THE HIGH COURT

[2023] IEHC 405

[2021 25 S]

BETWEEN

CABOT FINANCIAL (IRELAND) LIMITED

PLAINTIFF

AND

JOHN HAMILL AND BRIAN HAMILL

DEFENDANTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 12th day of July 2023

Introduction

1. These proceedings arise out of loan facilities entered into, in 2007, between the Defendants and ACC plc.

2. The Plaintiff issued a summary summons on 15 January 2021 seeking judgment in the sum of €899,830.84. The said sum was pleaded to be the total due and owing after all just credits and allowances and I will presently look at the contents of the summary summons in greater detail. The claim, as pleaded at para. 16 of the summary summons, comprised the following:

Principal	Interest	Surcharge	Adjustments	Total
€495,807.03	€357,815.50	€53,461.70	-(€7,253.48)	€899,830.84

3. The Defendants do not dispute:-

(i) entering the loan facilities in question;
(ii) agreeing to the terms governing same;
(iii) drawing down the relevant monies;
(iv) default in respect of repayment;
(v) demand for repayment having been served on them; and
(vi) that no payment has been made since demand.

4. An appearance was entered on behalf of the Defendants on 4 February 2021.

5. On 4 June 2021, the Plaintiff issued a motion seeking liberty to enter final judgment against the Defendants.

Applicable principles

6. The principles which guide this Court's approach to a summary judgment application are well known and it is sufficient for present purposes to quote from para. 9 of Mr. Justice McKechnie's oft–cited decision in *Harrisrange Limited v. Duncan* [2003] 4 IR 1, as follows:-

> *"(i) The power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) In deciding upon this issue the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
>
> *(iii) In so doing the Court should assess not only the Defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the Plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
>
> *(iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) Where however, there are issues of fact which, in themselves are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues;*
>
> *(vii) The test to be applied, as now formulated is whether the Defendant has satisfied the Court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the Defendant says credible?', - which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
>
> *(viii) This test is not the same as and should be not elevated into a threshold of a Defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) Leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the Defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be*".

7. Commenting on the relevant threshold, Murray J. in the Court of Appeal's 6 October 2022 decision in *Feniton Property Finance DAC & Anor v. McCool* [2022] IECA 217 stated (at para. 11):-

> "*11. At the same time, while the court must be cautious in granting summary judgment, and while the requirement that a Defendant establish a fair and reasonable probability of*

the Defendant having a defence is a relatively low threshold, it is a threshold: it is neither in the public interest nor in the interests of the parties that straightforward claims for a debt or liquidated demands should require to be determined by plenary hearing, with the additional delay and cost that such a hearing involves and the additional burden thereby placed on the resources of the courts (see Promontoria (Aran) Ltd. v. Burns [2020] IECA 87 (' Burns' at para. 4). The Defendant must, accordingly, lay a basis on which the court can conclude that there is in truth an issue to be tried, and that that issue is neither simple nor capable of being easily determined (see Prendergast v. Biddle, Unreported, Supreme Court, 31 July 1957)".

Affidavits

8. The Plaintiff's application was grounded on an affidavit sworn on 2 June 2021 by Mr. Tom Dillon, a director of the Plaintiff. A replying affidavit was sworn by the Second-Named Defendant, on behalf of both Defendants, on 2 December 2021. A supplemental affidavit was sworn by Mr. Dillon on 25 March 2022. In circumstances which I will presently refer to, Mr. Dillon swore a second supplemental affidavit on 27 June 2023 and, at the conclusion of the hearing which took place on 29 June 2023, I accepted a copy of same *de bene esse*.

9. It is fair to say that, in opposition to the Plaintiff's application, the Defendants assert the following:-

(i) insufficient evidence of a transfer of the relevant facilities to the Plaintiff;

(ii) a failure to comply with s. 28 (6) of the Supreme Court of Judicature (Ireland) Act 1877 ("the 1877 Act"), in particular, an alleged failure of the assignor to notify the Defendants of the transfer;

(iii) that a statement of account exhibited by the Plaintiff cannot be considered reliable;

(iv) the Defendants also contend (with reliance on *Sheehan v. Breccia* [2018] IECA 286 and *Flynn v. Breccia* [2018] IECA 273) that surcharges comprising part of the claim constitute a penalty and submit that for the relevant statement of account to be accurate, the Plaintiff would need to *inter alia* remove any surcharges and/or penalties over the term of the loan (see para. 2.17 of the Defendant's written submissions).

Principal sum only

10. At the outset of the hearing, counsel for the Plaintiff indicated that, in light of the issue taken with surcharge interest, the Plaintiff was seeking summary judgment *only* in respect of the *principal sum* of €495,807.03 and consented to its claim with respect to interest and surcharge interest being adjourned to plenary hearing.

11. The Defendants remained opposed to summary judgment in respect of *any* element of the claim, contending that a plenary hearing was required in the interests of justice.

Submissions

12. Before proceeding further, I want to express my thanks to Ms. McGurk BL and to Mr. Rowan BL, who made submissions on behalf of the Plaintiff and Defendants, respectively. I have carefully considered the oral submissions made with sophistication and clarity during the hearing, as well as the detailed written submissions, dated 20 and 21 June 2023, respectively. These were of considerable assistance in determining the matter.

Summary summons – 15 January 2021

13. The summary summons pleads, inter alia, that the relevant facility letter is dated 08 March 2007 ("the facility") and that it was made between ACC Bank plc ("ACC") of the first part and the Defendants of the second part, by which the Defendants agreed to borrow €1,550,00.00. The purpose of the facility is described, and it is pleaded that the principal sum was drawn down to the Defendant's loan account on 21 May 2007.

14. From paras. 7 to 9, it is pleaded that ACC re–registered as a private company, becoming ACC Bank Limited, as of 23 June 2014, and that, on 27 June 2014, its name changed to ACC Loan Management Limited. It is further pleaded that on 09 August 2016, pursuant to an ordinary resolution dated 13 July 2016, ACC Loan Management Limited converted to a designated activity company and, thereafter, was ACC Loan Management DAC ("ACC DAC").

15. Paras. 10 to 12 of the summary summons contain pleas with respect to the transfer of the facility. It is pleaded inter alia that, by mortgage sale deed, dated 31 October 2018, and Irish law deed of transfer, dated 17 December 2018, ACC DAC, as "seller", unconditionally transferred and assured all of its rights, title, interest and benefits (past, present and future) in relevant mortgage assets, loans and finance documents, including the right to demand and recover monies payable to ACC DAC, to Coöperatieve Rabo Bank U.A. ("Rabo U.A." or "Rabo Bank"), as "buyer". It is pleaded that the underlying loans included the facility bearing reference number 10041469.

16. It is further pleaded that by global deed of transfer, dated 5 July 2019, between Rabo Bank, as "seller" and the Plaintiff as "buyer" (the "GDT") Rabo Bank absolutely and unconditionally assigned and/or transferred to the Plaintiff all of its rights, title, interests, benefits and obligations (past, present and future) to or in connection with the underlying loans and each of the finance documents. It is also pleaded that the underlying loans were scheduled to the GDT and include the facility bearing reference number 10041469.

