THE SUPREME COURT

High Court Record No. 2010/900
Court of Appeal Record No. 2014/463
Supreme Court Record No. 2012/212

McKechnie J.
Charleton J.
McGovern J.

BETWEEN

BANK OF SCOTLAND PLC

PLAINTIFF/RESPONDENT:

AND

CHARLES (OTHERWISE CHARLIE) FERGUS

DEFENDANT/APPELLANT:

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 18th day of December, 2019

Introduction

1. This is an appeal from a decision of Finlay Geoghegan J. delivered in the High Court on the 30th March, 2012 and the resulting order of the 20th April, which was perfected on the 27th April, 2012. It is one of a number of cases which were initially transferred from this Court to the Court of Appeal pursuant to a Direction given under Article 64.3.1° of the Constitution, a transitory measure which pre-dated the full effect of the Thirty Third Amendment of the Constitution (Court of Appeal) Act 2013. Provision was also made for a certain number of such appeals to be transferred back to this Court, on an application by either party made under Article 64.3.3°. It is *via* this procedural route that the instant appeal was heard by this Court. This however, is not of any direct consequence to the judgment within, save to provide some context for the timeline of the proceedings.

2. Pursuant to the European Communities (Cross-Border Merger) Regulations 2008 (S.I. No. 157/2008), Bank of Scotland (Ireland) Limited ("the Bank"), merged with its parent company which is the entity named as the plaintiff/respondent in these proceedings. That merger took effect on 31st December, 2010. Pursuant to Regulation 19(1)(d) of the said 2008 Regulation, Bank of Scotland Plc now sues as successor to the Bank, which is dissolved but not formally liquidated. The defendant/appellant, Mr. Charles Fergus, is a business man with an address at Ceol na Mara, Tullan Road, Bundoran, County Donegal. At all relevant times he was heavily involved with a company known as Fergus Haynes (Developments) Limited ("the Company" or "the Principal Debtor"). On the 24th February, 2010, these proceedings were issued with the object of enforcing various guarantees/indemnities which the defendant had entered into in respect of certain facilities previously advanced to the Company, and which at the relevant date remained due and owing. These proceedings were successful in that regard as evidenced by the judgment above mentioned.

Factual Background

3. The Bank began acting as bankers to the Company in or about the year 2003. At all material times the appellant was the Chief Executive, principal promotor and a director of that Company. As such, it is alleged that he entered into several guarantees/indemnities in respect of any ongoing liability which the Company may have to the Bank. On the 4th September, 2008, the Bank pursuant to existing loan facilities, made demand of the Company, as principal debtor, for repayment in the amount of €7,796,121.84. As no satisfactory response was received, the Bank on the 6th September, 2008 appointed a receiver over the property and assets of the Company following which on the 17th September, an order for its winding up was made and a liquidator appointed. Nothing turns on these events. On the 15th December, 2009 solicitors on behalf of the Bank made a demand on Mr. Fergus, as guarantor, calling upon him to pay all sums due by the Company to the Bank "pursuant to the terms of the various guarantees entered into" by him: the amount then alleged was not stated in this letter of demand.

4. On the 24th February, 2010 these proceedings were commenced by way of a Summary Summons in which it was pleaded by the Bank that Mr. Fergus had entered into seventeen guarantees/indemnities in respect of the Company's various liabilities to it: as nothing turns on the technical description of these documents, save for one point subsequently noted, I will purely for convenience refer to these simply as "guarantees". The amount then claimed was €8,444,457.88. The guarantees in question were then listed, with seven out of the seventeen bearing no date bar the year. Staying with the sequence adopted in the special indorsement of claim, the following were given as the due dates:

(i)	30th March, 2004;	(ii)	21st May, 2004;	(iii)	20th August, 2004;
(iv)	(undated), 2004;	(v)	11th April, 2005;	(vi)	(undated), 2005;
(vii)	22nd July, 2005;	(viii)	(undated) 2005;	(ix)	1st June, 2006;
(x)	21st July, 2006;	(xi)	(undated), 2006;	(xii)	10th December, 2007;
(xiii)	(undated), 2007;	(xiv)	(undated), 2007;	(xv)	29th May, 2008;
(xvi)	(undated), 2008;	(xvii)	(undated), 2008.		

The proceedings were admitted into the commercial list on the 22nd March, 2010 and on the 22nd October, 2010, following a submission by Mr. Fergus that the validity and/or the enforceability of the guarantees were plausibly in issue, the matter was remitted to plenary hearing by the judge, then in charge of that list, McGovern J.

5. On the 5th November, 2010, a statement of claim was delivered by the plaintiff which referred to the seventeen guarantees above mentioned. Despite listing each of these guarantees however, the Bank pleaded that it would be pursuing its claim only on foot of four of them, being those above identified at (i) – dated 30th March, 2004: (iv) – 2004 undated: (vii) – dated 22nd July, 2005: and (ix) – dated 1st June, 2006: these four have

been referred to by the Bank as "the plenary guarantees". The statement of claim then pleads that those guarantees are capable of individual execution and enforcement, as continuing security for all sums advanced to and remaining due by the Company: no further reference was made to the remaining guarantees or to perceived defects or flaws in them. The total amount claimed by the plaintiff at this point was €9,012,207.15 plus interest: it also sought the costs of the proceedings.

6. In the defence as filed, Mr. Fergus firstly put the bank on proof of the amount allegedly owing by the Principal Debtor: secondly, it was asserted on his behalf, *inter alia*, that none of the guarantees were enforceable against him and further, that in respect of those relied upon, there was no note or memorandum sufficient for the purpose of the Statute of Frauds (Ireland) 1695. With the issues thus defined and in accordance with the practice of the commercial list, two matters followed: firstly, discovery was made by the Bank in February, 2011, with the necessary affidavit being sworn by a Mr. Julian Moroney, who will be referred to again in a moment. The documents disclosed, as one would expect, included statements of the accounts relied upon to establish the amount of the debt. Secondly, four witness statements were exchanged in advance of the hearing: for the appellants, one was that of Mr. Fergus himself dated 5th April, 2011, and one by a Mr. Brian Craythorne, dated 5th April, 2011, who as a forensic scientist was asked to assess the authenticity of Mr. Fergus's signature on the guarantees: for the respondent there was a statement of a Mr. Donal Waldron dated 14th March, 2011 and one of Mr. Bernard Raftery dated 23rd May, 2011. A trial date was set for the 24th May, 2011 but for reasons not relevant, that intended trial was aborted by Kelly J. A new trial date was set for November of that year.

7. The High Court hearing commenced before Finlay Geoghegan J. on the 8th November, 2011 with issues quickly emerging in relation to witnesses, witness statements and the admissibility of evidence, all of which are relevant for the purposes of this appeal. On the first day the Bank did not call their witness, a Mr. Donal Waldron to give evidence of the debt due, as had been anticipated, but instead relied on a Mr. Bernard Raftery, this because Mr. Waldron had fallen ill in advance of the hearing and was unable to attend Court in order to give evidence of the debt. The issue with Mr. Raftery as a witness however was that he was not in the position to give admissible evidence as to the amount due by the Company. The figure given by him in his witness statement, was the same as that given in the witness statement of Mr. Waldron, calculated as of the 14th March, 2011: €9,275,439.47. During examination in-chief it was discovered that this figure had not come from Mr. Raftery's own calculations or from his own examination of the books, records or other data held by the bank and rather that it had been directly adopted from the statement of Mr. Waldron whom he was replacing. Matters did not improve from the Bank's point of view in the sense that it had no other witness available, who had supplied a witness statement, who could give admissible evidence of the amount due.

8. Further since the delivery of both Mr. Waldron's and Mr. Raftery's witness statements, a more up-to date calculation of the debt had been done by a Mr. Julian Moroney, who had been a manager in the Bank's customer debt division until 31st December, 2010. On the

day of the hearing the figure which the Bank sought to introduce, was approximately €9,910,365 this being Mr. Moroney's figure, calculated up to the date of the hearing. Mr. Raftery had been given a copy of those calculations on the morning of the hearing, but had not had any involvement with their prior preparation: moreover, it transpired that he had left the Bank in August, 2011 had not in fact had any direct dealing with Mr. Fergus when the various guarantees were signed: his involvement was solely as a bank official who had reviewed the file. The learned judge refused, in these circumstances, to allow Mr. Raftery to give evidence as to the amount owed by the Company, emphasising that part of the appellant's defence in which he had specifically put the Bank on proof of the amount due. However, at the time of the hearing Mr. Moroney had taken up the position of senior manager in the customer debt division of Certus, a company engaged by the Bank to provide administrative support to them in their management of Irish and Northern Irish customers. Mr. Moroney, was as such authorised by the Bank to fully access the books and records of the Bank in respect of its customers in Ireland and Northern Ireland. He had not delivered any witness statement in advance of the hearing but had sworn the original affidavit of discovery, which had been delivered on the 22nd February, 2011.

9. At the conclusion of the first day of the hearing, counsel on behalf of the Bank made an application to call Mr. Moroney as an additional witness to prove the amount due. Finlay Geoghegan J., declined to entertain the application until the defendant had been informed of what evidence Mr. Moroney intended to give. On the morning of the 9th November when the hearing resumed, the application previously made was renewed: by this time an unsigned outline witness statement of such evidence had been given to Mr. Fergus. There was also a second aspect to this application, in which the Bank sought permission to ask Mr. Raftery in re-examination, about his knowledge of the Bank's accounts, based on the content of the grounding affidavit sworn by him, to support the earlier motion seeking liberty to enter final judgment. Counsel for the appellant strongly opposed both applications on the basis that it would be allowing the Bank to "plug an evidential hole", by adducing evidence long after it was entitled to do so and would result in prejudice to Mr. Fergus. On the latter point he submitted that in the event of there being a continuing evidential lacuna regarding the amount of the principal debt, he would be entitled to apply for a direction and would have every chance of success in that regard: further, he offered the view that any fresh set of proceedings brought by the Bank could be successfully defended on the basis of *res judicata*. Whilst counsel acknowledged that the trial judge had power to issue directions in relation to the conduct of the trial and that she could exercise some discretion in this regard: however, he submitted that this could not extend as far as to accede to the application then being made on behalf of the Bank.

10. Whilst the learned trial judge allowed the application, she did so with conditions attached. In relation to Mr. Raftery she was clear that in re-examination he was not to be asked any leading questions and that he would have to be carefully examined as to whether, at any point in the context of preparing for this case, he inspected the Bank's records in relation to the Company's debt. In relation to Mr. Moroney's intended evidence, the same would be allowed but on the basis that it would be confined to the amounts due in accordance

with the statements of accounts, identified in the affidavit of discovery sworn by him in February, 2011. She refused to allow any evidence of increased indebtedness beyond that date: accordingly, the Bank's claim was to be confined to the amount outstanding at that time. A full witness statement, properly verified by Mr. Moroney, would have to be delivered to the defendant to reflect this ruling. As part of her decision, Finlay Geoghegan J. also rejected the submission that the doctrine of *res judicata* could apply to any future proceedings taken by the Bank, as if she was minded to dismiss the claim, she would do so in such a way as to make clear that no determination of the real issues on their merits had taken place. Finally, she also noted the entirely unsatisfactory manner in which the Bank was seeking to prove its case. In light of this ruling, the matter necessarily had to be adjourned so that the defendant could properly examine the documentation which she insisted upon.

