAMA in October 2012 and the balance of the purchase monies of €1.8m was paid on 22 January 2013.

In cross-examination he confirmed that he did not have attendance notes on meetings with Mr Kelly solicitor on behalf of the plaintiff who he dealt with throughout the transaction. He confirmed that it was for NAMA to vet purchasers and parties would be served with a letter requiring confirmation that they were not connected to the original borrowers which letter would have been directed to the

instant plaintiff. He stated that it was always indicated that there would be a corporate purchaser and also confirmed the confidentiality requirement of NAMA as contained in a confidentiality agreement of 30 May 2012. The deposit payment of €200,000 was a show of good faith. He was not aware of any money going back to Mr McDonagh and the process of agreeing a price was not known to him. He confirmed that of the managers dealing with the transaction Suzanne Tyrrell and Michael Broderick were two of same.

Thomas Kelly

14. Mr Kelly confirmed that he is a solicitor and acted in the purchase from NAMA in 2012/2013 on behalf of the purchaser. He confirmed that the sale closed on 22 January 2013 at Beauchamps Solicitors. He confirmed that on closing he received a list of documents and those documents including:-

(1) the facility letter of 5 September 2007;

(2) the original mortgages executed in favour of Bank of Ireland by the defendants dated 7 December 2007 and 20 February 2009;

(3) copies of the various Family Home Protection Act declarations the original in his view being with the Property Registration Authority;

(4) copies of certificates of title, the original presumably being with the bank

(5) together with the number of valuations.

On cross-examination he confirmed that Mr Pat McDonagh Principal of the plaintiff was negotiating with NAMA and was also in contact with a number of the borrowers. On 22 August 2012 he received payment from three of the five borrowers however as no agreement was in place at that time monies were placed on deposit

account. He confirmed that these monies were from the Stockholm Fund and further confirmed that the deposit of €200,000 paid to NAMA in October 2012 was sourced from Supermacs. The witness dealt with Michael Broderick of NAMA and found him to be very straightforward and did not know that Mr Broderick was apparently a next-door neighbour of Mr Gilhooly. The witness confirmed that the monies from the Stockholm Fund were held until completion of the sale with NAMA. He confirmed that during the course of the proceedings he was obliged to swear a supplemental affidavit of discovery as initially he did not realise the level of detail required. The witness confirmed that the plaintiff company was formed on 22 August 2012. The witness confirmed that the formula of the deal with the three defendants was in existence prior to 22 January 2013 and in response to queries relative to letters dated 30 January 2013 signed by Mr Gilhooly and Mr O'Brien addressed to Soft Drive Limited (as to the settlement between the plaintiff and the said defendants) the witness identified that these letters were not executed by the plaintiff and that he was unhappy with the content of same as he wished the relevant letters to confirm that same was strictly without prejudice to the right of the plaintiff to pursue all other parties to the loan agreement in respect of the full balance due on foot of the loan agreements.

John Kelly

15. John Kelly, the defendant herein gave evidence that he was an auctioneer and estate agent practising in Athenry for approximately twenty-four years. However, because of business difficulties was obliged to close his business in December 2008. The witness went through the background of meeting with the various partners' to the partnership agreements which commenced in 2003. He indicated that Mr O'Hara had

been his solicitor on a number of occasions and that he negotiated land deals for the partnership. He gave evidence to the effect that the bank was happy to facilitate the partnership at all times and identified various facility letters. Insofar as the 2009 facility letter was concerned he indicated that he did not sign that as he was advised not to sign same given that the property crash had occurred by then. The witness gave evidence that prior to February 2011 the bank had threatened proceedings against the partners who worked to attempt to enter a resolution with the bank by seeking funds elsewhere. The funds which might have been available comprised the sum of €2.25m and this was offered in full and final settlement of the bank's entitlement under the relevant loan account. This offer was rejected within approximately two weeks and subsequently all monies were called in.

The witness had dealings with Mr Broderick in NAMA including a meeting where the witness was accompanied by Mr O'Donnell, his solicitor. He indicated that he produced a business plan and a statement of affairs and was surprised that NAMA subsequently sold the loan. Furthermore, there was confusion as to the identity of the purchaser and it was only in November 2013, in court, that he discovered some of the settlement terms with three of the five defendants.