17. It is pleaded at para. 12 that, on 15 July 2019, the Plaintiff wrote to the Defendants advising of the transfer of the facility to the Plaintiff.

18. From paras. 13 to 16 it is pleaded inter alia that, by letter dated 16 October 2020, the Plaintiff wrote to the Defendants enclosing a copy of the Defendant's statement of account relating to the facility and setting out particulars of the debt due.

19. It is further pleaded that the Plaintiff's solicitors wrote to the Defendants, on 23 October 2020, demanding payment of the outstanding debt within seven days and that the Defendants have failed to make any payments to the Plaintiff on foot of the said demand.

Grounding affidavit of Mr. Tom Dillon – 2 June 2021

20. Mr. Dillon avers that he is a director of the Plaintiff and duly authorised to swear his affidavit on behalf of the Plaintiff. As to his source of knowledge he makes the following averment at para. 2:-

> "*I make this affidavit from an examination of the books, records and accounts of the Plaintiff company, and such books, records and accounts include information compiled by the Plaintiff's predecessors in title, Coöperatieve Rabo Bank U.A. (hereinafter 'Rabo UA') and ACC Loan Management DAC (hereinafter 'ACC DAC') <u>within the ordinary course of business</u>; and where so compiled by the Plaintiff's predecessors in title, were supplied to, and received by, the Plaintiff company, <u>within the ordinary course of its business</u>. I also make this affidavit from facts within my own knowledge, save where otherwise appears and where so otherwise appearing, I believe the same to be true*". (emphasis added)

21. At this juncture, it is appropriate to note that Chapter 3 of the Civil Law and Criminal Law (Miscellaneous Provisions Act) 2020 ("the 2020 Act") concerns "*Business records and other documents in civil proceedings*". Section 13 provides that, subject to the provisions in Chapter 3:-

> ". . . *in civil proceedings any record in document form compiled <u>in the ordinary course of business</u> shall be presumed to be admissible as evidence of the truth of the facts or facts asserted in such a document…"* (emphasis added)

22. Section 14 of Chapter 3 of the 2020 Act begins in the following terms: -

> "*Admissibility of business records: general*
>
> *14. (1) Subject to this Chapter, information contained in a document shall be admissible in any civil proceedings as evidence of any fact in the document of which direct oral evidence would be admissible if the information—*
>
> > *(a) was compiled <u>in the ordinary course of a business</u>,*
> >
> > *(b) was supplied by a person (whether or not he or she so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and*
> >
> > *(c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned. . ..".*

23. Returning to Mr. Dillon's affidavit grounding the application, he avers at para. 6 that, pursuant to the facility, ACC agreed to lend and the Defendants agreed to borrow €1,550,000.00, and he exhibits a copy of same.

24. The facility letter details, inter alia, the amount; purpose; term; security; interest; repayment; special conditions; warranties and representations; conditions precedent, drawdown; and general

conditions. It was signed on behalf of the lender, and the final page contains the signatures of the Defendants (as borrower), pursuant to which they accepted the facility on the terms specified therein, which incorporate the lender's general terms and conditions applicable to commercial facilities, as set out in a January 2005 booklet, a copy of which was enclosed.

25. The aforesaid general terms and conditions are also exhibited by Mr. Dillon. Under the heading "*Assignment*", clause 4.22.3 of the said general terms and conditions provides:-

> "*4.22.3 The Bank may (without the need for any further consent from or notice to the Borrower) assign, transfer, mortgage, charge or otherwise grant interests in or dispose of the whole or any part of its rights, benefits and obligations in respect of a Facility, and all security therefore*".

26. The Defendants do not dispute that this condition governed their facility. At para. 8, Mr. Dillon makes the following averment on behalf of the Plaintiff: -

> "*8. The principal sum was drawn down to the Defendant's loan account on 21 May 2007 and I beg to refer to a copy of the Defendant's statement of account evidencing the drawdown of the monies (as collated and recorded by an officer of the Plaintiff upon receipt of a record of the transactional history of the Facility as supplied and provided by Rabo UA following the transfer of the facility to the Plaintiff)…*".

27. In the Defendant's replying affidavit, issue was taken with the statement exhibited by Mr. Dillon. The Defendants contend that they do not *"understand"* the basis upon which the Plaintiff relies on the said statement. With respect, this seems to me to be perfectly clear, having regard to the averments made by Mr. Dillon at paras. 2 and 8, seen in light of the provisions of the 2020 Act, to which I have referred.

28. At para. 4(a) Mr. Hamill goes on to make the following critique of the statement exhibited on behalf of the Plaintiff:-

> "*Specifically, the said documents are clearly not account statements of either ACC Bank plc/ACC Loan Management DAC and/or Coöperatieve Rabo Bank U.A., and insofar as a record of the transactional history of the facility was supplied to the Plaintiff by any predecessor in title as averred by Mr. Dillon at para. 8 of his affidavit, it is not understood why the actual business records allegedly provided to the Plaintiff are not being relied upon…*".

29. In essence, the Defendants say that they do not understand why ACC or Rabo Bank statements are not exhibited. Several comments seem appropriate: (i) the Defendants do not assert that the statements exhibited do not comprise business records compiled in the ordinary course of business; (ii) they do not take issue with Mr. Dillon's source of knowledge; (iii) no evidence is proffered to the effect that the statements are other than entirely accurate; (iv) the Defendants do not even assert that the statements are inaccurate in any respect; and (v) there is simply no evidence before the court which runs contrary to the explicit averments made by Mr. Dillon at paras. 2 and 8 of the grounding affidavit.

30. The evidence before the court allows for a finding that the Plaintiff has reproduced, on the Plaintiff's headed paper, a statement of account reflecting the record of the transactional history of the facility supplied to the Plaintiff by its predecessor in title, Rabo Bank. There is no evidence of a failure to comply with the 2020 Act and I can identify no issue of fact or law arising from the 2020 Act which might possibly give rise to a *bona fide* defence.

Discovery

31. During the hearing, a submission was made on behalf of the Defendants, to the effect that discovery was required by the Defendants in order that they could ascertain precisely what documentation or information formed the basis for the statement of account exhibited by the Plaintiff at para. 8 of the grounding affidavit. It was submitted that this was essential and, thus, a plenary hearing was required, in order that the Defendants could understand whether, for example, the Plaintiff's predecessor in title had furnished original statements to the Plaintiff, as opposed to, for example, providing the Plaintiff with access to a financial system of record keeping. With respect, I disagree. In my view, nothing is raised in the Defendant's replying affidavit and no issue has been canvassed in submissions made on behalf of the Defendants which requires determination at a plenary hearing, or discovery in that context.

32. There is no evidence before the court to the effect that the principal sum sought by way of summary judgment is other than correct. This is not a situation where, for example, a Defendant avers that there has been a miscalculation of a sum owing. Still less is it a situation where, for example, a forensic accountant has proffered evidence on behalf of a Defendant in support of such a contention.