11. The hearing resumed on the 1st December, 2011 with Mr. Moroney, who as stated above (para. 8) was no longer an employee of the Bank, as a witness. He identified three accounts subsisting in February, 2011, all of which in his sworn belief, were accurate as of those dates: copies of these had been identified in his affidavit of discovery and were produced before the trial judge. His evidence was that as *per* each statement of account, the aggregate amount due by the Company to the Bank in February, 2011, was €9,211,764. In addition, he stated that the net amount realised in the receivership to date was €323,488 with the incurred expenses of that process being €471,50, making the deficit a total of €148,012. He also gave evidence of making spot-checks on the Company's accounts with the Bank for the purposes of identifying any unusual transactions and of verifying that the rate of interest charged was in accordance with the relevant facility letter. These inquiries, which admittedly were based on the electronic records of the Bank, satisfied him that the sums claimed were a true and accurate representation of the debt due.

12. Mr. Fergus chose not to give any evidence during the course of the hearing and neither were any witnesses called on his behalf. Therefore, there was no evidence which contested the Bank's records of the Company's indebtedness, as given by Mr. Moroney nor did the appellant deny or otherwise contest that the signature appearing on the guarantees relied upon, was his.

Judgment of the High Court

13. The trial judge delivered her judgment on the 30th March, 2012 ([2012] IEHC 131, [2014] 4 I.R. 428). The first key finding made by her was in relation to the admissibility of the evidence given by Mr. Moroney as to the amount owed to the Bank. The respondent had submitted that his evidence was sufficient to prove the debt in question, relying in this regard on what was stated by Clarke J., as he then was, in *Moorview Developments Ltd. v. First Active* [2010] IEHC 275, (Unreported, High Court, Clarke J., 9th July, 2010) and hereinafter referred to as "*Moorview – 2010*" (at pg. 22/para. 6.3). In that case it was held, in summary, that the evidence of "a witness from a bank" based on documents kept by it "in the ordinary way as part of the bank's records" should be treated as *prima facie* evidence of the liability sought to be established. Where such a

witness is available, a party does not have to rely upon or conform with the requirements of the Bankers Books Evidence Acts 1879 – 1959, as amended ("the 1879 Act"). As the evidence is *prima facie* only, the learned judge went on to point out the obvious, namely that the accuracy of such records or any specific entry in them can of course be challenged by any party in the litigation. If such should be contested, then the trial judge would have to decide the issue in accordance with well recognised principles. It may well be that if the challenge is sufficiently compelling, the Bank's evidence may not be accepted as sufficient to establish the debt.

14. Finlay Geoghegan J. endorsed this approach (paras. 13 – 16 inclusive): as a result she was satisfied to accept that, as a former official of the Bank, Mr. Moroney, was entitled to give evidence, based on the electronic records kept by the Bank, as to the amount of the debt due. Given that no specific element of these records had been challenged, the learned judge concluded that the respondent, as a matter of probability, had established that the amount due as of February, 2011, was €9,211,764. She also accepted, given that the appellant had not himself given any evidence and had not denied that the signature appearing to be his was in fact his, that Mr. Fergus signed each of the four original documents sought to be relied on by the bank.

15. Although reliance was placed on a total of four documents, Finlay Geoghegan J. decided to firstly examine whether the latest in point of time, namely the guarantee of the 1st June, 2006, could be relied upon so as to establish the Bank's claim. There were several submissions advanced on behalf of Mr. Fergus as to why this guarantee was neither valid or enforceable. The first was that the guarantee named the Company as "Fergus Haynes Developments Ltd." whereas its correct name was "Fergus Haynes (Developments) Ltd.". She could not accede to this argument, again citing from *Moorview – 2010* (p. 6) and also relying on the principles set out by Lord Hoffman in I*.C.S. Ltd v. West Bromwich* [1998] 1 W.L.R. 896 regarding the construction of contractual documents. Her conclusion was that this was a typographical error and when the text was construed in context, this was clearly a mistake as the only company of relevance was "Fergus Haynes (Developments) Limited". Consequently, it was equally obvious as to what the correction should be. Therefore, the actual meaning which she derived from this guarantee was one which was and should be obvious to any reasonable person. She also noted that several of the facility letters issued to the Company by the Bank made inconsistent use of the parenthesis when setting out the name of the Company.

16. The second objection raised, in respect of this guarantee was that (as part thereof) there were two sheets of paper containing the same terms, one signed and one unsigned. These terms sought to exclude potential defences which otherwise might be available to the guarantor: this by seeking certain confirmations of the guarantor's understanding of the agreement. The original guarantee shows that the unsigned version was inserted after the execution clause, but before the back sheet: while the signed version had been attached only after the back page. Mr. Fergus also pointed out that his signature on the signed sheet appeared in black pen whereas his signature on the page with the execution clause was in blue pen, suggesting as a matter of probability that the signed sheet was

added after the entire document had been signed: on such basis he suggested that the guarantee should be held invalid. The judge however could not accept this, particularly since Mr. Fergus had not disputed his own signature on any of the documents before the Court. However, she was prepared to disregard the signed sheet, holding that it was not part of the "document" at the time of the execution of the guarantee: however, in her view neither the existence or location of this sheet had any bearing on the validity of the guarantee.

17. The next submission in relation to this particular document was that it was a guarantee and not an indemnity and that as such it was a contract to which the provisions of s. 2 of the Statute of Frauds (Ireland) 1695, applied. The appellant's contention, based on the judgment of O'Flaherty J. in *Boyle v. Lee* [1992] 1 I.R. 555, was that the agreement between the parties did not contain all of the essential terms: this because the unsigned sheet could not be considered as part thereof. Finlay Geoghegan J. described this objection as unfounded: even disregarding the sheet as she had done so, the rest of the document, as verified by his signature, quite evidently contained all of the terms as agreed, and as such, the same constituted a valid contract. Therefore, there was full compliance with the provisions of s. 2 of the 1695 Act.

18. The final submission in respect of this guarantee was to the effect that Mr. Fergus was not liable for the monies due by the Company having regard to the restructuring of its facilities which took place subsequent to the 1st June, 2006. A facility letter dated the 4th April, 2007, issued to the Company which granted certain new loans and restructured others. The Bank submitted that the guarantee of the 1st June, 2006 was a continuing guarantee to cover all sums then due or which might thereafter become due. The terms of the guarantee at clauses 2.1, 3.1, 4.1.1, 4.1.3 and 8 (in part), make reference to the fact that it applies to all monies owed by the Company to the Bank at that time and in the future.

19. The learned judge agreed with counsel for both parties that the applicable principles were not in dispute as to the circumstances in which a guarantee will be construed as encompassing future restructuring arrangements between the Principal Debtor and the bank. In short, she was satisfied that the determination of this issue will depend in each case on the precise scope of the guarantee and the effect thereon of the subsequent contractual arrangements in question. (O'Donovan & Philips, *The Modern Contract of Guarantee* (2nd English edition) at p. 309). In her view, when objectively construed in accordance with the words used, the guarantee of the 1st June, 2006 covered all past, present and future liabilities of the Company.

20. In this context, she did not accept the reliance placed by counsel for Mr. Fergus, on the decision of this Court in *Bank of Ireland v. McCabe* (Unreported, Supreme Court, 19th December 1994), in support of his submission that each of the guarantees relied upon, should be construed as intending to cover only the specific loan offered by that particular facility, pursuant to which the guarantee in question was given. While she did accept the submission that no satisfactory explanation had been offered for the apparent practice of

the Bank (para. 18 *supra*), that every new guarantee should cover all existing and future debt, this did not change the clear meaning of the terms of the guarantee of 1st June, 2006, which in her view was a continuing one for all monies due or which might thereafter become due by the Company. On that basis, the onus shifted to the defendant to establish as a matter of probability that such was not the case. However, he had not adduced any evidence to that effect: consequently the learned judge was not satisfied that there was any intention by the parties to limit or restrict any one guarantee to a particular facility or group of facilities granted by the Bank to the Company.

21. Accordingly, Finlay Geoghegan J. found the guarantee dated 1st June, 2006 to be valid and enforceable against Mr. Fergus and gave judgment in favour of the Bank in the amount of €9,211,764. She did make a concluding remark as to the unsatisfactory manner in which the Bank had conducted these proceedings and their less than careful dealings with Mr. Fergus. However, and notwithstanding, none of these shortcomings could be said to have any impact on the appellant's liability.

22. On the 20th April, 2012, the judge dealt with the issue of costs. Having heard submissions from both parties, she awarded the Bank the costs of their application for summary judgment: she made no order as to the costs of the aborted trial before Kelly J. and awarded the appellant the costs of one day's hearing to reflect the extra time taken by the Bank in calling an additional witness. Finally, she awarded the Bank 50% of its costs in respect of the balance of the proceedings.

Notice of Appeal

23. The appellant filed his Notice of Appeal to this Court on the 16th May, 2012. In it, there are seven grounds of appeal listed, which are as follows:

i) The trial judge erred in law in ruling as she did on the 9th November, 2011 to allow the Bank adduce further evidence to prove its debt against the appellant in circumstances where:

a) It became apparent during the trial that the only witness on which the Bank proposed to rely was unable to prove the debt of the Company to the Bank, whose debt the appellant had allegedly guaranteed;

b) No witness statement had been proffered by the Bank in respect of the aforesaid evidence, in contravention of Order 63A, Rule 22 of the Rules of Superior Courts;

c) The appellant had objected to the admission of the aforesaid evidence;

d) The admission of the aforesaid evidence deprived the appellant of the opportunity to apply for a direction that the Bank's case against him be dismissed;

ii) The trial judge erred in law and in fact by adjourning the trial to allow or facilitate the Bank to adduce further evidence to prove its case;

iii) *The trial judge erred in law by holding that the guarantee signed and given by the appellant on 1st June, 2006 was valid and enforceable;*

iv) *The trial judge erred in law by holding that the guarantee of 1st June, 2006 was a continuing guarantee of all monies then due or which might become due in the future by Fergus Haynes (Developments) to the Bank;*

v) *The trial judge erred in law by holding that the addition of a legal consent form after the execution of the document by the appellant did not invalidate the guarantee of 1st June 2006;*

vi) *The trial judge erred in law by holding that the guarantee of 1st June, 2006 complied with s. 2 of the Statute of Frauds (Ireland) 1695;*

vii) *The trial judge erred in holding that the errors in the name of the Company in the guarantees relied upon by the Bank were not fatal to their validity.*

Having regard to the submissions, and notwithstanding the extensive nature of the notice, the live grounds of appeal can conveniently be described as follows: firstly, the fair trial issue, secondly, the admissibility issue and thirdly, the validity and enforceability of the guarantee of 1st June, 2006. The latter has a number of facets to it, including the incorrect identification of the Principal Debtor, the insertion of a sheet after the execution clause and whether that rendered the guarantee invalid, and finally whether on that ground or on any other ground, the Statute of Frauds (Ireland) 1695 was sufficiently complied with.

The Appellant's Submissions

24. On the first matter the appellant has submitted, as an overarching point, that throughout the proceedings there was an extreme failure by the Bank to comply with Commercial Court Rules relating to the filing of witness statements. The only statement filed in accordance with Order 63A Rule 22(1) was that of Mr. Raftery and even then his statement was an adoption of the one filed by Mr. Waldron. He was not in a position to prove the matters contained in it in accordance with the rules of evidence. Mr. Julian Moroney did not file a witness statement in accordance with these rules as the Bank had not intended to call him as a witness prior to the hearing. The appellant cites from the decision of Clarke J. in *Moorview Developments Ltd v. First Active plc* [2008] IEHC 274, [2009] 2 I.R. 788 at 798 ("*Moorview – 2008*"), in support of the contention that where there has been significant failure to comply with case management directions, or in this case with court rules, the court may refuse to allow further witness statements or further amendments to existing statements.

