

**THE HIGH COURT**

[2022] IEHC 168

**Record Number 2015/256S**

**BETWEEN:**

**PROMONTORIA (OYSTER) DAC**

**PLAINTIFF**

**AND**

**DAVID LANGAN, GREGORY LANGAN AND BRENDAN LANGAN**

**DEFENDANTS**

**Judgment of Mr Justice Cian Ferriter dated this 21st day of March 2022**

**Introduction**

1. This is the plaintiff's application for summary judgment against the defendants. These summary proceedings were originally issued on 10th February 2015 by Ulster Bank Ireland Limited, who had been involved in lending monies to the defendants in respect of their farm business in north Dublin. The first and second defendants are brothers and the third defendant is their father.
2. The proceedings relate to sums claimed to be due by each of the three defendants in respect of a loan facility entered by them with Ulster Bank Ireland Limited dated 3rd February, 2010 which covered a working capital overdraft, repayable on demand, and a facility of €49,441.50 repayable over 40 months. Sums are also claimed on foot of a second loan facility in the sum of €580,000, also dated 3rd February, 2010, entered between Ulster Bank Ireland Limited and the first and second defendants. The second facility related to the restructure of an earlier facility. The third defendant is sued in respect of the amounts outstanding on this second facility on foot of separate guarantees of 9th March, 2007 and 10th May, 2010 entered between him and Ulster Bank Ireland Limited.
3. The plaintiff, Promontoria (Oyster) DAC, was substituted as plaintiff for Ulster Bank Ireland Limited, by order of the High Court on 19th June 2017 following its acquisition of the relevant loan facilities and guarantees. As we shall come to, that acquisition is disputed by the defendants.
4. These proceedings have had a lengthy history since their inception in February 2015. The proceedings were originally instituted with Ulster Bank Ireland Limited ("Ulster Bank") as plaintiff. Ulster Bank issued a notice of motion seeking liberty to enter final judgment against the defendants on 8th September, 2015. A series of affidavits were exchanged between Ulster Bank and the first and second defendants. A "*form of authority*" document was signed by the third defendant, Brendan Langan, on 4th March, 2015 pursuant to which he stated that he gave "*authorisation to my son Gregory Langan to make an entry of appearance and my power of attorney*" in these proceedings. The second defendant, Gregory Langan, appeared on behalf of all of the defendants in person at the hearing of the motion for judgment. He told the court that his father was elderly and unwell which is why he had not sworn any affidavit in the proceedings and why he had authorised Gregory Langan to act on his behalf in relation to the proceedings.

5. It appears that the Master transferred the motion for judgment to the High Court list in July, 2016. Ulster Bank sold its interest in the facilities and guarantees to Promontoria (Oyster) DAC and an order was made by the High Court (Humphreys J.) on 19th June, 2017 substituting Promontoria (Oyster) Ltd for Ulster Bank Ireland Ltd as plaintiff in the proceedings. As the motion for judgment had previously been adjourned generally with liberty to re-enter, Promontoria (Oyster) Ltd ("Promontoria") re-entered the motion for judgment.
6. It appears that the motion for summary judgment was listed for hearing in February, 2019 and was adjourned to allow the defendants bring solicitors on record and in circumstances where Gregory Langan advised he would be unable to attend court for medical reasons.
7. On 18th January 2021, the High Court (O'Hanlon J.) granted an order permitting Promontoria (now the plaintiff) to amend the endorsement of claim on the summary summons, in order to enable Promontoria comply with the Supreme Court decision in Bank of Ireland v. O'Malley [2019] IESC 84. That order also directed Promontoria to furnish an affidavit setting out the distinction between principal and interest claimed on the amended endorsement of claim. That was subsequently done by Promontoria, by affidavit of Donal O'Sullivan of 1st February 2021.
8. It is also appropriate to make reference to separate proceedings instituted by the first defendant, David Langan, against Promontoria (Oyster) DAC, Damien Harper and Link Asset Services DAC in 2021. In these proceedings, David Langan sought an injunction restraining Mr. Harper, a receiver appointed by Promontoria, from selling five acres of property which had been granted as security for the defendants' borrowings from Ulster Bank (which borrowings and security was acquired by Promontoria). In a reserved judgment of 8th June 2021, the High Court (Twomey J.) refused to grant the interlocutory injunction sought, which resulted in a sale of the five acres.
9. Mr. Kieran Dowling, head of insolvency at Promontoria, swore an affidavit in support of the summary judgment application on 21st February, 2022 in which he set out that a total of €218,313.17 had been received from the receiver in respect as being the net proceeds of sale of those lands. Mr. Dowling averred that those sums had been applied against the defendants' liabilities the subject of the application for judgment, thereby reducing the liability of the first and second defendants to €523,941.18 and that of the third defendant to €435,142.79. These are the sums in which summary judgment is now sought on the application before me.
10. At the outset of his submissions on behalf of the defendants, Gregory Langan sought an adjournment on the basis that a complaint had been made to An Garda Síochána in relation to the sale of the lands by the receiver. Mr. Langan had sworn an affidavit on 21st February, 2022, the day before the summary judgment hearing before me, in which this complaint and other related complaints were made. Mr. Langan also sought an adjournment on the basis that himself and his co-defendants had discharged their solicitor a short time before the hearing. In fairness to Mr. Langan, he went on to address