33. Whilst it is fair to say that the Defendants have put the Plaintiff 'on full proof' of their claim, nowhere have the Defendants asserted that the sum of €495,807.03 is inaccurate, as regards the principal sum owing. By contrast, at para. 20, Mr. Dillon explicitly avers that, as of the date of the swearing of his affidavit, the Defendants are indebted to the Plaintiff in respect of €495,807.03 (in respect of principal).

34. In circumstances where the Defendants do not claim that, as a matter of fact, the principal sum has been mis-calculated, it seems to me that a request for discovery amounts to a desire to embark on a classic "fishing expedition" (i.e. a search for material in the hope of being able to raise allegations of fact, as opposed to eliciting evidence to support allegations of fact, already made).

35. Continuing with an examination of the grounding affidavit, paras. 9 to 11, inclusive, concern the re-registration and subsequent change of name of the original lender (ultimately known as ACC DAC).

36. Para. 12 contains averments which reflect the pleas made in para. 10 of the summary summons. These pleas contain the transfer of the facility from ACC DAC to Rabo Bank. At the hearing, the Defendants did not appear to take any issue with respect to the validity of that transfer. The

averments made at para. 12 are uncontroverted and, in addition, Mr. Dillon has exhibited copies of the transfer documents in the form of a mortgage sale deed, dated 31 October 2018, and Irish law deed of transfer, dated 17 November 2019, the contents of which reflect the averments made. In short, the evidence before the court establishes that Rabo Bank acquired, from ACC DAC, the *entire* interest in the facility.

37. At para. 13, Mr. Dillon proceeds to make the following averments:-

> "*13. Thereafter, by Global Deed of Transfer ("GDT"), dated 5 July 2019, between Rabo U.A. as "seller" and the Plaintiff as "buyer", Rabo U.A. absolutely and unconditionally assigned and/or transferred to the Plaintiff all its rights, title, interests, benefits and obligations (past, present and future) to, or in connection with the said "assets", "underlying loans" and "finance documents" subject to the subsisting rights of redemption of the borrowers and any obligor. The said "assets", "underlying loans" and "finance documents" was scheduled to the said GDT and include the Facility bearing reference no. 10041469*".

38. Mr. Dillon has exhibited the said GDT, in which Rabo U.A. and the Plaintiff are the "seller" and "buyer" respectively. The operative part of the GDT begins in the following terms:-

> "*NOW THIS DEED WITNESSES as follows:*
>
> *1. In consideration of the payment by the buyer of the Purchase Price (as same may be adjusted in accordance with the PAD, the receipt of which is hereby acknowledged) the seller hereby grants, conveys, assigns, transfers and assures unto the Buyer, subject to the subsisting rights of redemption of the Borrowers and any obligor and to the extent capable of assignment, all of its right, title, interest, benefit and obligation (past, present and future) in and under each Underlying Loan and each of the Finance Documents and each of the Seller's right, title and interest in and to the Ancillary Rights and Claims and including, without limitation…*".

39. Schedule 1 to the GDT includes inter alia the following unredacted entries:

Connection ID	**Facility ID (user ref)**	**Facility ID (account number)**	**Borrower First Name**	**Borrower Last Name**
90472	10041469	10060648	John	Hamill
90472	10041469	10060648	Brian	Hamill

40. It is fair to say that the Defendants have not raised any specific issue with respect to the validity of the GDT. In essence, they put the Plaintiff 'on full proof' of its acquisition of the facility and contend that the Plaintiff has not met the requisite standard (which is, of course, to prove same on the balance of probabilities). For the reasons set out in this decision, I disagree with the contention that the Plaintiff has not met the burden of proof.

41. To better understand the Defendants' attitude, it is appropriate to quote verbatim para. 3 of Mr. Hamill's replying affidavit:-

"*At the outset I say that the Plaintiff herein is put on full proof of its alleged acquisition of the loan facility, being a letter of loan sanction and agreement date 8 March 2007, underpinning the Proceedings and that there has been a lawful and valid transmission of the pleaded facility and a chose of action to the Plaintiff. The Defendants' position in this regard has particular cognisance of what I say and am advised is the fact that the affidavit of Mr. Tom Dillon, sworn on 2 June 2021 on behalf of the Plaintiff in support of the reliefs sought, does not establish that the Plaintiff has lawfully acquired the pleaded facility and/or demonstrate compliance with the provisions of s.28 (6) Supreme Court of Judicature (Ireland) 1877 in respect of the alleged loan sales…*".

42. In response to the foregoing, Mr. Dillon swore a supplemental affidavit on 25 March 2022 with respect to the transfer of the facility from ACC DAC to Rabo U.A. and from the latter to the Plaintiff:-

"***Transfer of the Facility***

*6. The particulars of the Plaintiff's acquisition of the letter of Loan Sanction and Agreement dated 8 March 2007 (hereinafter "**the Facility**") are set out in the grounding affidavit.*

*7. The Mortgage Sale Deed dated 31 October 2018 (hereinafter "**the Mortgage Sale Deed**" includes the number "10041469" as one of the underlying loans forming part of the transfer. Schedule 1 to the Mortgage Sale Deed outlines, under the heading "**Underlying Loans**", that all loans are listed by account numbers. In this regard, I beg to refer to Exhibit "TD 5" to the grounding affidavit.*

8. The number 10041469 is the Defendant's account number and is the account number connected with the facility the subject of these proceedings. In this regard I beg to refer to Exhibit "TD 3" to the grounding affidavit.

*9. Clause 1.1 of the Mortgage Sale Deed defines the term '**Underlying Loans'** as follows:*

> *"**Underlying Loans** means the loans and other credit facilities advanced to the borrowers under the Underlying Loan Agreements to be purchased by [Rabo U.A.] pursuant to [the Mortgage Sale Deed] as outlined in Schedule 1…"*

10. As set out above, the facility is one of the 'Underlying Loans' included in Schedule 1 to the Mortgage Sale Deed.

*11. Recital (B) to the Irish Law Deed of Transfer dated 17 December 2018 (hereinafter "**the Deed of Transfer**") sets out the following:-*

> *"Terms defined in the Mortgage Sale Deed shall have the same meanings in this Deed, save where otherwise specified or where the context requires otherwise".*

12. Clause 1 of the Deed of Transfer goes on to provide, inter alia, as follows:-

> *"1. … [ACC DAC] as beneficial owner . . . hereby unconditionally, irrevocably and absolutely grants, conveys, assigns, transfers and assures unto [Rabo U.A.] ….all of*

their rights, title, interest and benefit (past, present and future) in and under each Mortgage Asset, Underlying Loan and each of the finance documents….

…

1.4 the right to demand, sue for, recover, receive and give receipts for all principal moneys payable or to become payable (in respect of each Mortgage Asset) the Underlying Loans and the other Finance Documents) or the unpaid part thereof and the interest. . . due or to become due thereon…."

13. I say and am advised that, by its reference to the 'Underlying Loans' and having regard to the foregoing terms, the Deed of Transfer demonstrably includes the Facility the subject of these proceedings.

14. By letters dated 17 December 2018, ACC DAC wrote to the Defendants notifying them of their intention to assign the Facility the subject matter of these proceedings to Rabo U.A. and Rabo U.A. wrote to the Defendants notifying him of the assignment and transfer of the Facility the subject matter of these proceedings. I beg to refer to a copy of those letters, on which, pinned together and marked with the letters and number "TD 1" I have signed my name prior to the swearing hereof.