25. In this context it is said that counsel on behalf of the Bank should never have been allowed to ask Mr. Raftery (i) questions which related to his grounding affidavit, in light of the trial judge's observations that "affidavits", are not admissible evidence, or (ii) questions on re-examination which should have been asked of him, when first introduced as a witness. Secondly, the premise upon which the learned trial judge permitted Mr. Raftery to give evidence on the "adopted statement of Mr. Waldron", was misconceived

and erroneous. The basis therefor was that to have rejected the application, thus leading to the case being dismissed, would have served no useful purpose as in her view the Bank would have been entitled to institute further proceedings which would be quite an undesirable course to permit, given that there had already been an aborted trial. The appellant objects to this, instead claiming that if the course urged by him had been adopted (para. 9 *supra*), the proceedings would have been dismissed on the merits.

26. The follow on aspect of this submission relates to the issue of *res judicata*, which was raised as part of the argument in the High Court, but not fully argued. Rejecting the views of the trial judge as to what consequences would follow if, his application had been successful (para. 9 above), the appellant submits that had the case been dismissed due to the lack of evidence, the only contentious element of this doctrine which could possibly arise thereafter, would be whether or not a final and conclusive judgment had been pronounced. He further says that the examples given, of where *res judicata* would not apply (Delaney and McGrath, *Civil Procedure in the Superior Courts*, 2nd edition p. 810) were not applicable to the circumstances standing before the court of trial, when Finlay Geoghegan J., as part of her ruling, made the observations which she did on this issue (para. 10 above). The illustration so described in this text simply had no relevance to this case at that particular time.

27. On the basis of some loose analogy, Mr. Fergus also refers to *Henderson v Henderson* (1843) 3 Hare 100 which he cites as applying where. "…a person may be precluded from litigating an issue which had not previously been decided when it is one that could have been brought forward in previous proceedings". Where such a situation arises, it is important to see whether or not the defaulting party is misusing or abusing the process of the court. In this case, the Bank must have known what its legal obligations were from day one and accordingly, such should have been in a position to establish their case in accordance with both the commercial rules and the relevant evidential requirements. Having failed to do so Finlay Geoghegan J. was incorrect in refusing to dismiss the proceedings at that point. The second issue relates to the admissibility of the evidence of Mr. Julian Moroney, upon which the trial judge gave judgment in favour of the Bank. Not having delivered a witness statement in advance of the hearing and not being an employee of the Bank, as of November, 2011, the appellant submits that the only conceivable basis upon which this witness could have given evidence of debt would have been, if the records had been properly proven, pursuant to the provisions of the Bankers' Books Evidence Acts 1879-1959, as amended. In this respect he cites the judgment in *Ulster Bank Ireland Limited v Dermody* [2014] IEHC 140 (Unreported, High Court, O'Malley J., 7th March, 2014) at p. 27 ("*Dermody*"), in which the defendant guarantor objected to the admissibility of affidavit evidence where the deponent was not an employee of the bank. O'Malley J., having referred to a number of cases where this type of issue had arisen, held that the books and records of a bank could only be proved by a partner or officer of the bank, and then only in compliance with the 1879 Act. In this regard, she could not accept the proposition first advanced by Clarke J. in *Moorview – 2010,* and subsequently followed by Finlay Geoghegan J. in this case and by Ryan J., as he then was, in *Bank of Ireland v. Keehan* [2013] IEHC 631 (Unreported, High Court,

Ryan J, 16th September, 2013) ("*Keehan"*), to the effect that business records are admissible as *prima facie* evidence of the truth of their contents without reference to statute. Accordingly, in the case before her, as the deponent was not an employee of the plaintiff bank, his tendered evidence was inadmissible. This approach followed closely that endorsed by Peart J. in *Bank of Scotland v. Stapleton* [2012] IEHC 549, [2013] 3 I.R. 683 ("*Stapleton*"). Relying on these authorities, Mr. Fergus submits that Mr. Moroney was not such an employee at the time and accordingly, his evidence should not have been admitted.

28. In an overall sense, Mr. Fergus relies on the above authorities in support of his submission that since Mr. Moroney was not an employee of the Bank at the time when he gave evidence he was not an eligible person to give such evidence, in accordance with the 1879 Act: it is urged that *Dermody* and *Stapleton* in particular support this proposition. He admits that the evidence was sufficient in accordance with the principles espoused by Clarke J. in *Moorview – 2010*, however he submits that it was not admissible due to Mr. Moroney not having been an employee of the Bank at the time he gave his evidence.

29. The final submission made by the appellant relates to the fact that Finlay Geoghegan J. gave judgment pursuant to the guarantee dated the 1st June, 2006: she chose this guarantee because it was the latest in point of time of the four relied upon by the Bank. In so doing, it is said that she erred as a matter of law given that there were several later guarantees, which were in the same form and which would appear to be valid on their face, namely those dated 10th December, 2007 and 29th May, 2008. The fact that those were not relied upon by the Bank is not relevant.

30. In the Australian case of *Mahoney v McManus* 180 C.L.R. 370, a guarantee was entered into by three people jointly and severally: subsequently a further guarantee in respect of the same principal debt was given by two of the three original guarantors. The third guarantor claimed that the execution of the second guarantee had the effect of discharging the first guarantee. This argument was not accepted by the court. However, in his judgment Gibbs C.J. commented, by way of *obiter*, that if the parties to both guarantees had been the same, the situation might have been different in that it would have been easier to come to the conclusion that they intended to substitute and discharge the latter guarantee for the former, rather than having two identical guarantees in respect of the same debt. These observations are quite apt to the circumstances of this case. Although different in detail to the facts of the instant case, nonetheless the appellant relies on the observations of Gibbs C.J. as supporting the proposition herein advanced.

31. In this context the appellant also points to a question asked of Mr. Raftery, as to the reason why, on each occasion of a new or revised facility, a fresh guarantee to cover all liabilities, and not just those particular to that facility letter was demanded by the Bank. His response was that while it did seem to be a rolling guarantee each time, he was not entirely sure whether each individual guarantee was intended to capture all or just a particular amount of the debt. It is also noted that at para. 80 of his witness statement, Mr. Raftery states that the guarantee dated the 29th May, 2008 was the guarantee

referred to in the facility letter of the 19th May, 2008, which did not come into effect. The appellant submits, that whilst the implication of this is that the guarantee did not take effect by reason of the facility of the 19th May, 2008 not being utilised, nonetheless it is said that Mr. Raftery was not in a position to have knowledge or give evidence concerning this particular letter, as he was not an employee of the Bank at the time. Even however if he had competence in this regard, his statement appears contrary to the unequivocal position adopted by the Bank throughout these proceedings which is that each guarantee was capable of being a continuing security for all debt due by the Company to the Bank both at a particular time and thereafter into the future.

32. In conclusion, the appellant submits that the decision of the trial judge should be overturned due to the numerous issues surrounding the admissibility of the evidence of the Bank's only relevant witness, Mr. Moroney, in particular given the fundamental nature of such evidence. He further submits that the decision of the learned judge to admit this evidence was based on an erroneous belief that if she had dismissed the case due to evidential inadequacy, the Bank could bring another set of proceedings thus adding substantial time and cost to an already troubled litigation process. Finally, he claims that the Bank was obliged to base its claim on the guarantee which was executed latest in time and not on the guarantee dated 1st June, 2006: this submission is based on the principle that the later guarantee extinguishes the identical one which preceded it in point of time. On these and on the other grounds as articulated, the appeal should be allowed.

The Respondent's Submissions

33. The respondent makes a preliminary point, which is this: that whilst it always understood that the sufficiency of its evidence to establish the debt was in issue, the pure "admissibility" argument was not: in particular, it is not to be found in the notice of appeal and was articulated only for the first time in the submissions made. Accordingly, the appellant should not be permitted to advance this argument before this Court. Without prejudice to this, however, the respondent nonetheless has dealt with this particular point in its submissions.

34. They have also dealt with two issues raised in the High Court proceedings, but which were not addressed by the appellant in his written submissions to this Court, these being firstly, the argument that pursuant to s. 2 of the Statute of Frauds (Ireland) 1695, the guarantee of the 1st June, 2006, as duly executed, did not contain all of the essential terms required to satisfy that provision and as such was invalid and secondly, that in a number of the guarantees relied upon, including that of the 1st June, 2006, the parentheses in the Company's name was missing: for either or both of these reasons, the defendant in the High Court urged that the guarantee was invalid. On the contrary however, the Bank submits that each of these arguments was dealt with fully and correctly by the trial judge.

35. The respondent submits that the objection to the admission of Mr. Moroney's evidence, based on the Bankers' Books Evidence Act 1879 – 1957, (as amended), is misconceived and that at least by virtue of the decision of this Court in *Ulster Bank Ireland Limited v. O'Brien & Ors* [2015] 2. I.R. 656 ("*O'Brien*"), admittedly given post the judgment of

Finlay Geoghegan J., the position in relation to this issue is no longer in doubt. It is the Bank's case that it is not necessary or obligatory for a bank to have recourse to the 1879 Act in order to adduce admissible evidence of debt, in particular in circumstances such as here where the defendant has not tendered any evidence to the contrary. They quote a passage from the judgment of MacMenamin J. in *O'Brien* (pg. 659) in which the learned judge said that a prima facie case is made out when "*…on the evidence available it would be open to a tribunal of fact, if no other evidence was given, or if that tribunal accepted that evidence even though contradicted in its material facts, to enter a verdict for that party*." (para. 2 of the judgment, p. 659 of the report). They also quote paras. 55-56 and pg. 682 – 683 of the report also from the decision of Charleton J. in that case to support the contention that in particular circumstances an inference can be drawn from the silence of a person who might reasonably have been expected to issue some form of denial, whereby their lack of contradiction can amount to the acceptance of the contrary case.

36. The Bank asserts that Mr. Moroney was competent to give admissible *prima facie* evidence of the indebtedness of the Company and as such, did not need to have recourse to the 1879 Act. In the absence thereafter of any contrary evidence, which was not adduced in this case, it is said that Finlay Geoghegan J., was entitled to accept and act upon that evidence.

37. The respondent suggests that it was entirely within the jurisdiction of the trial judge to allow Mr. Moroney to give evidence, notwithstanding the fact that a witness statement from him had not been delivered. Order 63A r. 22 of the Rules of Superior Courts is cited in support of this, in particular para. (1) of that rule: (para. 46 *infra*). They also refer to O. 36 r. 42 and O. 63A r. 5 of the RSC and to the inherent jurisdiction of the Court to control, subject to the demands of justice, its own procedure and proceedings. In this respect, the Bank says that Finlay Geoghegan J. exercised her discretion within the ordinary and necessary ambit of a trial judge's authority, and did so with notable care and fairness. Accordingly, the learned trial judge was perfectly entitled to rule as she did.

38. The respondent denies that the calling of Mr. Moroney in the circumstances occurring, could be said to fall within the most serious category of non-compliance with case management, in the context identified by Clarke J. in *Moorview – 2008*: rather, such a step became necessary once Mr. Waldron was indisposed and unable to attend. This did not represent a wilful and systemic non-compliance by the Bank with the procedural rule and in any event, it did not change the nature of the case which Mr. Fergus had to face: further such evidence was limited to the contents of the affidavit of discovery which had been previously sworn by him. Therefore, no one could have been taken by surprise.