in some detail at the hearing why the plaintiff was not, in his submission, entitled to summary judgment and why the affidavit materials tendered by the defendants to the court disclosed an arguable defence.

11. In light of the prolonged history of the matter to date, and in view of the fact that Gregory Langan was in a position to very ably make his submissions on all issues arising on the application for summary judgment, I believe the plaintiff's application for summary judgment can be dealt with safely and justly at this point. Accordingly, I do not propose to grant any adjournment of the matter and will proceed, rather, to address the substance of the application.
12. I should say that David Langan also delivered a further replying affidavit shortly before the hearing. While this was delivered very late in the day, as no objection was taken to the defendants' reliance on the contents of this affidavit at the hearing of the summary judgment application, I propose to have regard to the contents of that affidavit, and the affidavit of Gregory Langan of 21st February 2020, in dealing with the motion.
13. It is important to note at the outset that the defendants do not deny having received and obtained the benefit of the monies advanced pursuant to the loan facilities. As noted by O'Donnell J. (as he then was) in *Bank of Scotland v. Beades* [2019] IESC 61 (at paragraph 11), receipt by the defendants of the monies claimed by the plaintiff is central to any summary judgment claim.

#### **The applicable legal principles**

14. There is no dispute about the principles to be applied by a court in an application for summary judgment. These were summarised by McKechnie J. 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 issue 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 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 not be 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."

**The asserted defences**

15. I will address the issues raised by the defendants, in the several affidavits filed on their behalf, as yielding an arguable defence under the following headings:

- (i) Acquisition of Ulster Bank Ireland Limited's debt and security by the plaintiff
- (ii) Can Promontoria prove the debts claimed?
- (iii) Loans/Guarantees invalid?
- (iv) Alleged regulatory and registration breaches
- (v) Interest rate allegations
- (vi) Other matters

**(1) Acquisition of Ulster Bank Ireland Limited's debt and security by the plaintiff**

16. The defendants contend that there is not admissible proof before the Court of the acquisition by the plaintiff, Promontoria (Oyster) DAC, from Ulster Bank Ireland Limited of the defendants' loan facilities and guarantees.