15. As set out in the Grounding Affidavit, the Defendants were notified of the subsequent transfer of the Facility to the Plaintiff herein by letters dated 15 July 2019. In this regard, I beg to refer to exhibit "TD 7" to the Grounding Affidavit".

43. The letter dated 17 December 2018 is headed "Notice to Borrowers" and beings in the following terms:-

"*Dear customer,*

We give you notice that, by a Mortgage Sale Deed, we have assigned to Coöperatieve Rabo Bank U.A. (Rabo Bank) all our rights, title and interest (past, present and future) in and to any and all loan agreements with you (the Underlying Loan Agreements) and all guarantees and security granted in respect of and/or guaranteeing and/or securing the Underlying Loan Agreements (together with the Documents).

Our duties and obligations under the Documents have been assigned and/or assumed as and from 17th December, 2018 (the Transfer Date) . . ."

44. The said letter goes on to give notice that the borrower should perform the duties and obligations under the documents in favour of Rabo Bank and provides contact details. This so called "goodbye" letter was followed by a "hello" letter sent by Rabo Bank to each of the Defendants, dated 19 December 2018 entitled "RE: Important information regarding your loan agreements with ACC Loan Management DAC (Your/the Facilities)" and began as follows:-

"*Dear customer,*

ACC Loan Management DAC (ACC LM) advised you on 16th October 2018 of its intention to transfer its ownership rights, title and interest (past, present and future) of its loan portfolio,

including your Facilities, to Coöperatieve Rabo Bank U.A. (Rabo Bank), the Dutch parent company of ACC LM.

Rabo Bank now confirms that this inter–group transfer of your Facilities from ACC LM to Rabo Bank (the Transfer) completed on 17th December 2018 (the Transfer Date) and includes the transfer of any related security, guarantees and other rights (the Security) granted in respect of and/or guaranteeing your Facilities (together the Documents). Rabo Bank is licenced by the Dutch Central Bank in the Netherlands and regulated by the Central Bank of Ireland for conduct of business rules.

We attach the required formal notice of assignment to you on behalf of ACC LM…".

45. The letter went on to state that the Facilities would continue to be serviced in Ireland by Link Asset Services ("Link") on behalf of Rabo Bank and contact details were provided. The letter further stated:-

"*As previously advised a sale of your Facilities is under consideration and this continues to be the case. Should a sale be agreed, we will provide you with not less than two months advance notice before the sale completes*".

46. The 15 July 2019 correspondence comprised letters by the Plaintiff to each of the Defendants beginning in the following terms:-

"*Reference: DM / 7771241*

Original Credit Provider: ACC Bank

Outstanding account balance €904,414.40

Important information regarding your Facilities and/or guarantees

Dear Sir/Madam,

*We refer to the previous letter dated 30th April 2019 in which Coöperatieve Rabo Bank U.A. (**Rabo Bank**) informed you that it had sold all its rights, title and interest (past, present and future) in and to the underlying loan agreement(s) relating to Loan(s) (the **Underlying Loan Agreements**) and all guarantees and security granted in respect of and/or guaranteeing and/or securing the Underlying Loan Agreements (together the **Documents**) to Cabot Financial (Ireland) Limited (the **Buyer**) with effect from 5th July 2019 (the **Transfer Date**).*

What will happen after the Transfer Date

Cabot Financial (Ireland) Limited will service your loan(s) from the Transfer Date…".

47. The letter proceeded to state inter alia that all repayments should be directed to the Plaintiff and bank details were provided. The letter also stated inter alia: -

"***What you need to do next:***

We recommend that you give this matter your immediate attention and contact us on the details below to discuss your proposals…".

48. It is not suggested that the Defendants did not receive the foregoing correspondence. There is no evidence that, on receipt of same, the Defendants or either of them were unclear as to their

meaning. Neither of the Defendants have ever asserted that the facility was not included in the *Underlying Loan Agreements* or *Underlying Loans* or *Documents* as referred to in (i) the aforementioned correspondence of December 2018; (ii) the Mortgage Sale Deed dated 31 October 2018; (iii) the said correspondence of July 2019; and (iv) the GDT dated 5 July 2019.

Full suite of documents

49. Notwithstanding the fact that the validity of the transfer documents is not challenged, and the Defendants do not assert that their facility was not, in fact, transferred to the Plaintiff, and despite the evidence before the court in the form of sworn averments and exhibited documents, the Defendants submit that the Plaintiff has not met the burden of proof with respect to the transfer to it of the Defendants' facility. It is submitted that, in circumstances where the GDT provides, at para. 1: -"*in consideration of the payment by the Buyer of the Purchase Price (as same may be adjusted in accordance with the PAD)…."* additional documents exist regarding the loan transfer which have not been exhibited and terms are used in the GDT which are defined in other documents relating to the transfer. Arising from the foregoing, the Defendants make the following submission:-

> "*In circumstances where the Plaintiff is seeking summary judgment, it cannot satisfy the Court that it is entitled to summary judgment in the absence of a full suite of documents relating to the alleged transfer. Reliance cannot and should not be placed upon a document containing undefined terms which is proffered to the Court, in the absence of a document containing the definitions thereof also being provided. The failure of funds to provide such documentation has been the subject of judicial commentary in, inter alia, Farrell v. Everyday Finance (DAC) [2022] IEHC 303 and Everyday Finance DAC v. Woods [2019] IEHC 605*". (emphasis added) (para. 2.8 of the Defendant's written submissions)

50. With regard to these submissions, it bears repeating that (i) the Defendants nowhere assert that their facility has not been *acquired* by the Plaintiff; (ii) nor do they challenge the *validity* of the GDT; or (iii) proffer any evidence whatsoever which controverts the explicit averments made on behalf of the Plaintiff to the effect that there has been an absolute acquisition by it of their facility. These are not, for example, plenary proceedings where a challenge is brought in respect of the transfer; or a breach of contract is alleged by a party to the transfer; or the court is asked to determine a dispute in relation to the meaning of a term found in the transfer documentation (in which case a full suite of transfer documents, including definitions, might well be essential).

51. Having carefully considered each of the authorities to which counsel very helpfully drew the court's attention, I have not identified any principle which supports the proposition that the Plaintiff was required to exhibit *"a full suite of documents relating to"* the transfer of the facility to the Plaintiff. Bearing in mind that the Defendants were not party to the transfer documents, the burden on the Plaintiff is to prove on the balance of probabilities that Rabo U.A. acquired the entire interest in the facility from ACC DAC in 2018 and that the Plaintiff subsequently acquired that entire interest in the facility, in 2019, from Rabo U.A. The court has evidence before it comprising of (i) sworn averments in respect of the transfer to/acquisition by the Plaintiff of the entire interest in the facility; and (ii) documentation which, in objective terms, is entirely consistent with these averments. In the

absence of any evidence to the contrary, I am satisfied that the Plaintiff *has* proved the foregoing, on the balance of probabilities. A full suite of transfer–related documents was not required in order to demonstrate the fact of acquisition by the Plaintiff of the Defendants' facility.