39. On the *res judicata* issue, the respondent submits that Mr. Fergus' complaint that the process should have been dismissed and that in any fresh proceedings he could have relied upon this plea is incorrect for the reasons made clear by the judge during her ruling on the 9th November, 2011. Any hypothetical dismissal of proceedings would not have been based on the merits: therefore, such a step would not give rise to a possible future bar by virtue of *res judicata*. In this respect, the respondent cites the decision of this

Court in *Sweeney v. Bus Átha Cliath & Ors* [2004] 1 I.R. 576 and indeed the comments of Finlay Geoghegan J. in this case when she said that on any such dismissal she would have made it clear that she had not made any determination on the merits of the issues when existing between the parties. In such circumstances, *res judicata* would simply not apply.

40. The respondent then submits that the appellant's apparent reliance on the rule in *Henderson v Henderson* (1843) 3 Hare 100, 67 E.R. 313 is misguided, as that rule is intended to guard against a different form of abuse than that targeted by the appellant in his submissions. The Bank says that the principles outlined in that case, represent a more flexible approach, whereby the courts may restrain a litigant from advancing issues which could have been raised in earlier proceedings, it is not concerned with preventing the re-litigation of issues which have not been conclusively determined on their merits.

41. The final submission made by the respondent relates to the alleged extinction of prior valid guarantees by the execution of subsequent ones, of a similar nature. The respondent objects to the appellant's submission that the Bank should not have been entitled to "*pick and choose*" from amongst the various guarantees and that the implication of the judgment of the High Court is that the guarantee which is latest in time is the one which the Court is entitled to give its judgment on foot of. The Bank says that the judgment of the High Court gives no such implication and that at all times its position was that it was entitled to obtain judgment against the appellant based on any one of the plenary guarantees relied upon (para. 5 *supra*), as each represented a continuing obligation. The respondent agrees with the view expressed by the trial judge that the guarantee of the 1st June, 2006 was a continuing all monies guarantee and that as such it was unnecessary to consider any of the remaining guarantees. It is respectfully submitted the appellant's reliance on the Australian High Court decision of *Mahoney v. McManus* [1981] 180 C.L.R. 370 is misplaced.

42. The Bank also notes the argument made on behalf of the appellant that it should be inferred that each individual guarantee should be linked to a specific loan facility, this based on the decision of *Bank of Ireland v. McCabe* (Unreported, Supreme Court, 19th December 1994). However, the respondent draws our attention, as did the learned judge in her judgment, that this argument runs contrary to the express terms of the guarantees, including that which ultimately gave rise to judgment being given in favour of the bank. Coupled with the fact that Mr. Fergus did not adduce any evidence which could prove any kind of implied agreement between himself and the Bank limiting any of the guarantees to a specific loan facility, the respondent submits that the decision reached by the trial judge on this point was well founded in evidence.

43. In conclusion, the respondent agrees with the reasoning of Finlay Geoghegan J. in respect of all matters which have been raised by the appellant. They see no basis for overturning her decision and furthermore do not believe that any of the issues raised by the appellant could be capable of reaching the necessary threshold in order to do so.

Discussion / Decision

Issue No. 1: The Fair Procedure Point (para. 23 above)

44. Prior to the creation of the commercial court, there were some instances of what could be loosely described as case management, such however were mostly haphazard and random and those which did take place, tended to occur at trial rather than having any pre-trial focus. All of this dramatically altered with the creation of the commercial court and the making of the rules which govern its process. It is I think accepted by all that its undoubted success could not have been achieved without the active intervention of the judiciary and their frontline approach to insisting upon rule compliance: only for good, well established and justifiable cause, would indulgence be granted. As one would expect however, the general approach became more refined and more nuanced over the years, but never to a point where the effectiveness of its procedures became compromised. Such an approach has served both litigation and the administration well.

45. The basic *rationale* underlying the court and the process which govern it, are very well known, and require no repetition in this judgment. It is sufficient to recall that the purpose of its procedural requirements can be seen from many it not all of its rules, including rule 5, which will be quoted in a moment: and it is this: to ensure that proceedings may be determined in a manner which is just, speedy and efficient: to which can be added the objective of minimising costs (*Re Norton Health Care* [2005] IEHC 411, [2006] 3 I.R. 321). There are of course other objectives, but in a broad sense its major focus is as I have described.

46. There are two rules of Ord. 63A of the Rules of the Superior Courts which are relevant to this case: rule 5 and rule 22(1) read as follows:-

> *"5. A judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings."*
>
> *"22(1) Unless a Judge shall otherwise order, a party intending to rely upon the oral evidence of a witness as to fact or of an expert at trial shall, not later than one month prior to the date of such trial in the case of the plaintiff, applicant or other party prosecuting the proceedings and not later than seven days prior to that date in the case of the defendant, respondent or other party defending the proceedings, serve upon the other party or parties a written statement outlining the essential elements of that evidence signed and dated by the witness or expert, as the case may be."*

It should also be noted that rule 6 of Order 63A is a more explicit amplification of the general nature of what is stated in rule 5.

47. Perhaps the earliest authorative decision, both in a general and specific sense, dealing with the commercial rules, their non-compliance and the consequences which might or should follow therefrom, is that of *Moorview Developments Limited v. First Active Plc* (delivery date 31st July, 2008) [2009] 2 I.R. 788, [2008 IEHC 274 ("*Moorview – 2008*").

In his judgment, Clarke J., as then, recalled the difficulties which he, as the trial judge, had in trying to get the plaintiff, one of many companies which comprised the Cunningham Group, to comply with time limits, agreed upon by the parties, and on that basis directed by the court, for the delivery of witness statements, both as to fact and as to expert testimony. Despite significant delays, several extensions of time were nonetheless granted: it was only following the making of a "unless order" that such statements were ultimately delivered. From a reading of the judgment, it is abundantly clear that the Group's response to their obligations was neither orderly or compliant: rather, they exhibited a clear disrespect for the directions of the court. This was the background to a further application by the plaintiff to file a new and more detailed statement of evidence from a witness, whom they intended to call, a Mr. Kieran O'Brien.

48. The learned judge, on this aspect of the case, commenced by noting the importance of the necessity to ensure reasonable compliance with procedural requirements, if case management was to work. There was an obligation on all parties to this effect, each of whom should be conscious of the fact that where default was of such a degree, he or she may be deprived of evidence which evidently they otherwise might benefit from. It was no answer simply to point to the lack of prejudice to the opposing party by reason of such failure. When rejecting such a submission where the comparable rules of court in England and Wales were being considered, Lord Wolfe in *Beachley Property Limited v. Edgar* [1996] T.L.R. 436, in making it "absolutely clear" that such an approach had to be rejected, pointed out that if such was the governing principle, the very reason for case management in the first place would disappear. In his view when considering any application for the late admission of evidence, there were multiple factors at play, including many which were intended to have a broader reach than simply the case before it.

49. Clarke J., found the reasoning of Lord Wolfe in *Beachley Properties Limited* to be impressive, despite pointing out that the subsequent over rigid application of the principles therein stated, had been disapproved in later UK authority (pg. 797). Nonetheless, the learned judge emphasised that in looking at this area the court should be conscious, not only of each party to the litigation before it, but also "…to the consequences for litigation generally of an unduly lax approach to compliance in a timely fashion with procedural requirements" (pg. 795). Further, at this general level, whilst a court must be careful not to adopt a rigid and inflexible approach purely to encourage compliance, nonetheless it must equally avoid an over indulgence to that end, which would be self-defeating.

50. Clarke J. then considered how a court might approach a situation where there had been fault, differentiating between different levels of non-compliance. In brief, if the default, although material, could not be said to be significant, the court, particularly in the absence of serious prejudice, should try and facilitate the reception of the evidence or further evidence as the case may be. Recourse may legitimately be had to the imposition of conditions in this regard, particularly if such could remove or ameliorate any prejudice which might exist.

51. However, in serious cases of default, the factors of persuasion one way or the other, must extend beyond the situation of either individual party and must include a consideration of the overall integrity of the administration of justice generally. Drawing these factors together, at para. 26 (pg. 798) of the judgment, the learned judge continued:-

> *"At all times the court should, of course, consider whether any measures short of excluding the relevant evidence might meet the requirements of the case. However, a point will, necessarily, be reached where to afford any further indulgence to a party would create a likely expectation amongst parties generally of a level of indulgence which could only undermine case management."*

On the particular facts of the case before him, he refused the application made.

52. Another case in which the issue of pre-trial delivery of witness statements and compliance with case management directions was dealt with was in *Ryanair v. Bravofly* [2016] IESC 53 (Unreported, Supreme Court, 23rd February, 2016). Ryanair brought proceedings against Bravofly due to their "screenscraping" of Ryanair's website data, seeking a number of injunctions as well as other orders. Kelly J. (as he then was), during the case management process directed the delivery of witness statements to be completed by the 15th March, 2010, with the hearing scheduled to take place on the 12th October, 2010. Witness statements were duly delivered by both parties, however in a letter written by Ryanair on the 6th July, 2010, they included two supplemental statements. Bravofly complained about this on one occasion before the trial but the issue was not raised again until the first day of the hearing. McGovern J. ruled that the statement was inadmissible due to its non-compliance with directions, however he also adjourned the hearing after learning of Ryanair's intention to appeal the ruling so made.

53. In a judgment which I delivered on the 23rd February, 2016, the issue of this ruling and the subsequent adjournment came before this Court. I noted that to allow an adjournment at Ryanair's behest was a less than ideal scenario given that the events which had given rise to the proceedings had taken place nearly nine years previous. Again, this situation serves as an example of the necessity for parties to take compliance with time limits seriously, in order for the efficient running of court processes to take place. In that circumstance, where a supplemental statement is delivered significantly outside the directed time limit, the Court must scrutinise the surrounding circumstances with a high level of scepticism so as to make sure that justice between the parties can still be achieved if the statement is to be admitted. There are a number of factors which can be taken into consideration in order to determine the appropriate decision, including: the reply (if any) of the other party, the significance of the statement and whether the other party would likely be prejudiced. One observation which I made and am inclined to restate is that justice is the ultimate objective of case management, not just at an *inter partes* level but also at the level of the system of justice as a whole: the functional operability of that system is an integral part of it. In that particular case however, justice was not jeopardised by allowing the statement into evidence.

54. I do not think that the circumstances relevant to issue No.1, in this case, can truly be said to fall within the kind of circumstances envisaged in the judgments above described. There is no suggestion that the respondent in this case failed to comply with any pre-trial direction made by the court. In the present context, a witness statement from both Mr. Waldron and Mr. Raftery had been delivered to the appellant, in a timely manner. Rather, the problem emerged at the opening day of the trial when Mr. Waldron was not available to give evidence due to illness. Instead, Mr. Raftery was called as a witness to give evidence, but was unable to offer admissible evidence of the principal debt. In fact, the figures given by him in his witness statement had been taken from that of Mr. Waldron. Furthermore, he also sought to give evidence of a more up to date calculation of the precise debt, which had been made by Mr. Moroney. This individual, was not even on the list of witnesses: therefore, one would not have expected the Bank to have pre-trial, delivered a witness statement relative to him.

55. These circumstances gave rise to an application firstly mentioned on the opening day of the trial, but formally moved on 9th November, 2011. Leave was sought to call Mr. Moroney as a witness. Evidently no pre-trial direction had been given in respect of him. Therefore, the situation facing the learned trial judge at that time was entirely different to the circumstances envisaged by Clarke J. in *Moorview – 2008*. Consequently, I do not believe that the principles outlined in that decision and in *Ryanair v. Bravofly* would have been appropriate for Finlay Geoghegan J. to have applied when dealing with the application so moved.