The witness identified a copy of a letter from the relevant three defendants who wrote to the Bank of Ireland in respect of encashing the Stockholm Fund. The witness complained that a portion of the settlement as between the three defendants and the plaintiff incorporated a transfer of unencumbered partnership assets now worth €130,000 which the partners were not entitled to do under the partnership arrangement between the parties.

He was distressed at the drip-feed of information and felt that there were other agendas at play in relation to the entirety of the transaction from NAMA to the plaintiff.

In cross-examination the witness accepted that he signed all the facility letters save the facility of 2009. He confirmed that funds were drawn down to the extent mentioned in the facility letter of 5 September 2007 and that that facility incorporated an increase of €600,000 over what had previously been made available. He accepted that there was default in payment, that there was a demand of 5 January 2011 sent to him and he also accepted that the sum in the demand was a correct statement of the due amount. He confirmed he did not respond to the letter of demand.

Issues

1. Amendment

16.

(a) During the course of evidence and prior to the last witness of the plaintiff giving evidence counsel on behalf of the defendant indicated that he wished to amend the defence and counterclaim to incorporate a claim that by reason of the settlement with three of the five defendants the within defendant was released from his obligation either under the law as to the release of sureties or under the Civil Liability Act.

(b) There was no formal application before the court nor an affidavit. Previously counsel on behalf of Mr O'Hara had applied to Judge Meenan to amend his defence and counterclaim in a similar fashion however this application was

refused. The application on behalf of Mr O'Hara was renewed before this Court on the opening day of the trial and was again refused on the basis of the lateness of the application, the fact that this Court is not an appellant court to any order Mr Justice Meenan might make and the fact that the within matter was being dealt with on a case management basis without any indication of such an amendment application previously.

(c) Insofar as the within defendant is concerned given that Mr O'Hara was refused his application not withstanding that he did have documents in writing in accordance with the rules of court whereas the defendant did not, this Court made a ruling refusing the defendants application.

(d) The basis of the application stems from the aforesaid two letters of Mr O'Brien and Mr Gilhooly addressed to Soft Drive Limited concerning the settlement subsequently achieved between the plaintiff and the relevant three defendants. In this regard the letters relied upon as aforesaid could not avail the defendant for the following reasons: -

(1) the defendant was a borrower to the bank assuming joint and several liability with his partners and any surety or guarantee status may well arise as between the partners but did not arise as between one or more of the partners and the bank;

(2) the two letters of 30 January 2013 were addressed to Soft Drive Limited who did not acquire the loans from NAMA;

(3) the within plaintiff did not sign those letters and therefore is not bound by same;

(4) the content of the letters are such that it is clear that same comprise an offer of settlement as opposed to the terms of settlement insofar as in

each letter the second paragraph states "…I make the following proposals in settlement of that liability".

2. Date of Transfer

17. The evidence before this Court of Cathal De Barra, Daniel Cashman and Thomas Kelly, all solicitors, as to the date of transfer is relevant. S.90(1) of the 2009 Act provides that service of an acquisition schedule on a participating institution in accordance with ss. 87 or 89 operates by virtue of the Act to effect the acquisition of each bank asset specified in the acquisitions schedule by NAMA group entity. The security documents mentioned in the schedule were the deed of charge of 20 February 2009 and the deed of mortgage and charge of 7 December 2007 aforesaid in respect of the various folios mentioned in the second schedule to the said document.

By loan sale deed of January 2013 NALML agreed to sell to the instant plaintiff for the consideration of €2m, all right title interest and benefit past present and future under the loan assets, financial documents and related security in relation to *inter alia* the letter of offer dated 5 September 2007 with the benefit of the deed of charges of 20 February 2009 (which is the Athenry property) and the deed of mortgage and charge of 7 December 2007 (various properties acquired by the partners or one or more of them since the first facility letter with the Bank of Ireland). In addition, the parties entered into a transfer of the transferor's right title and interest in the security documents subject to the proviso for re-entry.