52. In *Promontoria (Arrow) Ltd. v. Burke & Ors* [2018] IEHC 773, the Plaintiff sought summary judgment against the Defendants, who argued for a plenary hearing. The Plaintiff claimed to have acquired, from National Asset Loan Management Limited ("NALM") the loan facility and related rights which NALM had acquired from EBS Building Society ("EBS") pursuant to the National Asset Management Agency Act 2009 ("the 2009 Act"). For the reasons outlined in his 19 December 2018 judgment, Barniville J. (as he then was) concluded that the Defendants had raised an arguable case that the Plaintiff's claim was statute barred and liberty to defend, on that issue alone, was granted pursuant to O. 37, rr. 7 and 10 of the Rules of the Superior Courts ("RSC").

53. One of the four defences which the Defendants sought to raise in *Promontoria v. Burke* was that Promontoria had not put before the court sufficient evidence of its entitlement to obtain judgment on foot of the loan facility granted by EBS. In particular, the Defendants challenged the documentation exhibited on behalf of the Plaintiff, contending that there was a failure to exhibit certain of the documents in connection with the transfer of a portfolio of loans from NALM to Promontoria. The extent of redactions made to the Global Assignment Deed, in that case (various versions of which were exhibited on behalf of the Plaintiff by a Ms. Burns) was also challenged. The learned judge stated inter alia the following at para. 61:-

> "*61 . . . Following a challenge to the extent of the redactions made to the document, Ms. Burns exhibited a further redacted version to her final affidavit sworn (sworn on 7th December 2017). There were fewer redactions to the version of the Global Assignment Deed exhibited to that affidavit. Ms. Burns did not exhibit a copy of the mortgage sale deed dated 27th October 2015 between NALM and Holding. Nor did she exhibit a copy of the deed of novation dated 20th November 2015. <u>The Defendants take issue with the failure to exhibit those documents.</u>*
>
> *62. However, I am satisfied that the redacted copy of the Global Assignment Deed exhibited by Ms. Burns to her final affidavit does, adequately evidence the transfer of the Defendants" loan from NALM to Promontoria*". (emphasis added)

54. In the present case, I am satisfied on the basis of the evidence before the court that the fact of acquisition by the Plaintiff of the Defendant's facility has been established on the balance of probabilities. Just as in *Promontoria v. Burke*, it was unnecessary for the Plaintiff to exhibit a full suite of documents relating to the transfer in question, no such obligation arises in the present case. Rather, and echoing the observations by the court at para. 66 of the judgment in *Promontoria v. Burke*, it was open to the Plaintiff in the present case to exhibit a copy of the GDT in redacted form and to rely on same as *prima facie* evidence of the transfer to the Plaintiff of the Defendant's facility.

55. What can be discerned from the unredacted version of the GDT in the present case, in the context of explicit averments and the correspondence sent to the Defendants, comprises sufficient evidence to satisfy the burden of proof resting on the Plaintiff. Even if other documents in existence are related to the transfer and contain definitions of terms used in the GDT, the Defendants have never asserted that they were unclear on any terms used in any document. Nor have they pointed to any lack of clarity which might undermine what is, according to the unredacted portion of the GDT (which identifies the Defendants by name and the facility by account number), an unambiguous and absolute acquisition of rights by the Plaintiff.

56. Before leaving the decision in *Promontoria v. Burke,* it is noteworthy that the learned judge was satisfied that the Defendants had *not* established an arguable defence in relation to proof of transfer of their loan to the Plaintiff, even though Promontoria relied only on the Global Assignment Deed and had not exhibited a Loan Sale Deed. As to the relationship between the two instruments, this was explained at para. 72 as follows:-

> "*72 . . . I acknowledge that the Global Assignment Deed does make reference on a number of occasions to the Loan Sale Deed and to the fact that in the event of any inconsistency between the terms of the Global Assignment Deed and the terms of the Loan Sale Deed, the terms of the latter deed shall prevail*".

57. The foregoing fortifies me in the views expressed in this decision with respect to the Plaintiff having met the burden of proof regarding transfer to it of the Defendant's facility without being required to exhibit any further documentation related to the transfer. In the present case, the Defendants were no more entitled to insist on seeing the "*PAD*", which is referred to in para. 1 of the GDT and the Plaintiff was no more required to exhibit same to meet the burden of proof in this application, than the Plaintiff in *Promontoria v. Burke* was obliged to produce the Loan Sale Deed, in addition to the global assignment deed, despite the reference in the former to the latter, and the potential effect *of* the latter *on* the former. This, of course, reflects the fact that proof *of* transfer, on the balance of probabilities, is what the court must be satisfied of, and this does not require a granular analysis of the *terms* of the transfer.

58. In a 19 July 2019 decision by McDonald J. in *Everyday Finance DAC v. Woods & Anor* [2019] IEHC 605, the court dealt with an application that the Plaintiff produce certain documents referred to in the indorsement of claim in the relevant summary summons. Among these were a Deed of Transfer and Amended Deed of Transfer. At para. 9, the learned judge stated inter alia the following:-

> "*9 . . . In circumstances where the Plaintiff moves for judgement as successor in title to Allied Irish Banks and where the Defendants contest their title, it seems to me that it is necessary in the interests of disposing fairly of that issue that the Defendants should see the relevant parts of those deeds which evidence the transfer of their loans and security from Allied Irish Banks to the Plaintiff. However, the cases show that the Courts have consistently taken the view that it is only those provisions evidencing the assignment of the relevant loans and the security which are relevant in this context and that it is reasonable for the balance of the documents to be redacted*".

59. I am satisfied that the Defendants in the present case *have* seen unredacted parts of a deeds which evidence the transfer of their facility both from ACC DAC to Rabo U.A. and from the latter to the Plaintiff. On the particular facts before him in *Everyday Finance DAC v. Woods*, the learned judge indicated at para. 12 that the Defendants in question:-

> "*would be at a serious litigious disadvantage if they did not see the relevant parts of both deeds that evidence the assignment of their loans and security*".

60. Nothing of the sort arises here. There is no litigious disadvantage as the Defendants have had sight of deeds which, on their face, clearly transfer the facility to the Plaintiff.

61. The learned judge went on to observe in *Everyday Finance DAC v. Woods* that those parts of the relevant agreement dealing with assignment which had been produced could not be understood without the relevant definitions of the defined words used in the unredacted provisions. Thus, he took the view that the interests of justice required "*that the definitions in question should be unredacted*". The foregoing situation is wholly different to the present case where (i) the Defendants do not assert that they cannot understand the unredacted provisions of the GDT; (ii) the Defendants do not assert that the unredacted terms of the GDT can only be understood with reference to definitions found elsewhere; (iii) the unredacted portions of the GDT are capable of being understood on their face and constitute prima facie evidence of transfer to the Plaintiff; and (iv) the Defendants have not asserted that they are at any litigious disadvantage without *other* transfer–related documents (as opposed to putting the Plaintiff 'on full proof').