56. In acceding to this application, the trial judge imposed conditions to ensure that any immediate prejudice suffered by Mr. Fergus would not impact upon his ability to defend the proceedings. Mr. Moroney was obliged to produce a compliant witness statement which he did. Mr. Moroney's evidence was confined to the figures outlined in the affidavit of discovery sworn by him on behalf of the Bank in February, 2011. No later calculation was permitted. Furthermore, so as to permit Mr. Fergus to consider the situation resulting from this ruling, the judge adjourned the trial for an appropriate period. On its recommencement, it was not nor could it have been argued, subject to one point, that Mr. Fergus continued to suffer any prejudice. It seems to me that the trial judge achieved a situation which preserved the justice of the litigation process.

57. It is accepted by the appellant that the decision made by the learned trial judge was fully within her right to so do, both as narrowly provided for under O. 63A, and in the wider context of the Constitution. Rule 5 explicitly confers jurisdiction to give such directions and make such orders as will achieve the objectives set out in that rule. Furthermore, not only has a trial judge jurisdiction in this context, there is undoubtedly a constitutional duty to ensure the fairness of a trial. Whilst this is sourced in Article 38° when dealing with criminal matters, it is both found and derived in civil matters from Article 34° and Article 40.3° of the Constitution. Therefore, I am entirely satisfied that the decision made by her in light of the conditions imposed, was an appropriate and proper one to have taken.

58. The caveat above mentioned relates to what I have described as the *res judicata* argument. Given the conclusion which I have reached on the entitlement of Finlay Geoghegan J. to make the decision which she did, this point, even if in certain circumstances it might be arguable, simply falls away. Consequently, I would reject the submissions made by the appellant on this, issue No. 1.

Issue No. 2: The Admissibility Dispute (para. 23 above)

59. Prior to the financial crisis, there was rarely, if ever, a problem of substance about a financial institution establishing, by admissible evidence, a debt due by a client or customer of that body, or in the absence of any such claim the account or facility which another party may have had with that bank. In virtually all cases the provisions of the 1879 Act facilitated such a proof. Whilst the Act may not have been expressly referred to or even notionally at the forefront of one's attention, nonetheless the essential requirements of compliance were to be found, not only in the evidence given but also by whom it was given. In saying this, I am making no distinction between where the Bank was itself a party to these proceedings and was seeking judgment, or where as a witness, its records were required in some third party action: even if evidently we are concerned in this case with the former only. In the last ten years or so, greater scrutiny has been focused on the question of proof, largely but not exclusively because of the restructuring which has occurred within banking groups whereby subsidiary or associated companies were subsumed into their parent identity. This was facilitated by the Cross-Border Merger Regulations, above referred to at para. 2.

60. Many institutions, including those whose original identity had not altered, began to seek judgment, with increasing vigour and urgency, in respect of debts due and either at that time or immediately thereafter, further sought to enforce the underlying security which virtually was always in place. In attempting to establish a defence, of any sort, even one which might only justify a referral to plenary hearing, many borrowers, who felt their very financial livelihood was at stake, sought to advance any argument, either factually or legally, that might have been open to them. One focus of their attention centred on the rules which governed proof of debt, in the type of proceedings which they faced. Arising from these circumstances, there have been a number of cases in the recent past which have had to address various issues which are a consequence of this situation. For the purpose of this case however, we are only concerned with the evidential issue.

61. The starting premise upon which this issue must be considered seems to me to involve a number of broad questions. Firstly, has the plaintiff brought itself within the provisions of the 1879 Act, for if it has, no further discussion is required, save to ensure that its provisions are complied with in any individual case. Secondly, if the Act is neither invoked or complied with, is there an alternative legal basis or bases upon which such a debt can be proved. This involves asking whether any such basis could give rise to a hearsay objection and if so, can an exception to the rule be found either at common law or in statute. Thirdly, which is probably an aspect of the second question, is whether separate and distinct from both the 1879 Act and the hearsay rule, there is some other sustainable route by which such evidence becomes admissible. Whilst there may be other issues in

play, these in my view are the essential matters for discussion. Leaving aside the statutory provisions for a moment, it should be said at the outset that a separation of link within the evidential chain should be noted. There are several aspects or matters which may arise in this very context. Is the proffered deponent an appropriate person to swear the grounding affidavit or give oral evidence as to debt: has he or she been duly and properly authorised to offer such evidence: what access and access to what documents, books and records did the individual in question have, what exercise did he in fact conduct in this regard, what verification took place as between the documents produced to the court and the origins of the information therein contained. The ultimate determination as to whether the debt was proved or not is quite incidental to what I have described. Against this background it is instrumental to look at the cases which I have referred to.

62. As between these possibilities, the contentious debate in the case law which I am about to refer to, has not centred, as such, on whether the provisions of the 1879 Act have been complied with or not: rather, it has focused on the establishment of a basis, alternative to that provided by the Act, upon which evidence of debt could be tendered. Such was first identified by Clarke J., as he then was, in *Moorview – 2010*, to be later followed and expanded upon by Finlay Geoghegan J. in the instant case, and also by Ryan J., in *Keehan*. That approach was rejected by O'Malley J., then of the High Court, in *Dermody* and certainly, insofar as it was necessary to do so, it was also seriously questioned by Peart J. in *Stapleton*. From the overall tenure of that judgment, I could not agree, as Ryan J. has suggested, that the learned judge cited *Moorview – 2010* "with apparent approval" (para. 21 of his judgment). I will leave aside *Ulster Bank v. O'Brien* for the moment, so as to deal firstly with the other cases involved: having done so, I will however come back and consider *O'Brien* separately. As matters currently stand, there is therefore a difference of view as to whether a bank has to comply with the 1879 Act, unless excused by some recognised exception to the hearsay rule, or whether external to those provisions and that rule, the bank can invoke a separate and distinct basis so as to establish debt. Before a consideration of this case law however, firstly, a consideration of the 1879 Act would be appropriate.

The 1879 Act

63. The original Act was amended by The Bankers' Books Evidence (Amendment) Act 1959, and further by s. 131 of the Central Bank Act 1989 ("the 1879 Act"): it has also been applied to several different bodies, of varying nature and in diverse circumstances, none of which however are not material to this case. In its current version the relevant sections are as follows:-

> *"s. 3 Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts there recorded."*

> *"s. 4. A copy of an entry in a banker's book shall not be received in evidence under this Act, unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the*

usual and ordinary course of business, and that the book is in the custody and control of the bank.

Such proof may be given by a partner or officer of the bank and may be given orally or by affidavit sworn etc."

"s. 5. (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that—

(a) in the case where the copy sought to be received in evidence has been reproduced in a legible form directly by either or both mechanical and electronic means from a banker's book maintained in a non-legible form, it has been so reproduced;

(b) in the case where the copy sought to be received in evidence has been made (either directly or indirectly) from a copy to which paragraph (a) of this section would apply:

(i) the copy sought to be so received has been examined with a copy so reproduced and is a correct copy, and

(ii) the copy so reproduced is a copy to which the said paragraph (a) would apply if it were sought to have it received in evidence;

(c) in any other case, the copy has been examined with the original entry and is correct.

(2) Proof to which subsection (1) of this section relates shall be given—

(a) in respect of paragraph (a) or (b) (ii) of that subsection, by some person who has been in charge of the reproduction concerned,

(b) in respect of paragraph (b) (i) of that subsection, by some person who has examined the copy with the reproduction concerned,

(c) in respect of paragraph (c) of that subsection, by some person who has examined the copy with the original entry concerned,

and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.",

(b) by the deletion in section 6 after "legal proceeding" of the words "to which the bank is not a party",

(c) by the insertion of the following section after section 7:"

"s. 6 banker or officer of a bank shall not, in any legal proceedings, be compellable to produce any Bankers Book the content of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts then recorded, unless by order of judge made for special cause."

"s. 9(1) In this Act the expression "bank" and "banker" mean any of the following: -

(a) The Bank of Ireland, the Hibernian Bank, the Munster and Leinster Bank, the National Bank, the National City Bank, the Northern Bank, the Provincial Bank of Ireland, the Royal Bank of Ireland and the Ulster Bank,

(b) Any other person who is the holder of a license issued under section 47 of the Central Bank Act 1942.

(c) …

(d) …

(2) Expressions in this Act relating to "banker's books" –

(a) include any records used in the ordinary business of a bank… whether

(i) comprised in bound volumes, loose leaf binders or other loose leaf filing systems…or

(ii) kept on microfilm, magnetic tape or in any non-legible form (by the use of electronics or otherwise) which is capable of being reproduced in a permanent legible form.

(b) …

(3) …"

64. This statutory code by which, subject to its terms, evidence may be given of the contents of the books, records and data of a bank, specifies a number of qualifying requirements, which can quickly be seen from a consideration of some key definitions or descriptions which it provides: these are as follows: -

- "bank": is not confined to the nominated entities referred to in s. 9(1)(a) of the Act, but by virtue of para (b) of that subsection it includes the vast majority of known entities which provide banking services in this jurisdiction;

- "banker's books": to be so considered, it must be one of the ordinary books of the bank and kept and retained in its custody and control: such since 1989 includes what I may loosely describe as computer records;

- "an entry in such a book": is one made in the usual and ordinary course of business and a copy of such entry must have been examined with the original and verified as correct;

- "reception into evidence": subject to compliance, such copy shall in all legal proceedings be received as "*prima facie* evidence of such entry";

- "legal proceedings": include those in which the bank is a party or where it is but a witness; and covers both civil and criminal proceedings;

- "the witness who may prove": any partner or officer of the bank, which includes any employee thereof may do so;

- "evidence by what means": either orally or by affidavit;

It will have been observed how the language used in *Moorview – 2010* is strikingly close to what is stated in a number of these measures: against this statutory background, the relevant case law must now be looked at.

The Case Law

65. There are several cases cited by both appellant and respondent in their submissions, which are said to be relevant to this point; some of which were decided before and some after the judgment of the High Court in the instant case. Each decision has a varying level of similarity with the other, but what emerges is that there is a difference of view as to how and in what manner a bank can establish by admissible evidence the debt which it seeks to recover. In order to arrive at a decision in this regard, it is I think necessary to have a closer look at the case law involved.

66. The judgment of Clarke J., in *Moorview – 2010*, which is of immediate interest is one, I think, of a total of 13 judgments or thereabouts, which he delivered in the overall litigation between the parties involved. In this particular module, First Active Plc sought to establish the indebtedness of the plaintiffs (the Cunningham Group) to it. The essential, indeed the only witness in this regard was a Mr. Collison. An objection was taken that some of the documents produced by him were not capable of being proved under the 1879 Act. That gave rise to the following passage which appears at para. 4.8 of the judgment. When dealing with such objection, the learned judge continued: -

> *"However, that submission seems to me to misunderstand the object of that legislation. As pointed out in Volume 1 of the 1st Edition of [Halsbury's]* Laws of England *at para. 1301, the main object of the Bankers Books Evidence Acts is to relieve bankers from the necessity for attending at court and producing their books under a* subpoena duces tecum*. The purpose of the Acts is not, therefore, to facilitate banks in proving matters. The purpose is to enable evidence to given of the content of other parties bank accounts without the necessity for the attendance of a representative of the bank concerned and the production of the relevant books. However, in this case, a representative of the bank did attend and give evidence that the records which he produced to the court were taken from First Active's electronic books and faithfully recorded what was present in them. In those circumstances there is no need for the relevant records to conform with the Bankers Books Evidence Acts. That legislation is irrelevant to a case where the contents of the bank's books are proved in the ordinary way by a witness who can give direct evidence of having analysed the books."*

67. The second aspect of that judgment which must be referred to, is where the learned judge dealt with a submission that, where multiple transactions give rise to the overall debt, the bank is obliged to call as its witnesses, every person who had been directly and personally involved in each of the transactions. In rejecting this, Clarke J. at para. 6.3 said:-

> *"What Mr. Collison's gave evidence of was an analysis carried out by him of documents kept by the bank in the ordinary way as part of the bank's records. Business records of that type are* prima facie *evidence of a course of dealing between the parties, although of course, any party is free to challenge the accuracy of any such records. However, the idea that a bank wishing to prove its case in debt against a customer has to produce a separate bank official who was personally involved in each individual transaction which gives rise to the customer's current debt is, in my view, fanciful. A witness from a bank is entitled to give evidence of the bank's records showing the amount due by a customer of that bank. That evidence and those records prove* prima facie *evidence of the liability." (emphasis added)*

The learned judge goes on to point out that such evidence may be challenged and depending on the nature of the objection raised and what may be offered in support by the opposing party, the trial judge will have to decide whether, in an overall sense, he/she is satisfied, as to the cogency and weight of the bank's evidence.