17. Before addressing that contention, it is necessary to deal with another title-related contention made by the defendants to the effect that Ulster Bank Ireland Limited had in fact transferred its title to the loans and guarantees to another entity in the NatWest group. The defendants sought to contend that the loans had, in effect, moved out of the jurisdiction, and, therefore, were subject to UK regulatory control, by virtue of the fact that Ulster Bank Ireland Limited was directing recovery matters through a recovery office in Belfast.
18. I do not believe there is any substance in this contention. The loan facilities and guarantees being sued upon were entered into between Ulster Bank Ireland Limited and the defendants. The letters of demand for the facilities were issued by Ulster Bank Ireland Limited, with its registered offices at George's Quay, Dublin 2, from its branch in Lucan, Co. Dublin. The letter of demand for the third defendant's guarantee was issued by Ulster Bank Ireland Limited through its Collection and Recoveries department which was expressed in correspondence to be "c/o" an address in Northern Ireland; however the legal entity corresponding at all times was Ulster Bank Ireland Limited with registered offices at George's Quay, Dublin 2 and expressed to be regulated by the Central Bank of Ireland, as was made clear at the foot of the demand letter. There is no credible evidence before me of the facilities and guarantees having been assigned to another Ulster Bank entity or of the lender having moved out of the jurisdiction. It is clear that the loans and guarantees remained at all times the property of Ulster Bank Ireland Limited, prior to the transfer to Promontoria (Oyster) DAC, and no credible evidence is before me to suggest otherwise.
19. As no arguable defence arises from this contention, I will proceed to address the arguments raised by the defendants as to the validity of the assignment of the loan facilities and guarantees by Ulster Bank Ireland Limited to Promontoria (Oyster) DAC.
20. Mr. Langan submitted that as he and his co-defendants had not been provided with inspection of the original documents relevant to the alleged assignment by Ulster Bank to Promontoria of the loans and guarantees they have been hampered in marshalling any case they would wish to make against the validity of the assignment. He says that they have not seen the original of the mortgage sale deed, which appeared to be with a different Promontoria entity, being Promontoria Holding 172 BV, a Dutch entity. They complain that the global deed of transfer was redacted and that it is not possible to determine from the copy documents provided in support of the application "*who bought what when*".
21. Donal O'Sullivan has exhibited a global deed of transfer dated the 19th December, 2016 entered into between Ulster Bank Ireland DAC, Ulster Bank Limited and the plaintiff which transfers to the Plaintiff all of Ulster Bank Ireland DAC's "right, title, interest, benefit and obligation in and under" each facility letter and the security interests relating thereto. The unredacted portions of the schedule of security documents appended to the global deed of transfer specifically lists the two loan facilities which are the subject of this summary judgement application. Clause 1.1 of the global deed of transfer assigns to the plaintiff

“all right, title, interest, benefit” of Ulster Bank Ireland Limited in any security interests relating to these loans, which clearly includes the guarantees.

22. Furthermore, Ulster Bank Ireland Limited (renamed Ulster Bank Ireland DAC) agreed to the substitution of the plaintiff into the within proceedings and sent “goodbye” letters to the defendants advising the defendants of the transfer of the liabilities under the facility letters and the guarantees to the plaintiff.
23. I am satisfied that the proofs adduced by the plaintiff on this application as to the acquisition by it of Ulster Bank’s interests in the relevant loans and guarantees meet the legal requirements for same as set out in the decision of Murphy J. in *English v Promontoria (Aran) Limited (No.2)* [2017] IEHC 322, as approved by Barniville J. in *Promontoria Aran Ltd v. Burke and Donnelly* [2018] IEHC 773 at paragraph 66. *English v. Promontoria Aran Ltd* makes clear that no arguable defence arises from the matters complained of by the defendants here. In that case, at paragraph 55 Murphy J. stated:

*“The approach taken by the plaintiff to this application has been to raise a multiplicity of issues concerning execution and redaction as set out above. Counsel has raised many hares relating to these issues. He has invited the Court to speculate that the redacted portions of the mortgage sale deed and the deed of novation may reveal that there is some wider context to these transactions; that there might be other parties involved; that without sight of the redacted portions of those deeds one cannot be sure that the underlying agreements between Promontoria Holding 128 B.V. and the various Ulster Bank entities are valid. All of the issues raised by counsel for the plaintiff would be properly and validly raised if the plaintiff were a party to the deeds with an entitlement to challenge their efficacy, but he is not a party to the deeds. He is a third party whose only entitlement is to be shown that the stranger knocking on his door claiming possession has in fact acquired the interests of Ulster Bank Ireland Limited.”*

24. Similarly here, Mr. Langan has made various allegations as to alleged infirmities in the execution of the deeds as between Promontoria and Ulster Bank, has speculated on the involvement of other parties and has otherwise sought to impugn the validity of the underlying agreements. However, the defendants’ only entitlement is to be shown that the plaintiff has in fact acquired the interests of Ulster Bank in the loan facilities and guarantees. I am satisfied that the relevant parts of the deed of transfer before the Court make clear that the plaintiff acquired both the loan facilities in issue and the related security of the guarantees. The defendants have not raised any credible basis upon which the Court could be satisfied that the plaintiff has not acquired Ulster Bank’s interests in the loans and guarantees in light of the evidence before the Court.
25. I am satisfied, accordingly, that no arguable defence is raised by the defendants in relation to this issue.