62. I also take the view that the Defendants' purported reliance on *O'Connor v. Promontoria (Aran) Limited & Ors; M & F Finance (Ireland) Limited v. Promontoria (Aran) Limited & Ors* [2022] IEHC 616 cannot avail them. The following passage from the decision of Roberts J. featured at the trial before me:-

> "*98. In his decision in Everyday Finance DAC v. Woods [2019] IEHC 605, McDonald J was clear that, subject to a detailed justification being given on affidavit, a party seeking inspection was entitled to see the definitions in a deed. I agree with that position.*
>
> *99. In my view, this particular case can be distinguished from those cases where the courts have dealt with matters on the basis of unredacted documents. In those latter cases <u>the scope of challenge to the documents was much narrower than in the present case and what was required to be established was the title to the loans</u> and mortgages in question. These include applications for summary judgment such as in Launceston Property Finance DAC v. Walls [2018] IEHC 610 or Promontoria (Arrow) Ltd v. Burke [2018] IEHC 773 or procedural applications for the substitution of a Plaintiff such as IBRC v. McCaughey [2014] IEHC 517. <u>In this case, a wide-ranging challenge has been advanced to the validity of the Transfer Documents. The Transfer Documents themselves are central to this issue. The redactions are extensive and done in a manner which does not permit the reader to understand, even in general terms, what is behind many of the redactions. In a dispute of this nature, this appears to create an unfairness for the Plaintiff and an unsatisfactory position for the court</u>*

> <u>who is to decide on the merits.</u> *The Plaintiff may well not succeed on the points of challenge (many of which as I have stated earlier are generalised and wide-ranging) but these should be determined by reference to the actual terms of the Transfer Documents (subject to redaction of confidential information not necessary for the determination of the Plaintiff's challenge)*". (emphasis added)

63. These proceedings are wholly unlike the case which was before Roberts J. In the present case, no challenge has been made to the validity of the GDT or, for that matter, to the validity of any other transfer–related documents. Furthermore, this is a case where the relevance of transfer documentation is to the *narrow,* albeit fundamentally important, question of title to the facility. On the basis of the evidence put before the court, the Plaintiff in the present proceedings has met the burden of proof with respect to title. There is no question of the GDT being a document which cannot be understood "*even in general terms"* in the form exhibited. Rather, it clearly evidences transfer of the facility to the Plaintiff when one has regard to (i) the ordinary meaning of unredacted wording, combined with specific reference to; (ii) the name of each Defendant and; to (iii) the account number of the facility which appear in Schedule 1 to the GTD.

64. The situation in the present case is also wholly unlike that which confronted the court in *Mars Capital Finance Ireland DAC v. Temple* [2023] IEHC 94, upon which the Defendants seek to rely. Dealing with an appeal from the Circuit Court, Simons J. considered, by way of a *de novo* hearing, the Plaintiff's application for possession of certain property pursuant to s. 62 (7) of the Registration of Title Act 1964. The Defendant resisted the application for possession on the basis that affidavit evidence did not establish that the underlying debt had been transferred to the Plaintiff by EBS. At paras. 7 and 8 of the learned judge's decision, he outlined deficiencies in the evidence before him, as a result of which he formed the view that the limited material before the court "*did not establish, even on a prima facie basis, that the relevant debt had been acquired by the Plaintiff".* The deficiencies found by the learned judge simply do not arise in the present case, where the Plaintiff has put cogent evidence comprising of (i) uncontroverted averments and (ii) documentation the terms of which are consistent with those averments which, taken together, certainly establishes, to the civil standard of proof, that it acquired the Defendants' facility.

65. Again, unlike the situation in the present case, Simons J. found, at para. 8, another potential shortcoming in the evidence before him, in circumstances where it appeared that the debt may initially have been held by *"EBS Building Society rather than by the original Plaintiff in the proceedings, namely, EBS Mortgage Finance",* and the court went on to state that: -

> "*It is not apparent from the limited affidavit evidence how the debt is said to have been transferred between these two companies*".

66. At para. 13, the learned judge stated inter alia:-

> "*. . . I have concluded that the proceedings should be adjourned to plenary hearing. This is because it is not possible, on the basis of the limited affidavit evidence currently before the court, to determine whether the moving party, Mars Capital, is the owner of the debt upon*

> *which the application for an order for possession is predicated. The evidence is, at best, ambiguous*".

67. The foregoing finding, on the very particular facts in *Mars Capital Finance*, does not assist the Defendants. Far from being ambiguous, the evidence before this Court is clear, cogent, consistent and uncontroverted as to ownership by the Plaintiff of the Defendants' facility.

<u>1877 Act</u>

68. It will be recalled that, at para. 3 of the Defendants' replying affidavit, it is asserted that the Plaintiff has not established compliance with the 1877 Act, s. 28 (6) of which provides that:-

> "*(6) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. . ."*.

69. It is fair to say that compliance with the foregoing requires the Plaintiff to prove (i) that the assignment was absolute; (ii) that it was under the hand of the assignor; and (iii) that notice was given to the Defendants. The court has ample evidence of the foregoing.

70. The final page of the 31 October 2018 mortgage sale deed (ACC DAC / Rabo Bank) which comprises Exhibit TD 5 to Mr. Dillon's 2 June 2021 affidavit shows execution by both ACC DAC and Rabo Bank. Similarly, the penultimate page of the 5 July 2019 GDT (Rabo Bank / the Plaintiff) shows execution by Rabo Bank (and the final page demonstrates execution by the Plaintiff). The terms of both deeds make clear that these were absolute assignments by ACC DAC and Rabo Bank, respectively, consistent with the explicit averments to that effect at paras. 12 and 13 of the Plaintiff's affidavit, sworn by Mr. Dillon on 2 June 2021.

71. The court also has clear evidence of notice to the Defendants. I referred to the relevant correspondence earlier in this judgment, but, for the sake of clarity, this comprises the following:-

- 17 December 2018 – notice by ACC DAC to the Defendants ('goodbye' letter);
- 19 December 2018 – notice Rabo Bank to the Defendants ('hello' letter);
- 15 July 2019 – notice by the Plaintiff to the Defendants ('hello' letter).

72. I feel bound to reject the submission made on behalf of the Defendants that it is for the *assignor* to notify the debtor of the transfer and that unless there is evidence of, in effect, a 'goodbye' letter from Rabo Bank (in addition to a 'hello' letter from the Plaintiff) this Court cannot be satisfied that the provisions of s.28 (6) of the 1877 Act have been complied with. This submission on behalf of the

Defendants is undermined by relevant authority. In *AIB Mortgage Bank v. Thompson* [2017] IEHC 515, Baker J. confirmed:-

> "*50. The 1877 Act <u>does not make provision for who is to give the notice</u> in writing of the assignment.*" (emphasis added)

73. As to the requirements of a valid notice, the learned judge stated the following in the preceding paragraph:-

> "*49. I consider that in order to be a valid notice under s. 28(6) the debtor must be given express notice in writing of an assignment of his debt to another, that other must be identified, and the notice must contain sufficient information to enable the debtor to know with reasonable certainty that the assignment did assign the debt so that he may without acting at his peril pay the debt to the identified assignee. The absence of a date is not relevant, and this must be because s.28 (6) expressly provides in its terms that the date of the notice to the debtor is the effective date of the assignment for the purposes of the assignment at law*".