68. In the instant case, counsel on behalf of Mr. Fergus objected to the admissibility of Mr. Moroney's evidence to which in response the bank relied upon what was said in *Moorview – 2010.* Having quoted para. 6.3 of the judgment, Finlay Geoghegan J., at p. 433 of the report went on to say: -

> "I respectfully agree with the above approach as being correct. In this case Mr. Moroney, as a former official of the bank, is entitled to give evidence of the bank's records in relation to the indebtedness of the company to the bank. Those records including electronic records of the bank. That evidence is admissible evidence and is *prima facie* evidence of the liability of the company to the bank. As pointed out by Clarke J., if a specific element of the records is challenged, the court would have to decide on the factual dispute and the weight to be attached to the evidence of the relevant bank official would depend upon his personal knowledge of the matters in dispute." (emphasis added)

As no such challenge had been made however, she was satisfied to admit that evidence and conclude on the basis of it, that as a matter of probability, the amount due by the Principal Debtor to the bank, as of February, 2011, was €9,211,764.00. The learned judge, apart from relying on the evidence of a former employee, which was not the situation in *Moorview*, did not otherwise add to what had been said in *Moorview.* See also the judgment of Ryan J. in *Keehan*, in which he expressly agreed with both *Moorview* and

the decision of Finlay Geoghegan J. in this case (para. 19). So, these cases constitute one line of authority on the issue, namely that external to the Bankers' Books Evidence Act and without having to rely on any exception to the hearsay rule, a bank can establish its debt claim if it produces a witness, who can give evidence like Mr. Collison did in *Moorview*.

69. In a comprehensive review of the case law, as it then stood, O'Malley J., in *Dermody* considered whether *Moorview – 2010* was an authority which could be relied upon by the bank on the facts of the case before her. These showed that the plaintiff, named in the title of the action, was Ulster Bank (Ireland) Limited which, in the summary proceedings issued by it, sought liberty to enter final judgment against the defendants in the sum of €102,386.12. On appeal from the Master, who dismissed the claim, the evidence showed that the grounding affidavit was sworn by a Mr. Richard Evans, who in a correcting affidavit said that he was an employee of Ulster Bank Limited and not as first averred, an employee of the plaintiff company. In any event, in that capacity, he stated that he had full access to the file, was acquainted with the history of the account and had been authorised to swear this affidavit on behalf of the plaintiff. Furthermore, he gave evidence of familiarity with the ordinary conduct of business in the plaintiff bank and that the banker's books relied upon were the ordinary books of that bank. In addition, he said that the entries referable to the defendants were so made in the ordinary course of business and finally, that the books in question were kept in the custody and control of Ulster Bank (Ireland) Limited. All of these averments, quite evidently were included so as to show compliance with the requirements of the 1879 Act. Notwithstanding, the issue which arose was whether his evidence was admissible under either the provisions of that Act, or on the basis of the observations made in *Moorview – 2010*.

70. The learned trial judge considered the issues to be firstly, whether the records are admissible by way of a common law exception to the rule against hearsay and secondly, if not, whether the 1879 Act had been complied with. Having noted the views of Clarke J., in *Moorview – 2010*, supported by those of Finlay Geoghegan J., in this case, and those of Ryan J. in *Keehan*, to the effect that business records of this nature are admissible as prima facie evidence of the truth of their content, she outlined her own view at para. 45 of the judgment which was:-

> "Unfortunately I find myself unable to reconcile this with the decision of the Supreme Court in *Hunt*, and I have not been referred to any authority which includes such records as exceptions to the rule at common law. (It is true that a number of 19th Century decisions pre-dating the Act of 1879 held that entries made in business records were admissible, but this appears to have been so only where the person who made the entries as deceased)."

She thus held that the judgments referred to were not consistent with the decision of this Court in *Criminal Assets Bureau v. Hunt* [2003] IESC 20, [2003] 2 I.R. 168 ("*Hunt*"), and as she was bound by it, she had to reject the evidence of Mr. Evans.

71. O'Malley J. drew support for her conclusion from the decision of Peart J. in *Stapleton*. In that case the original mortgage had been with Bank of Scotland (Ireland) Limited, which of course was dissolved when its assets and liabilities including all rights and obligations which it had, were transferred to its parent company as of 31st December, 2010. The former entity therefore no longer had any physical presence in this jurisdiction and had outsourced the management of its portfolio to an independent service company called Certus. The grounding affidavit was sworn by an employee of that company, namely a Ms. Joanne Finnegan. Despite exhibiting the authorisation of the bank to swear the affidavit grounding the motion and despite stating that she had access to the file and thus to the history of the borrowing, nonetheless objection was taken on two points, firstly, that her evidence was hearsay and secondly and in any event, that she was not an employee of the plaintiff bank. Having considered *Hunt*, and the *Moorview -2010* decision, Peart J. citing a passage from Matthews & Malek, *Disclosure,* (2nd Ed. Sweet & Maxwell 2000 at para. 8.39), and a further passage from *Phipson on Evidence*, (1st Ed. Sweet & Maxwell 2000 at para. [36-74]), declined to admit the evidence. He was strongly of the view that the *Moorview – 2010* decision was not an authority for the proposition that someone other than an employee of the bank could produce copies of the bank's records so as to prove the debt being claimed. He said:-

> "There is nothing within that legislation (the 1879 Act) which relieves a bank from the strictures of the rule against hearsay". And then continued "Where a bank needs to prove by sworn testimony the amount it is due by a defendant customer, that evidence must be provided by an officer or partner of the bank [that is an employee]…to allow otherwise would be akin to a foreign bank engaging a solicitor here to collect a debt, and that solicitor coming to court and giving evidence as to the amount due to the bank…the evidence is necessarily hearsay and inadmissible." (pg. 691)

Accordingly, O'Malley J. was satisfied that unless an exception to the hearsay rule could be identified either at common law or by statute, then the only manner in which entries in bankers' books could be established was via the 1879 Act.

72. The learned judge then went on to consider whether Mr. Evans could be said to be a "officer" of the bank within the meaning of the Act. She could not agree that he could be so classified. He was not an employee of the plaintiff, but rather held that status with a separate legal entity. She rejected any view that in distinguishing between Ulster Bank Limited and the plaintiff company, she was creating an artificial distinction without meaning. This was not so as in establishing companies, of a subsidiary or associated nature, the Ulster Bank Group must be taken to have been conscious of their separate and distinct legal entities. Accordingly, she dismissed the appeal. This therefore represents the alternative line of authority in question.

The Hearsay Rule:

73. The rule against hearsay has been embedded as a core principle of our common law system since its first emergence in the Eighteenth Century. The purpose of the rule was

to help ensure the integrity of evidence that might be tendered in court proceedings. However, a level of dissatisfaction gradually arose, by reason of an over rigid application of what had been established, thus creating a feeling of confusion and uncertainty. Its complex nature did not help and it was seen as imposing onerous obligations which many felt were not necessary. To address these misgivings, the rule on an ongoing basis has been refined and modified throughout the years. This by both judicial creativity and statutory intervention. Despite such reforms however, the rule continues to survive and where in play can have an important bearing on the outcome of a case. It applies to both civil and criminal law.

74. An illustration of its continuing significance can be seen from the case of *the People (DPP) v. Lynch* [2016] IECA 78 (Unreported, Court of Appeal, 3rd March, 2016). In that case Mr. Lynch had been charged with armed robbery and as part of the prosecution's case, evidence was led from the Garda Pulse Database which showed an ownership link between the vehicle involved in the crime and that registered in the name of Mr. Lynch. The argument on his behalf was that the entry contained in the database was made by a Garda who had not been called as a witness. The Court of Appeal so agreed and concluded that the intended evidence constituted hearsay. As the admission of such evidence was highly prejudicial to the accused, the resulting conviction was quashed.

75. As stated, in order to mitigate the harshness of the rule, a number of exceptions were gradually established in the case law and created by statute. Examples, so generated, and which currently exist include, admissions and confessions, statements as part of the *res gestae*, dying declarations, certain statements of persons now deceased, testimony in former proceedings and previous statements of witnesses. On the statutory side, one can look to s. 21 of the Criminal Justice Act 1984, Part II of the Criminal Evidence Act 1992, s. 8 of the Criminal Asset Bureau Act 1996, s. 917M(4) of the Taxes Consolidation Act 1997, s. 23 of the Children Act 1997, and s. 68 of the Civil Registration Act 2004, to name but some. To varying degrees these exceptions have restricted the application and have abridged the consequences of the rule. In the circumstances of the instant case, we are not of course concerned with any of those exceptions, rather the issue centres on the method by which a bank can establish, by admissible evidence, a debt which it seeks to recover from a customer.

76. It has traditionally been understood and accepted that evidence of entries in bankers' books would constitute hearsay unless saved from its reach by some exception created either at common law, or by statute. Save for the distant past, it was readily recognised that every individual who made any entry in the books of the bank referable to the debt sought to be recovered, would not be available to give evidence either orally or by affidavit, and even if so, the impracticality of calling all such witnesses is self-evident. Hence, in order to facilitate the more orderly conduct of bank business, as well as preserving evidential integrity, the legislature in 1879 enacted the Bankers' Books Evidence Act. As a result, evidence which otherwise would not be admissible became so, but only to the extent provided for by the Act. In the absence of due compliance therewith, there is nothing in these statutory provisions which, outside of their terms, has

the effect of relieving a bank from the strictures of the rule. Accordingly, it is abundantly clear that the basic hearsay principles continue to apply unless a bank can take advantage of such provisions.

77. That this is so, seems quite clear from the judgment of this Court in *Criminal Assets Bureau v. Hunt* [2003] IESC 20, [2003] 2 I.R. 168, even if the statutory regime was different to that under consideration in the instant appeal. In that case, pursuant to s. 63 of the Criminal Justice Act 1994, an officer of CAB, obtained documents from a number of financial institutions relating to the banking affairs of Mr. and Mrs. Hunt: effectively, these were copies of accounts held in their names. The officer in question passed these on to an Inspector of Taxes, who on foot thereof raised tax assessments against the defendants. CAB sought judgment against the first named defendant in the sum of €1,778,343.76. Whilst there were many issues raised, the one relevant for present purposes was whether the plaintiff was entitled to rely, as it had done, on these bank statements without adducing before the court, proper proof of the documents in question. Without this proof it was argued that the records were hearsay, and unless coming within one of the recognised exceptions, should be rejected. In response, CAB submitted that these were admissible by virtue of s. 8(5) and 8(7) of the Criminal Asset Bureau Act 1996 ("the 1996 Act").