**(2) Can Promontoria prove the debts claimed?**

26. A core submission made by Gregory Langan on behalf of the defendants at the hearing before me was to the effect that the plaintiff had not produced any admissible evidence that the defendants owed them any monies at all. He submitted that as there was never any course of dealing or statements of account as between Promontoria and the defendants, Promontoria was not in a position to obtain judgment.
27. While Mr. Langan accepted that Ian Duffy as an officer of Ulster Bank Ireland Limited was in a position to give admissible evidence as to dealings between Ulster Bank and the defendants in respect of the loan facilities in issue, and to do so pursuant to the provisions of the Bankers' Book Evidence Act, he maintained there was no admissible evidence from Promontoria as to any course of dealing between Promontoria and the defendants. He submitted that the plaintiff here had not exhibited any statements of account verifying monies supposedly owed by the defendants to it and had not otherwise tendered admissible evidence of the debt said to be owed to it. He submitted that, in the circumstances, the plaintiff was unable to prove its case and relied in this regard on the judgment of Baker J. in *Promontoria v. Burns* [2020] IECA 87, the decision of Humphreys J. in *Havbell v. Harris* [2020] IEHC 147 and the decision of Clarke C.J. in *Bank of Ireland v. O'Malley* [2019] IESC 84.
28. With respect, in my view Mr. Langan's arguments in that regard are misconceived. The key distinguishing feature between this case and *Promontoria v. Burns* is that in this case there is direct, admissible evidence from an officer of Ulster Bank who avers that he reviewed the books and records of the bank relating to the defendants' loans; who exhibits the facility letters and guarantees and avers as to the entry into those agreements by the defendants; who avers, on the basis of his review of the relevant records, that the defendants failed to maintain the overdraft account in accordance with the terms and conditions of the facility and failed to make agreed repayments in respect of each of the loan accounts the subject of the facilities and that, in consequence, demands for repayment were made. He exhibits the relevant letters of demand. He also refers to statements of liability for the relevant accounts, and the guarantee liability, and exhibits the statements of liability which break down the amounts due as between principal and interest, specifying the applicable interest rate in each relevant period and how the interest was calculated, and setting out the overall sums due. The statements go up to December 2014.

In a follow-up affidavit, Mr. Duffy averred that the defendant's failure to make repayments had occurred for some considerable time prior to 2012 and that the defendants were well aware of this.

29. The plaintiff has acquired these debts and is not seeking any sums (such as for additional interest) beyond the amounts owing to Ulster Bank Ireland Limited as of December 2014. The amounts owing at that date are the subject of direct and admissible proof including from the affidavit of an officer of Ulster Bank Ireland Limited, Mr. Ian Duffy, whose evidence as to the demands, arrears and sums due is admissible under the Bankers' Book Evidence Act.