74. Considered in light of the foregoing principles, I am satisfied that the notices to the Defendants (17 December 2018; 19 December 2018; and 15 July 2019) constitute valid notices under s.28 (6) of the 1877 Act.

75. In the manner examined earlier, the 2018 notices specify the effective date as being 17 December 2018, whereas the 2019 notice specifies the effective date as being 5 July 2019. I feel bound to reject the submission that, to be effective, a notice must contain a specific account number. No such requirement is explicitly provided for in legislation, nor has any principle to that effect been opened to the court. Rather, as Baker J. made clear in *AIB v. Thompson,* the point is that a debtor is given enough information to know "*with reasonable certainty"* that the assignment did take place so that it is safe for the debtor to pay the assignee identified. The notice relied upon by the Plaintiff in the present case certainly meets the foregoing standard. It seems to me that, underlying the respondents' submission is the proposition that there is a specific formula of notice which cannot be departed from. Regardless of the sophistication with which the submission is made, I feel obliged to reject it, having regard to a literal interpretation of s.28 (6) and a consideration of relevant authorities, in particular, *AIB Mortgage Bank v. Thompson*.

76. In *Promontoria (Oyster) DAC v. Tomas Lynn* [2022] IEHC 99, the Plaintiff sought to rely on a series of correspondence as meeting the requirement laid down by s.28 (6) of the 1877 Act. From para. 24, onwards, Simons J. identified certain infirmities including inter alia that the correspondence was issued neither by the assignor, nor the assignee; and the letter did not specify the date after which payments were to be made to the assignee. These infirmities do not arise in the present case.

77. At para. 26, the learned judge rejected the notion that a notice of assignment must be given separately from and in advance of a demand for payment by the assignee. The learned judge explained the rationale for this view (at para. 27) as follows:-

"27. . .. One of the principal purposes of the notice requirement is to inform a debtor that the assignee is in a position to give a good discharge for the debt. Thereafter, the debtor is obliged to make payment to the assignee (rather than the assignor) and can do so safe in the knowledge that such payments go towards reducing the debt and that the assignor no longer has any interest in the debt.

28. There is no logical reason for saying that the statutory purpose cannot be achieved by the giving of notice of the assignment as part and parcel of a comprehensive letter of demand. Put otherwise, there is no logical reason that a single document may not serve the twofold objective of giving notice of the assignment of the debt and making demand for payment. The debtor would not be in any way prejudiced by such an approach. The debtor would understand the basis upon which the assignee claims to enforce the debt, and if the debtor had any doubts in this regard, he would be entitled to satisfy himself that there has been an assignment. The most obvious method of doing this would be to seek confirmation from the assignor that the latter has no further claims in respect of the debt…".

78. It will be recalled that, in the present case, the Plaintiff wrote on 16 October 2020 specifying, inter alia (i) the facility's account number; (ii) the then–outstanding account balance; (iii) the Plaintiff's reference number; and stating inter alia (iv) "*please find attached a statement of transactions of your ACC account which was acquired by Cabot Financial (Ireland) Ltd. in July 2019".* The said letter was sent by the Plaintiff in the wake of the 15 July 2019 letter which constituted valid notice per s. 28 (6). If the absence of a reference to the 5 July means that the 16 October 2020 letter was not *further* notice complying with s.28 (6), that cannot be said of the 23 October 2020 letter of demand, which was subsequently sent to each of the Defendants by the solicitors representing the Plaintiff / assignee. For the sake of completeness, the letter of demand included inter alia the following:-

"*Our Client: Cabot Financial (Ireland) Limited*
Account name: JOHN HAMILL AND BRIAN HAMILL
Amount outstanding: <u>€899,830.84</u>
Dear sir,
We act on behalf of Cabot Financial (Ireland) Limited, ('CFI').

We have been instructed by our client, CFI, to write to you regarding a facility letter dated 8 March 2007 ("the Facility") between ACC Bank plc of the first part and John Hamill and Brian Hamill of the second part which, as you are aware from recent correspondence, has been assigned to our client.

Coöperatieve Rabo Bank U.A. ("Rabo Bank") acquired the legal and beneficial rights, title, interest and benefit of certain assets including the Facility, pursuant to the terms of the Irish Law Deed of Transfer dated 17 December 2018 between ACC Loan Management Designated Activity Company of the first part and Rabo Bank of the second part. CFI acquired the legal and beneficial ownership of certain debts and their related rights pursuant to the terms of a

Global Deed of Transfer dated 5 July 2019 between Rabo Bank of the first part and CFI of the second part.

We are instructed that the sum of €899,830.84 remains unpaid in respect of the facility, full details of which have previously been provided to you. We hereby demand payment of the full sum to be made to this firm within seven days of this letter, failing which, we are instructed to issue legal proceedings for the recovery of same, without further notice. We will rely on this letter in applying to court to seek our costs for this action should same be deemed necessary.

The enforcement options available to our client include but are not limited to…".

79. Guided by the principles which emerge from *Promontoria v. Lynn,* I am satisfied that this 23 October 2020 letter comprises *both* (i) a demand for payment to the assignee, i.e., the Plaintiff; and (ii) notice complying with s.28 (6). In short, the Plaintiff has certainly demonstrated compliance with the 1877 Act in my view.

80. Insofar as the Plaintiff relies on the decision of Stack J. in *Farrell v. Everyday Finance DAC* [2022] IEHC 303, that judgment concerned an application to inspect documents which had been brought pursuant to O. 31, r. 18 of the Rules of the Superior Courts; s. 91 of the Land and Conveyancing Law Reform Act; O. 50, r. 4 of the RSC; and the inherent jurisdiction of the court. Wholly unlike the situation in the present case, the significant issues between the parties were, first, whether the Defendant had complied with the Plaintiff's notice to produce by exhibiting redacted copies of the Global Deed of Transfer and amended and reinstated Global Deed of Transfer; and second, whether the Plaintiff was entitled to production of additional documents.

81. Wholly unlike the present situation, the underlying proceedings were plenary in nature and the Plaintiff had delivered a lengthy statement of claim in which a wide range of complaints were made, in particular, that the transfer of the relevant loans and securities from AIB to the Plaintiff was invalid. The contrast between the present case could hardly be more stark. These are not plenary proceedings. The Defendants do not assert that the GTD is invalid. At most, they put the Plaintiff 'on full proof' (in particular regarding the transfer of the facility and notice per s. 28 (6) of the 1877 Act). For the reasons set out in this judgment, I am satisfied that the Plaintiff has met the burden of proof.

82. It is also fair to say that, in *Farrell v. Everyday Finance DAC,* much of the learned judge's decision addressed whether the Plaintiff was entitled to see unredacted documents or whether the extent of the redaction should be reduced. In the present case, the Defendants do *not* aver that they are entitled to see an unredacted version of the GDT. Nor do they assert that any redactions should be removed. In other words, and entirely unlike the position in *Farrell v. Everyday Finance DAC*, justification of the redactions made to the GTD was not an issue which featured in the case before me. It was in the context of looking at *justifications* for redactions that the learned judge came to

the view (at para. 52) that the solicitor for the Defendant should confirm that only the price had been redacted or that there was some other reason for redacting additional words. Stack J. then proceeded to state:-

> "*In addition, in Everyday v. Woods McDonald J. was clear in his view that, subject to a detailed justification being given on affidavit, the party seeking inspection was entitled to see the definitions in the deed…*".