78. At p. 189 of the report, Keane C.J., giving the judgment of the court, first said:-

> "It is clear, in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved only by their authors giving sworn evidence and being subject to cross examination, unless advantage was taken of the provisions of the Bankers' Books Evidence Acts 1879 to 1959. The documents in question, accordingly, should not have been admitted in evidence in the High Court unless, as the plaintiff contends, they were admissible under the provisions to which I have referred."

It seems to me that this statement is authority for the proposition that such documents cannot be adduced in evidence unless via compliance with some statutory provision enacted for that purpose.

79. As noted, the statutory provisions in that case, pursuant to which the plaintiffs claimed admissibility of the documents were s. 8(5) and 8(7) of the 1996 Act which provide, in the words of Keane C.J., a relaxation of the rule against hearsay; as the court is entitled to accept as truthful an unsworn statement made out of court by a Bureau officer to the Bureau officer who gives evidence that he acted on foot of the information in question. However, the learned judge could not accept that it would follow from this that any evidence which the first bureau officer obtained and which he informed the bureau officer giving evidence is also admissible. In his view, this would lead to an absurd operation of the provisions in question, wherein plainly inadmissible evidence could be rendered admissible provided the bureau officer who obtained it informed another officer of its contents during the course of a conversation.

80. Thus, Keane C.J. found that the evidence should not have been admitted by the court. It did not come within one of the recognised common law exceptions to the hearsay rule, the records had not been proven under the Bankers' Books Evidence Acts 1879-1959 and the sections of the 1996 Act referred to by the plaintiffs did not serve to make them admissible either.

81. In the passage quoted at para. 4.8 of the judgment in *Moorview – 2010* (para. 66 above) Clarke J's., citation from Halsbury was to show the purpose behind the 1879 Act. In its original form such undoubtedly was designed to save bankers from having to attend court and having to produce their books under *subpoena*. At that time however, the Act only applied to third party proceedings. As and from 1989, that restriction was deleted from s. 6 of the Act (s. 131 of the Central Bank Act 1989). As a result, after that amendment, the provisions of the legislation applied to all legal proceedings, including those in which the bank itself was a party: in fact, as pointed out at para. 64 above, it also applies to criminal proceedings. It cannot therefore be the case that the original *raison d'etre* of the Act continues to determine either its objective or scope. Such reasoning in my view is no longer applicable and cannot be regarded as justifying the current basis for the Act. Therefore, insofar as what Halsbury said informed the views of Clarke J., such is no longer the case. Quite evidently, it must be pointed out that the amendment made in 1989 had not been drawn to the attention of the learned judge. If it had, it is quite likely that some adjustment to his views would have followed.

82. In any event, I am not at all sure that the alternative basis raised in *Moorview – 2010*, was in fact necessary so as to justify the evidence that was given on behalf of the bank. It will be recalled that the witness in question, Mr. Collison, was a senior employee of the bank and from May, 2000, was personally assigned to monitor and assess the facilities relating to the overall Cunningham Group. In preparation for his evidence, he had personally consulted the books and records of First Active and based thereon had produced a series of calculations said to reflect the plaintiff's indebtedness. Moreover, he also produced three lever arch files amounting to some hundreds of separate dividers, which contained vouching documentation in respect of virtually every item which formed part of his calculations. He was assisted by one colleague only, whose work he was personally familiar with.

83. Furthermore, First Active was a bank, the entries made were recorded in the ordinary books of the bank and were made in the usual and ordinary course of business: those books were kept in the custody and control of the bank. In addition, Mr. Collison was unquestionably an officer of the bank and had been duly authorised to act on its behalf. Therefore, it seems to me that, as a matter of probability, the provisions of the Act could in substance have been invoked, so as to have what was tendered, validly admitted in evidence. It is therefore unclear what the documents were, in *Moorview – 2010*, which were challenged as not being admissible under the 1879 Act. Whilst of course I readily yield to the knowledge which Clarke J. had of this overall litigation, nevertheless it does not appear clear why it had been thought necessary to determine the issue without

recourse to the 1879 Act. I therefore remain doubtful as to whether the views expressed could be considered as part of the *ratio decidendi* of that case.

84. In any event, it is important to be more specific about precisely what *Moorview* held: in the first relevant passage the learned judge was referring to where an employee of a bank attended at court and gave viva voce evidence, which included confirmation that the documents produced were sourced by him from the electronic books and records of the bank: in such circumstances, the 1879 Act did not apply (para. 66 above). In the second passage, Clarke J., held that there is no requirement on a bank to produce an official who personally witnessed each and every transaction which navigated through the account(s) in question in order to establish the debt due at demand date, that where documents are kept by the bank in the ordinary way as part of their records, those records are *prima facie* evidence of a course of dealing between the parties (para. 107-110) and finally, that the content of such records constitute *prima facie* evidence of the liability. Such records of course can be contested in any or all of their aspect by the defendant (para. 67 above).

85. Leave aside the reference to a "course of dealing", which I will come back to in a moment (para. 105-110 below), I cannot, with great respect, agree with the fundamental point that is made. No authority is cited for this proposition, which would be a significant departure from what the legal position was and what it was understood to be prior to that decision. Business records do not create an exception to the hearsay rule. The reliance on the passage from Halsbury can no longer provide any justification for the proposition advanced. In addition, there was little real discussion about the hearsay rule and the decision of Keane C.J. in *Hunt* does not appear to have been opened to the learned judge. In the UK the opportunities for creating further exceptions at common law to the hearsay rule were virtually terminated by the well-known decision in *Myers v. Director of Public Prosecutions* [1965] AC 1001. Such was followed shortly thereafter by legislation on both the civil and criminal side. In this jurisdiction the scope for judicial movement in this area has not been ruled out (*Eastern Health Board v. M.K.* [1999] 2 I.R. 99, Denham J.); nevertheless, other judges for example, Keane J., as he then was, has expressed the view on a number of occasions that any further modification would be best effected by the Oireachtas *(The People (DPP) v. Marley* [1985] I.L.R.M. 176). Whichever, it seems clear that the learned judge did not intend to create a further exception to the rule: indeed, the approach adopted was that such rule had no application in the circumstances outlined. Accordingly, with great respect, I would decline to follow this aspect of the judgment.

86. A further important feature of *Moorview – 2010*, which has a direct bearing on this appeal, should be highlighted. As indicated, Mr. Collison, at the time of the hearing and at least as far back as May, 2000, was an employee of the bank and therefore can clearly be considered an "officer" thereof. Even therefore if I am incorrect in disagreeing with Clarke J., and if the alternative basis, as suggested, is available, *Moorview* cannot be considered as an authority for permitting someone who is not an officer, to give such evidence of the type under discussion. Without offering any justification for the step taken, it follows that likewise I cannot agree with Finlay Geoghegan J. who was satisfied to accept the evidence of Mr. Moroney, who in my view as "a former official of the bank", could not be qualified

to give evidence in this case. (para. 68 above). If it were otherwise I cannot see any logical basis, as a matter of principle, to debar any individual from giving such evidence provided authorisation, access and scope of exercise were otherwise satisfactory. That in my view would be close to a startling proposition. Consequently, being in accordance with the views herein expressed, I fully agree with the observations made by Peart J. in *Stapleton* and by O'Malley J. in *Dermody* on this issue.

87. A final point about *Moorview – 2010*: part of the *rationale* in that case and those which followed its line of authority, is that a defendant may challenge any evidence adduced by the plaintiff bank, failing which it becomes *prima facie* evidence of the debt. Such a right does of course exist, but that entitlement cannot be used to shift the burden or obligation on the moving party to establish its case. In proceedings which have travelled in their entirety through the Summary Summons procedure, the most contentious issue which generally arises is whether or not leave should be granted to defend the proceedings. The jurisprudence in this regard is well established and requires no repetition (*Harrisrange v. Duncan* [2002] IEHC 14, [2003] 4 I.R. 1 and *Aer Rianta v. Ryanair Ltd (No 1)* [2001] 4 I.R. 607). There is no mention of the phrase "*prima facie* evidence" in Ord. 37 RSC. It seems therefore to me that even if uncontested at any level, the Master as it would be in that case, must still be satisfied that the plaintiff has established its case.

88. In non-summary proceedings, those not involving Ord. 2 or Ord. 37 of the RSC, a question may legitimately arise as to whether a party has established a *prima facie* case: if he or she has so established, an application for non-suit at that point will not be successful. Depending on circumstances, such evidence however may or may not be sufficient to enter judgment for the plaintiff. Certainly in proceedings commenced by plenary summons, the question for the deciding court will be different as between adjudicating on an application for a non-suit and being satisfied to enter judgment (*O'Toole v. Heavey* [1993] 2 I.R. 544). In that case, leaving aside the complications which arise where more than one defendant is sued, Finlay C.J. and Egan J. pointed out what the distinction is, in broadly similar language. Egan J. at p. 549 of the report, described the differences between the two tests: where it is intended to call evidence if the application is refused the role of the judge is that "…he has to decide whether there is any evidence from which it could be inferred that there was negligence. There is an undoubted difference between the following two tests:-

(a) Whether there is any evidence from which negligence may be inferred, or

(b) Whether negligence has, in fact, been established on the balance of probability."

It therefore seems to me that in all cases before judgment can be decreed, the court must be satisfied on the balance of probabilities that the evidence, either oral or documentary, is sufficient to establish the claim to the standard which I have indicated. In the absence of challenge or any contradictory evidence, it will of course be easier to reach this threshold: but even in such circumstances, the claim and all of its essential elements must be proven to the civil standard. I do not accept any inference that some lower

standard would be acceptable in the absence of challenge. That would be a fundamental departure from my understanding of what the legal position is.

89. A further word about the summary process: the procedure provided for, being specific and somewhat truncated, is appropriate for a certain type of case: whilst a defendant is, as of right, entitled to enter an appearance, leave must be obtained so as to defend the substance of what is asserted. When granted, the case will be remitted to plenary hearing, such as occurred in this case: where that happens there is no distinction from that point onwards, regardless of whether, from inception the proceedings were commenced in a summary manner or were in plenary form. Therefore, the procedures become and remain the same.

Ulster Bank Ltd v. O'Brien & Ors [2015] 2. I.R. 656 "O'Brien"

90. There were three judgments delivered in *O'Brien*, those of MacMenamin, Laffoy, and Charleton JJ.. Having considered each in some detail, I am not persuaded that my reasoning in the instant case is flawed or that my approach should be altered. A few observations however would be appropriate.

91. At the outset I do not accept that the summary process, whilst providing a valuable procedural tool which I fully support where appropriately used, could be said to be nuanced in favour of a defendant (para. 2: MacMenamin J.) or that somehow it is favourably protective of such person (para. 14: Laffoy J.). On the private law side, there are very few examples of where permission is required as a condition of defending an action which has been asserted against a person by another party. In fact, Ord. 37, r. 9 RSC seems to suggest that before leave should be granted, a defendant must establish a good defence to the claim: rule 10 also suggests that even then conditions may be attached. Thankfully case law has set out a series of principles that are more balanced to the needs of justice. Nonetheless, the process falls short of a plenary hearing and to that extent, despite safeguards, care must be taken in its exercise.

92. In his judgment MacMenamin J. makes a number of points which I should briefly comment upon. I do not quite understand the reliance which the learned judge placed upon the fact that the demand letter was signed by a Ms. Mary Murray, who swore the affidavit grounding the application for judgment. I fully accept that in respect of the issuance of such letter, her evidence could not be characterised as "hearsay", rather it is as the judge said, first hand evidence of the fact that she signed it. That fact alone however, could not on any view be taken as evidence of the truth or accuracy of its content. Unless the personal signature of a specific individual is demanded by the contractual arrangements between the parties, a situation I have never come across, it will rarely if ever be an issue as to who signed the letter. Hence, this point must be regarded as peripheral and certainly could never form the principal basis of sustaining the advanced claim.