Although the transfer document contains a date of "22^{n} January, 2012" I am satisfied for the following reasons that the document of transfer was concluded on 22 January 2013:

(1) In the habendum of the transfer the loan sale deed was referred to as being of "even date";

(2) the habendum incorporates a receipt of the purchase monies;

(3) the evidence of Mr Cashman solicitor acting on behalf of NAMA in the relevant transaction is uncontroverted and was to the effect that a deposit sum was paid in October 2012 in the sum of €200,000 and the balance of €1.8m was paid on 22 January 2013;

(4) Thomas Kelly solicitor acting on behalf of the instant plaintiff gave uncontroverted evidence to the effect that €200,000 was paid by way of a show of good faith to NAMA on 2 October 2012 and he further confirmed that the sale closed on 22 January 2013 at Beauchamps office;

3. Dealings between the Plaintiff and the Three Defendants

18. Insofar as concerns the copy letter adduced into evidence by the defendant during the course of his evidence, written by the three defendants to the Bank of Ireland, concerning the Stockholm investment, such a letter is addressed to the Bank of Ireland and received by the bank on 11 March 2011. Such letter was in advance of the loans of the defendants being acquired by NAMA in October 2011 therefore does not avail the defendant in his argument as to agendas at play between the three defendants and the within plaintiff.

19. The defendant has argued that there was a breach of the confidentiality agreement of 30 May 2012. This is not something that is pleaded by the defence and

in any event even assuming that there has been a breach of the confidentiality agreement nevertheless that is a matter as between the within plaintiff and NAMA rather than something the defendant can rely on.

4. Defence and Counterclaim

20. Notwithstanding the defence there was no evidence led nor indeed submission made as to: -

(1) the asserted transfer of the relevant charges by Bank of Ireland to the Central Bank on or about 15th February, 2008;

(2) the asserted common and/or mutual and/or unilateral mistake as to the loans being effectively non-recourse loans;

(3) the asserted recission of any agreement by the defendant

(4) any alleged loss or damage by reason of a breach of the asserted express and/or implied terms of the agreement contended for in the defendant's defence and counterclaim; or

(5) the basis for the plea that the defence was gravely prejudiced by reason of delay.

5. Extent of Indebtedness

21. It is argued by the defendant that he has not been afforded any allowance in respect of the additional security offered by two of the three settling defendants. Further, the defendant believes that on a sale of the secured property and this additional property the full indebtedness claimed in these proceedings would be

discharged and would produce excess funds to be distributed amongst the partners. There is no evidence to this effect. The sum now being claimed by the plaintiff is the figure of €11,407,826.90 which represents the sum in the pleadings less a figure of €309,831.00 for monies already received from the three defendants together with an allowance in respect of €56,153.00 for rent received by the plaintiff from the secured property since 2013.

I am satisfied that notwithstanding the potential for recovery of some or all of the outstanding indebtedness from the secured and/or additional property agreed to be made available to the plaintiff this does not preclude the plaintiff from seeking judgment of a sum due and owing by the defendant on foot of the loan account based upon his joint and several liability, provided the defendant has been furnished with an allowance of all sums actually received by the plaintiff either from the other partners or from the income yield from the relevant lands. This accounting has been credited to the amount outstanding. It is within the privilege of the plaintiff to seek judgment in respect of one or more of the defendants with whom they had not already entered into a compromise, notwithstanding they may ultimately in due course secure repayment of such indebtedness by a realisation of secured assets. It would be post such realisation of such secured assets that the defendant might in due course have reduced liability to the plaintiff.

6. Condition Precedent

22. Insofar as conditions precedent are concerned as aforesaid there is no such term in the facility letter of 5 September 2007. Furthermore, there is no evidence of the defendant relying upon any prior valuation requirement in earlier facility letters.

The within matter is not at all akin to the circumstances which arose in the matter of *IBRC v Cambourne Investments Limited Incorporated* [2014] 4 IR 54 where Charleton J in that matter was satisfied that the condition precedent of securing valuations prior to draw down was not for the sole benefit of the bank given the terms of same, namely, the parties had agreed that the valuation should be a particular minimum, which it was not, and also the conditions were such that the loan to value ratio was to remain at 80% whereas the valuations placed the loan to value ratio of over 120%. Furthermore, as was observed by Charleton J the lack of compliance with the condition precedent was not such as to avoid the indebtedness which would be due and owing on foot of a simple contract.