30. As the plaintiff acquired the relevant facilities and guarantees from Ulster Bank Ireland Limited, the plaintiff is perfectly entitled to deploy evidence given on affidavit by Mr. Duffy, as an officer of Ulster Bank, the former owner of the loans and guarantees, in support of Promontoria's application for judgment.
31. Mr. Langan further contended that the demand letters were invalid as they were not on Ulster Bank headed paper and were unsigned. The demand letters exhibited before me are in fact clearly issued on behalf of Ulster Bank Ireland Limited and no issue arises in that regard. Mr. Langan averred that no "final" demand letters were received by the defendants and avers that there is no evidence that the demand letters were received by the defendants. I do not believe that these carefully worded averments yield an arguable defence. There is no credible basis before me for the contention that the defendants were not aware that they have fallen into arrears and that Ulster Bank had demanded those arrears.
32. Mr. Langan next contended that there was no evidence of default or arrears before the Court. However, this is not borne out by the averment of Mr. Duffy to the effect that the overdraft facility and the two loans had fallen into arrears and that agreed payments had not been made. Critically, there is no evidence before the Court from the defendants seeking to demonstrate that they did not fall into arrears or that they were otherwise compliant with the repayment terms of the facilities in issue.
33. As regards Mr. Langan's reliance on the cases of *Bank of Ireland v. O'Malley* [2019] IESC 84I and *Havbell v. Harris* [2020] IEHC 147, I accept the submission on behalf of counsel for Promontoria that the requirements of *Bank of Ireland v. O'Malley* as glossed in *Havbell v. Harris* are met on the facts of this case. The amended endorsement of claim clearly sets out how the sums were calculated, split as between principal and interest, and for what periods. The figures are sourced from the direct and admissible evidence of Ian Duffy, an officer of Ulster Bank at the relevant times. As made clear by Clarke C.J. in *Bank of Ireland v O'Malley*, the purpose of particularisation on the special endorsement of claim in a summary summons is to ensure that a person receiving such a summons has the necessary details to decide whether they should concede or resist. This needs to include an indication as to the interest rate being applied from time to time and as to how the ultimate sum claimed has been calculated. Those requirements are met in the amended Summary Summons delivered in this case. The loan facilities and the terms of same are set out in some detail, as are the terms of the guarantees. The sums claimed on each account are broken down as between principal and interest. The rate of interest applicable for each period of interest charge is specified. The defendants are in a position to readily identify and understand the necessary details relating to the claims.
34. Accordingly, in my view, there is clear and admissible evidence before the Court as to the amounts owing to Ulster Bank Ireland Limited at the date of institution of proceedings. That debt was acquired by Promontoria and is now owed to it. Promontoria has not in fact sought any sums above and beyond those which were owing to Ulster Bank Ireland Limited at the date of institution of the proceedings. It has made clear in its affidavit



evidence that it expressly waives any entitlement to claim interest from December 2014 onwards.

35. In the circumstances, I am satisfied that the plaintiff has proved its entitlement to the sums claimed and no arguable defence has been raised by the defendants in this regard.

**(3) Loans/Guarantees invalid?**

36. Mr. Langan sought to raise various issues relating to the circumstances of entry into the guarantee and loan facilities which he said raised arguable defences such as to warrant the matter proceeding to plenary hearing.
37. It was said that the third defendant, Brendan Langan, did not receive any independent legal advice before he signed the two guarantees. It was submitted that any enforcement of the guarantees must be in accordance with the Code of Conduct on Mortgage Arrears as the security involved Brendan Langan's family home. It was also submitted that Brendan Langan was a consumer and that the guarantees were entered in breach of the Unfair Terms in Consumer Contracts Directive and the Consumer Credit Act, 1995. It was further submitted that the guarantees were signed without the knowledge of Mr. Langan's spouse. It was asserted that the second guarantee was entered into by Brendan Langan when he was in advanced years, lacking proper eyesight and at a time when he was no longer involved in the business. The essence of Mr. Langan's submissions at the hearing of this application were to the effect that Brendan Langan entered the second guarantee under duress.
38. The 9th March, 2007 guarantee ("the first guarantee") was for a sum not exceeding €600,000 and was a guarantee in respect of the liabilities of Brendan Langan's sons, the first and second defendants, to Ulster Bank Ireland Limited. The first guarantee noted at its foot that "*you are recommended to take independent legal advice before signing*". The guarantee is witnessed by Sean Browne, a solicitor in Con O'Connor & Co. Solicitors, 7 Dublin Street, Balbriggan, County Dublin.
39. The guarantee of 10th May, 2010 ("the second guarantee") also involved Brendan Langan guaranteeing the debts of his sons, the first and second defendants, to Ulster Bank. Clause 13.1 of the second guarantee provided that "*this deed is in addition to any other guarantee or security present or future held by the bank for the Debtor's obligations and shall not merge with or prejudice such other guarantee or security or any contractual or legal rights on the bank*". This guarantee, which is signed by Mr. Brendan Langan, is witnessed by Shane Dowling, solicitor. The foot of the guarantee states as follows:

*"I confirm that I am a solicitor acting for Brendan Langan and that prior to the execution of this deed I explained its nature, content and effect and the practical implications of signing it to Brendan Langan and he/she informed me that he/she wished to proceed with the transaction."*

Underneath this confirmation, there is the signature of Shane Dowling of Gerard L. McGowan Solicitors, Skerries, County Dublin.

40. In relation to the guarantees, Brendan Langan was a partner in the farming business being carried on with his sons and as such had a material interest in the subject matter of the loans. He was a member of the Fingal Farmers Group who had negotiated the original facilities which were the subject of the restructure in 2010. On the face of the second guarantee, Brendan Langan confirms that he had the benefit of legal advice before entering that guarantee. His execution of the first guarantee was witnessed by a solicitor. There is no evidence before me, beyond mere assertion, that Brendan Langan entered these agreements under some form of duress or without the opportunity to access legal advice as he saw fit. There is no medical evidence before the Court to support the assertion that Brendan Langan lacked capacity to enter either of the guarantees. The criticisms levelled at Ulster Bank at the hearing, in relation to the entry by Brendan Langan into guarantees, focused on the second guarantee. Even if it was the case that there was an arguable defence in relation to the validity of the second guarantee (and I do not believe that the matters raised went beyond mere assertion), Brendan Langan would still be liable on foot of the first guarantee for the sums claimed.
41. As regards the other matters raised in relation to the guarantees, the family home is not referred to at all in the guarantees being sued upon nor is it referred to in the facility letters of 3rd February 2010. There was no security given over the family home in relation to the loan facilities or the guarantees. No order for possession is sought in these proceedings. Arguments relating to the family home and the Code of Conduct of the Mortgage Arrears are misconceived in the circumstances.
42. Mr. Langan further complained that the guarantees did not reference any particular facility letter and that the 3rd February 2010 loan facility referenced a guarantee for €670,000 to be given by Brendan Langan when the second guarantee was in fact for €580,000. However, the terms of the guarantees are such as to cover all liabilities owing by the second and third defendants to Ulster Bank. There was no requirement for the guarantees to reference any particular facility letter in the circumstances. No arguable defence arises on this point either.

#### **Loans and Guarantee related to consumers**

43. Mr. Gregory Langan contended that there was an arguable defence to the effect that he and his father were consumers who were entitled to the benefit of consumer protections at the time of entry into the loan facilities and (in the case of his father) the guarantees and that these protections had been denied to them, rendering the loans and guarantees unlawful. In that regard, Mr. Langan sought to rely on a case recently heard (but not at the date of this judgment yet decided) by the Supreme Court in *AIB v. Thomas O'Callaghan and Mary O'Callaghan* in which he contended the defendants who were also farmers had raised an important issue as to whether they were consumers for the purposes of the relevant statutory protections.
44. A determination by the Supreme Court of an application for leave to appeal was made on 20th December, 2021: see [2021] IESCDET 137. In its determination, the Supreme Court said it was satisfied that the matter of general public importance does arise as to the correct construction of the term "consumer" for the purposes of the relevant legislation.

However, it is clear from the terms of the Court of Appeal decision in that case (AIB v. O'Callaghan [2020] IECA 318) that the question of whether or not the defendants were consumers for the purposes of the relevant legislation arose in relation to borrowing which was not for their primary business. Mr. O' Callaghan was a poultry farmer in Limerick and his wife, Mrs. O'Callaghan, was a nurse. They were being sued in respect of a loan which they had taken out not for the purposes of Mr O'Callaghan's poultry business but rather for investment in development land in Slovakia (which they intended to build housing on) and for renting out farmland beside that development land in Slovakia.