83. As well as taking the view that the facts and circumstances in *Farrell v. Everyday Finance DAC* are so different to those in the present case that it is a decision which cannot assist the Defendants, and whilst it may involve repetition, the following observations seem appropriate: (i) it seems to me that no detailed justification has been given by the Defendants, on affidavit, regarding any entitlement to see definitions which are contended to be in a different deed; (ii) in the manner examined earlier, the plain meaning of the terms used in the GDT seem to me to render this entirely unnecessary, given that the burden facing the Plaintiff was to adduce *prima facie* evidence so as to demonstrate on the balance of probabilities that it took a full assignment of the facility; (iii) furthermore, and in the manner examined earlier, Mr. Dillon's supplemental affidavit of 25 March 2022 contains a series of uncontroverted averments with respect to the meaning of terms used in the various transfer deeds and no issue has been taken with same in any replying affidavit; (iv) in addition, the correspondence sent to the Defendants explains the meaning of relevant terms (such as "*Underlying Loan Agreements"; "the Documents"*; "*the Transfer Date"*; *"the Security"*); (v) furthermore, the Defendants have never asserted in correspondence, nor have they averred that they cannot understand any of the terms used in correspondence to them or in the GDT without additional definitions being supplied; and (vi) it should also be said that there is nothing in the Defendants' replying affidavit which takes issue with the Plaintiff not having exhibited *other* deeds related to the transfer of their facility to the Plaintiff.

Summary

84. Insofar as the Plaintiff seeks summary judgment in respect of €495,807.03 (principal), I am satisfied that the Defendants have not raised any arguable defence.

85. Guided by the principles laid down by McKechnie J. in *Harrisrange,* and approaching the exercise of this Court's jurisdiction with the requisite caution, I am satisfied that there are no issues of fact or law which cannot safely be determined at this juncture.

86. I am not satisfied that the Defendants have established a fair or reasonable probability of having a real or *bona fide* defence.

87. On the contrary, it is *very clear* that there is no defence to this aspect of the Plaintiff's claim and for the reasons set out in this decision I am refusing leave to defend.

88. Despite the skill with which the submission is made, I reject the proposition that, because other aspects of the Plaintiff's claim, namely, with regard to interest and surcharges, should be remitted to plenary hearing, the interests of justice require the entirety of the claim to go to plenary hearing.

89. It seems to me that it is not in the interests of justice, given that court resources are necessarily finite, for additional time and significant expense to be devoted to a plenary hearing in respect of a claim to which there is no arguable defence. That cannot be in the public interest, and I would respectfully suggest that it is not in the interests of the Defendants either.

90. In other words, given the inevitability of the Plaintiff's claim for principal (to which there is no arguable defence) succeeding, a decision by this Court to remit that claim to plenary hearing would serve only to waste time and resources and create an additional costs-liability for the Defendants.

91. I want to make clear that this Court came to the foregoing views *before* having sight of (i) a 23 June 2023 letter sent by the Plaintiff's solicitors to the Defendants' solicitors; (ii) the Portfolio Acquisition Deed, dated 12 April 2019, between Rabo Bank, as "Seller" and the Plaintiff, as "Buyer" (the "PAD"); and (iii) the second supplemental affidavit of Mr. Dillon, sworn on 27 June 2023, which exhibits the PAD. In other words, it was only *after* reaching the foregoing decision, that I turned to look at items (i) to (iii).

92. The context in which the PAD was produced by the Plaintiff is as follows. Having reviewed the Defendants' legal submissions, dated 21 June 2023, it appeared to the Plaintiff that the Defendants took issue with the Plaintiff's failure to exhibit the PAD. By letter dated 23 June 2023, the Plaintiff's solicitors confirmed to the Defendants' solicitors that their client had no difficulty with providing a redacted copy of the PAD and did so. The said letter concluded by stating the following:-

> "*For the avoidance of doubt, we confirm that the Plaintiff's is that it is not necessary to rely on the PAD to ground its application for summary judgment in circumstances where the Global Deed of Transfer dated 5 July 2019 alone is sufficient to demonstrate the transfer of the Defendants' Facility the subject matter of these proceedings to the Plaintiff (and we refer you to the Plaintiff's legal submissions in this regard). However, the Plaintiff has no difficulty with providing a copy to the Defendants*".

93. The attitude adopted by the Plaintiff, namely, that it was not necessary for the Plaintiff to rely on the PAD to ground the present application for summary judgment, reflects the findings of this Court. Therefore, nothing turns on whether or not Mr. Dillon's second supplemental affidavit, exhibiting the PAD, was admitted into evidence, or not. It is sufficient to say that, as a matter of fact (which was acknowledged during the hearing) the Defendants did receive and had sight of the PAD prior to the hearing. The PAD, in fact, contains a list of definitions, as employed in the PAD and in the transaction documents, including the GTD. These definitions include "*Underlying Loans"* and "*Underlying Loan Agreements"* (reflecting the use of those terms in notice to the Defendants of 17 December 2018; 19 December 2018; 15 July 2019; and in the GDT). Whilst a consideration of the PAD was unnecessary for the court to reach its decision, the foregoing fortifies me in the view that

the only just result of the present application is to accede to it, there being no issues in dispute, and no question of additional evidence or fuller argument being needed to safely determine the matter.

Conclusion

94. In conclusion, the Defendants do not deny availing of the facility. They do not deny default on their part. They do not deny the validity of the demands. They do not dispute failure to repay. They do not assert any error in the calculation the sum claimed. The Plaintiff has demonstrated the assignment, to it, of the facility. The Plaintiff has demonstrated compliance with s. 28 (6) of the 1877 Act. The Defendants have not raised any arguable defence. The Plaintiff is entitled to summary judgment in respect of the principal sum of €495,807.03.

95. The balance of the Plaintiff's claim shall be a matter for plenary hearing concerning only the Plaintiff's entitlement to interest / surcharge interest.

96. For the avoidance of doubt, the issues raised in opposition to the Plaintiff's claim for principal (the transfer of the Facility to the Plaintiff; compliance with the 1877 Act; and reliance on the 2020 Act) have been found by this Court *not* to constitute arguable defences and, therefore, cannot be raised, again, when the interest / surcharge issue is dealt with by way of plenary hearing.

97. The parties are invited to agree the terms of a draft order reflecting the outcome of this decision and to submit same within 14 days. Having regard to the "normal" rule that "costs follow the event", and in light of s. 169 of the Legal Services Regulation Act 2015, my preliminary, but strongly-held view, is that the justice of the situation is best met by an order for costs in favour of the Plaintiff, being the "entirely successful" party. In the event that the parties do not reach agreement on the form of a draft order, short written submissions should be furnished within the same 14–day period.