7. Mr O'Donovan

23. The defendant complains as to the nature of the evidence adduced by Mr O'Donovan, former Bank of Ireland official. I do not accept that there is any difficulty with the nature of the evidence adduced by Mr O'Donovan in or about sworn confirmation of the matters contained in his prior affidavit of 24 August, 2011. In this regard the plaintiff relies on the textbook of McGrath, Evidence, 3rd Edition 2020, Chapter 3 as to refreshing memory in like circumstances to that of Mr O'Donovan's evidence. I am satisfied that the content of the affidavit of 24 August, 2011 was made or verified by Mr O'Donovan contemporaneously with the perusal of the various bank records by Mr O'Donovan. In this regard the comments made by McGrath at para. 3-181 are particularly apt: -

> "It is evident, therefore, that there is no requirement that the witness have a recollection of the transaction or event independently of the document and if

> 'the witness can say that, from seeing his own writing, he is sure of the facts stated therein, such statement by him is admissible in evidence of the fact'".
>
> This category of 'past recollection recorded' effectively constitutes an exception to the hearsay rule. The witness, by swearing to the accuracy of the written document which he or she uses to refreshes his or her memory, invests the out of court statement with sufficient reliability to justify its reception in evidence".

I am satisfied in those circumstances that the evidence of Mr O'Donovan was sufficient to establish the sequence of loan facilities, the transfer of the loan account into the five names of the partners (notwithstanding that the initial loan facility of December 2015 was in respect of four of the five partners) and the statement of account identified at exhibit "I" in the affidavit of Mr O'Donovan.

24. In addition to the foregoing the following matters support the indebtedness of the within defendant independently of his oral testimony to the court namely: -

(a) by virtue of the evidence of Mr Melvin Smith there was clearly identified a substantial course of dealings between the parties supportive of the fact that the facility letter of 5 September 2007 was entered into and monies advanced on foot thereof;

(b) the letter of demand of 5 January 2011 was dispatched to the defendant without response and this would amount to an admission against interest as was referred to by Charleton J in *Ulster Bank v O'Brien* [2015] 2 IR 656;

(c) the documents exhibited in the affidavit of Mr O'Donovan and the nature of the evidence he has afforded to this Court carry indications of reliability;

(d) Mr O'Donovan's testimony was in relation to evidence of the bank's records and same provide *prima facie* evidence of liability.

(e) Given the nature of the evidence under cross-examination of the defendant in respect of the facility letters, the default in payment, the outstanding balance and receipt of the letter of demand of 5 January 2011, together with the failure of the defendant in evidence to adduce any basis why the plaintiff should not be entitled to the benefit of the provisions of s.14 of the Civil Law and Criminal Law Miscellaneous Provisions Act 2021, the Plaintiff is also entitled to rely on Chapter 3 thereof and this Court should use its discretion in favour of admitting the evidence of the Bank of Ireland contained in the affidavit of 24 March 2011 of Mr O'Donovan and exhibits therein compiled in the ordinary course of business.

25. In all of the circumstances I am satisfied that the plaintiff has manifestly established the indebtedness of the defendant to the plaintiff, the history and background giving rise to such indebtedness, the obligation of the defendant as a joint and several borrower, the relevant outstanding balance, the default in payment of interest and the demand of the defendant of 5 January 2011.

Decision

26. In the events therefore I am satisfied that the plaintiff is entitled to judgment as against the defendant in the sum of €11,407,826.90.

27. Having heard the parties on the issue of costs (when the defendant sought to avoid costs in reliance on a late offer of settlement (September 2021) and assertion that the plaintiff pursued the defendant with vigour), an order for costs to be adjudicated on in default of agreement in favour of the plaintiff is appropriate.

28. The orders to be made will be:

(a) Judgment in favour of the Plaintiff against the Defendant in the sum of €11,407,826.09.

(b) Costs in favour of the plaintiff to be adjudicated upon in default of agreement.