45. The crucial distinction on the facts before me is that the facilities and guarantees related to a farming business carried on by the three defendants in partnership. None of the facilities is expressed to be a consumer loan or for purposes other than the business being carried on by the defendants. The loan facilities were subject to the bank's "standard terms and conditions governing business lending to partnerships – business banking". No evidence has been put before the Court by the defendants which would support any arguable case that the loans were for purposes other than their principal business. I do not see that there is any arguable contention that any of the defendants were consumers on the facts here.
  
46. Gregory Langan complained he was not the property owner when he became party to the loans. However, not being a property owner, when he is party to a business which has acquired the loans, does not make him a consumer for the purposes of those loans. Mr. Langan sought to assert that he was subject to undue influence and misrepresentation when he entered into the 2010 loans. These were mere assertions unsupported by any cogent or credible evidence. He also sought to contend that he had not been advised to take independent legal advice before entering loans. No arguable basis in law was identified for an alleged duty on the bank to advise him to get independent legal advice in relation to a business loan.

#### (4) Alleged regulatory and registration breaches

47. The defendants have asserted that Ulster Bank acted in breach of various regulatory codes in their dealings with the defendants in relation to the loans including the Code applicable to Small and Medium Enterprise, the Code of Conduct on Mortgage Arrears and the Unfair Terms in Consumer Contracts Directive. Complaint was also made as to the failure by both Ulster Bank and the plaintiff to register the loans with the Central Credit Register.

48. The Code of Conduct on Mortgage Arrears clearly has no application as no order for possession is being sought. The Unfair Terms in Consumer Contracts Directive has no application where the defendants were not borrowing, or guaranteeing, as consumers. Insofar as any other regulatory or registration requirement is said to have been breached, quite apart from the fact that there is no evidence beyond mere assertion of same, no arguable defence can arise in light of the Supreme Court decision in *Irish Life and Permanent Plc v Dunne* [2016] 1 IR 92. In that case, Clarke J. (as he then was) rejected the argument that “the contractual arrangements between a lender and a borrower must be taken to have implied into them the provisions of the Code (The Code of Conduct on Mortgage Arrears) in circumstances where the Code can change from time to time (and thus could not have been particularly in the contemplation of the parties when they entered into their contracts)” and where, the Central Bank Act 1989 did not expressly provide that certain terms were to be implied into relevant contracts.
49. The defendants next sought to contend that an arguable defence to the claims arose from the fact that Promontoria was not regulated by the Central Bank of Ireland and it was alleged, the defendants accordingly had no redress pursuant to Central Bank Codes of Conduct or which they could pursue to the Financial Services Ombudsman.
50. Part V of the Central Bank Act, 1997 was amended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 to introduce a regulatory regime in respect of Credit Servicing Firms, bringing such firms within the Central Bank’s regulatory remit, and the activity of credit servicing became a regulated activity in Ireland. In *Launceston Property Finance Ltd. v. Burke* [2017] 2 I.R. 798 (at paragraphs 20 and 21), McKechnie J. concluded that the Oireachtas in enacting the 2015 Act had amended, inter alia, Part V of the Central Bank Act 1997 and did so “in order to ensure that borrowers who had a ‘regulated loan’ which was acquired by an ‘unregulated body’ would continue to have the protection of various consumer codes and statutory provisions.” McKechnie J. was satisfied, from the provisions of the 2015 Act, that Launceston Property was not itself obliged to be “authorised” by the Central Bank in order to legally operate within the State. In my view, the decision in *Launceston v. Burke* is a full answer to the defendants’ complaints under this heading. As the plaintiff is a credit service firm, the defendants are not deprived of the benefit of any applicable codes.
51. Accordingly, no arguable defence arises from this issue.
52. In his final affidavit, Gregory Langan also sought to allege breaches of the UK Financial Conduct rules. I see no arguable basis for invoking UK regulatory rules in circumstances

where the defendants' loans and guarantees remained at all times within the ownership of Irish entities.

(5) Interest rate allegations

53. The defendants made a number of allegations about the treatment of interest rates under their original 2006 facility.

54. Firstly, the defendants made complaint about manipulation of Euribor rates by entities in the NatWest group, of which Ulster Bank of Ireland Limited was a part, and maintained that this yielded an arguable defence to the claims in these proceedings. In *McAteer & Ors v Fried & Ors* [2019] IECA 216 the Court of Appeal affirmed an order striking out the clauses in the defence and counterclaim that sought to rely inter alia on the fining of RBS by the European Commission in December 2013 for participating in cartels responsible for manipulating EURIBOR as a defence to a claim by Ulster Bank Ireland DAC and receivers appointed by Ulster Bank Ireland DAC. The Court noted at paragraph 44:

"No doubt the wrongdoing of RBS and other lending institutions has had serious implications not alone in the city of London but worldwide. In particular, the conduct engaged in by RBS between January of 2006 and March 2012 whereby the LIBOR was manipulated improperly is now well known and has been the subject of investigations, civil processes, criminal proceedings and other findings and determinations in a variety of jurisdictions. Ulster Bank is a subsidiary of RBS. There is no authority identified for a proposition that those facts in themselves give rise to, or warrant, without more, an inference of an agency subsisting as between Ulster Bank and RBS based on pure conjecture and surmise..."

55. It follows that no arguable defence arises on this issue.

56. Secondly, the defendants contended that Ulster Bank had, without their knowledge or consent, unlawfully changed the basis of calculating interest rates in 2006, from prime rate to costs of funds in relation to the original loan facility which was restructured as the €580,000 loan facility in February 2010. This allegation was addressed by Ian Duffy on affidavit in which he explained the legitimate basis for same. In my view, in any event, the replacement by Ulster Bank Ireland Limited of the prime rate with the cost of funds

rate prior to 2010 cannot have any bearing on the defendants' liability on foot of the 2010 facility letters and the third defendant's guarantees. The 2010 loan facilities operated by the defendants were expressly subject to the cost of funds base rate and the defendants agreed to the terms and conditions of the facility letters of the 3rd February, 2010. The loan facilities of the 3rd February, 2010 expressly provided that: "This facility letter supersedes all prior agreements, arrangements or correspondence between the Bank and the Borrower in relation to the Facilities". Accordingly, complaints in relation to alleged breaches of a prior agreement for an earlier facility do not give rise to an arguable defence for sums due on foot of the February 2010 facilities.

57. Finally, Mr. David Langan contended in his affidavit delivered just before the hearing that Ulster Bank had applied interest rates changes in 2012 in breach of the terms and conditions applicable. As pointed out by counsel for the plaintiff, this issue was being raised for the first time some 10 years after the alleged interest overcharging. It was not supported by any contemporaneous complaints. In my view the defendants' case in this regard is mere assertion and is not supported by credible evidence that they were affected by the application of interest charges in breach of the terms and conditions of their contract. Accordingly, I do not believe any arguable defence arises under this heading either.
58. The final affidavits of the defendants also sought to raise an issue in relation to the Statute of Limitations as regards interest, but no stateable defence in the Statute arises where the proceedings were issued in 2015 in respect of debt arising from 2010 onwards.

#### (6) Other Matters

59. The defendants also sought to raise issues in respect of the sale of the 5 acres of property with secured the loan facilities, including complaints to the gardai in relation to same. As noted earlier, that sale was the subject of an interlocutory injunction application which was refused by the High Court. It is not appropriate for the defendants to agitate matters relating to the sale of the property in these proceedings.

#### Conclusion

60. The first and second defendants entered the facility letters dated 3rd February, 2010 and the third defendant entered into the two guarantees the subject of the proceedings. The defendants do not deny getting the loan monies, and the benefit of those monies. The

loans fell into arrears. Ulster Bank were entitled to call in the loans and the guarantees. The plaintiff acquired Ulster Bank's interest in the loans and guarantees. The plaintiff has proven the sums claimed are due and owing to it.

61. Taking into account the sums received by the receiver from the sale of 5 acres of land securing the second facility, I therefore grant judgment to the plaintiff as follows:
  - (i) Against the first and second defendants in the sum of €523,941.18.
  - (ii) Against the third defendant in the sum of €435,142.79.
62. The plaintiff is also entitled to its costs of these proceedings to be adjudicated in default of agreement.