93. In all cases it will be necessary for any plaintiff to adduce proof of the debt as of a particular date, which in turn will involve proof of the preceding transaction(s), the

amount drawn down, the payments made and the amount due at either default or demand date. Save therefore being a precondition to the institution of proceedings, a demand letter is not critical. Having made reference to such letter, MacMenamin J. then states "If there is no response to the letter of demand, a plaintiff's case is proved" (para. 5 of the judgment). In my view, it cannot be the case that such a letter could of itself be sufficient to grant judgment, or that "a plaintiff's case is proved" if there is no response to it. Further, I have strong misgivings about any attempt to incorporate into civil law a rule of evidence which allows inferences to be drawn where the circumstances might expect a response from a defendant, a suggestion which has been repeated by Charleton J. in this appeal, and a point which I will return to a little later (paras. 97-104 below).

94. As above noted, the procedure by summary summons may be adopted in any of the classes of cases nominated in Ord. 2 of the RSC. When utilised, the process by which the case is progressed is set out in Ord. 37. The essence of the approach adopted by Laffoy J. is evident from an early part of her judgment where she identifies the jurisdiction relied upon by the bank, as being founded on that provision. She therefore proceeded to examine the evidence *via* that lens. In particular, she highlights rule 1 of that Ord. which reads: "The said application shall be supported by an affidavit sworn by the plaintiff or by any other person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed and stating that in the belief of the deponent there is no defence to the action". The evidence in the case showed that the grounding affidavit was sworn by a senior bank official: who had been duly authorised to make the affidavit; who consulted the books and records of the bank and who was the person with responsibility for the daily management of the facilities in question. Accordingly, Laffoy J. was satisfied that Ms. Murray was a "qualifying deponent" for the purposes of Ord. 37, r. 1 of the RSC. The bank was therefore entitled to judgment.

95. The defence asserted on behalf of the O'Brien's was that the bank had failed to satisfy the requirements of s. 4 and s. 5(1)(b) of the 1879 Act. Laffoy J. agreed that if in play, the provisions were not complied with and in the process observed that "it is undoubtedly the case that a copy of the entry should only be received in evidence when proof of the three matters outlined in s. 4 is given by a partner or officer of the bank, that is to say by an employee of the bank" (para. 31 of the judgment). However, the learned judge was satisfied that "The bank did not have to rely, and was not relying, on an entry in a banker's book being admitted in evidence to establish the O'Brien's indebtedness to it in the sum claimed in accordance with the provisions of the Act of 1879, as amended, so that the necessity to comply with the provisions of ss. 4 and 5 of the Act of 1879, as amended, did not arise" (para. 21 of the judgment). It is this view which I respectfully disagree with.

96. It is not entirely clear to me as to the precise basis upon which Laffoy J. came to rule out the 1879 Act. Quite evidently the rules of court, in this case Ord. 37, r. 1 RSC, could not override some statutory requirement which otherwise applies to the proceedings, or to any particular aspect of them. The decision in *Dermody* was not solely based on the trial judge being bound by *Hunt*, rather O'Malley J. quite independently of *stare decisis* and

having considered the statutory provisions in some detail, including the amendment made to the original s. 6 by s. 131(b) of the Central Bank Act 1989, disagreed with *Moorview, Keehan* and the judgment of Finlay Geoghegan J. in this case. Likewise, did Peart J. in *Stapleton*. I do not accept that these cases can be distinguished in the manner suggested, or that the passage from Keane C.J., which I have cited at para. 78 above, and which incidentally is unrelated to the 1996 Act (para. 77), can be explained away by the isolation of a single sentence which is to be found in para. 24 of the judgment of the learned judge. I remain therefore of the view that what was stated by the Chief Justice is not only correct, but is also highly relevant to this case. In any event from an overall reading of her judgment, it seems to be the case that the learned judge preferred the approach of Clarke J. and those which followed it, over that set out in *Dermody* and *Stapleton*.

97. Whilst I find myself in agreement on one important matter with Charleton J., I regretfully have to differ from him on a number of other issues which he has addressed both in his judgment in *O'Brien* and that given in the within appeal. The point upon which I agree is that records made in the course of business are not, for that reason alone, an exception to the hearsay rule (para. 49 of his judgment). There is nothing sacrosanct about business records: experience has shown why this is very much so. The issues upon which I differ in a significant way include the suggestions, variously put, (i) that statements made in the presence of a party to civil proceedings may be admitted in evidence: presumably against him: (ii) that silence in certain circumstances can be taken as acquiescence in the asserted statement, and (iii) where a reasonable person would be expected to deny and fails to do so, an inference can be drawn which equates to an acceptance of the contrary case (para. 55 – 57 of his judgment). Where any one of these situations exists, the learned judge says that the event in question constitutes some sort of exception to the hearsay principle and/or can be considered as an admission against interest. With great respect, any reliance on *Rex v. Christie* [1914] A.C. 545 to support these propositions on the civil side is one I strongly disagree with.

98. Charleton J. in *O'Brien*, made these observations when discussing the rule against hearsay and the various exceptions to it. However, he does not offer any view, as to reasoning, in respect of the authorities which I have cited and examined above. He mentions the case of *Bessela v. Stern* (1877) 2 C.P.D. 265 (C.A) in which the silence of a man who had promised to marry a woman, was taken as evidence of an admission that the assertion was true in the context of not responding when the statement was repeated before him. The learned judge makes it clear however that the principle ought not to be applied liberally or abundantly. Citing from Heydon and Ockleton, *Evidence: cases and materials* (4th ed., Butterworths 1996) at pp. 147 and 148, the principle was elaborated on: -

> "In cases where the inference may be drawn, the test is whether a denial could reasonably be expected in the circumstances. The circumstances of a business relationship commonly permit the inference to be drawn: a defendant's silence in

the face of correspondence becomes much more relevant in business cases than in affiliation cases…"

Charleton J. goes on to say that an analysis of whether a failure to respond in the face of an accusation can amount to a declaration against interest must depend upon a myriad of factors, the following of which are indicative but not definitive: these include an analysis of the nature of the relationship between the parties, the circumstance in which the allegation is made, any documentary proof and finally, whether a failure to respond in circumstances when a denial would clearly be required, would amount in terms of the conduct of reasonable people to an admission. (para. 61 his of judgment in *O'Brien*).

99. Speaking more generally than the instant case, the position in England and Wales since the decision of *R v. Christie* [1914] A.C. 545 is not at all as clear cut as suggested with some of the more recent authorities conflicting (*Hall v. R* [1971] 1 W.L.R. 298, *Parkes v. R* [1976] 1 W.L.R. 1251, *R v. Chandler* [1976] 1 W.L.R. 585: in particular see *Phipson on Evidence* (18th Ed., Sweet & Maxwell, 2013) paras. [37-04] - [37-08]). However and more importantly, these are all cases which consider the principle from a criminal law perspective and therefore are not of direct relevance to the instant situation.

100. The cases on the civil side which are mentioned in *O'Brien* are firstly, *Bessela v. Stern* (1877) 2 C.P.D. 265 (C.A.) which is noted above in para. 98: and *Wiedemann v. Walpole* [1891] 2 Q.B. 534, which likewise was an action for breach of promise to marry where the defendant's silence was taken as an admission of that promise: however, both of these specifically relate to oral statements made in the presence of a party outside the context of litigation, a situation vastly different from the within. Then cited is *Freeman v. Cox* (1878) 8 Ch. D. 148, wherein the failure of a defendant to answer the affidavit filed against him was sufficient to constitute an admission that he owed the money alleged. *Hollis v. Burton* [1892] 3 Ch. 226 is not referenced in *O'Brien*; however, it bears mentioning due to its consideration of *Freeman v. Cox* and in particular by reason of the judgments of Kay LJ and Lopes LJ. Lopes LJ stated that he felt that *Freeman* expanded the doctrine of implied admission as far as it could possibly go, while Kay LJ went even further, saying that he himself would not follow the precedent set by that case, which was: that in a situation where the defendant has made no admission but has refused or failed to answer an affidavit filed by the plaintiff, that in and of itself is to be taken as an admission. In addition, he described the practice as a "very dangerous one".

101. A more recent consideration of these cases came in *Killick v Pountney* [1999] All E.R. (D) 365, a probate action, the facts of which involved an allegation of undue influence against the defendant solicitor. The solicitor did not answer any correspondence from the plaintiff nor did he seek to defend or take any part in the action at all. In addressing the question of whether, in those circumstances, an adverse inference could be drawn from the conduct of the defendant, the judge was unconvinced by *Freeman v. Cox* and wholly more persuaded by the views taken in *Hollis v. Burton*. He placed reliance on the gravity of the issues at hand, the severity of the allegations and on his role as judge in a probate matter, being to determine what the last wishes of the testator were. All of these, he felt,

could not allow him to safely treat the inactivity of the defendant as an admission, in fact he stated that there were a number of reasons why the defendant may have chosen not to participate in the proceedings, many of which were unrelated to any possibility of guilt.

102. These cases illustrate a high level of reluctance amongst the judiciary to further extend this type of approach into the civil law more generally. I share that reluctance and indeed would oppose the incorporation of any such principle into the civil law of this jurisdiction.

103. More specific to the context of banker and customer, it is notorious that for the vast majority of people the relationship is not based on an equal footing. Here I am not simply talking about the rate of interest being charged, the security demanded or other terms and conditions being imposed for obtaining a loan or for being granted facilities of some other type. I am including, access to correspondence, bank statements and other records of the transaction(s) between these parties: which at a moment's notice can be accessed and understood by the bank, but in many instances not so readily by the customer. The current obligations to supply information which have been referred to do not adequately address this situation. The recent public scandal about tracker mortgages verifies this point: according to the Central Bank's Final report of Tracker Mortgage Examination in July, 2019 there had been €683 million paid out by the financial institutions involved in redress and compensation to the customers affected.

104. Furthermore, for a multitude of different yet genuine and understandable reasons, a customer may not reply to correspondence, may not engage with the bank or credit institution, and may simply fail to deal with or respond to the resulting demands. In the last ten years or more courts in this jurisdiction dealing with possession orders and debt recovery have witnessed at first hand this type of conduct on almost a daily basis. Sometimes it is prompted by fear, by ignorance, by not knowing what to do or who to turn to, or by failing to face up to reality, all resulting in the situation being ignored. There are I am sure a multitude of other reasons for not engaging. To suggest in those circumstances that a demand letter or a failure to reply could be taken as an admission of the debt due, is something I simply could not accept. I would not therefore permit a bank to establish its debt by relying upon any inference drawn from the non-response or silence of a customer: the obligation is and remains on it to adduce sufficient evidence to that end.

The Instant Case

105. In his judgment in the instant case, Charleton J. takes the view that the hearsay principle has no application, and therefore it is unnecessary to search for any exceptions to it. The reasons given relate to the vast bulk of correspondence passing between the parties which in his view show a mutual trust and understanding of the underlying relationship. When the guarantee documentation is added in, the same "constitute a course of dealing between the parties which in other circumstances would be called admissions". This material therefore suggests nothing, except an understanding by both parties of the "true state of affairs". By reason of these circumstances, including the lack of engagement by Mr. Fergus with the evidence and his failure to adduce any form of contradictory evidence, the learned judge took the view that it was unnecessary to have any recourse

to inferences from silence. Although it is not entirely clear, I interpret these observations to mean that where a course of business dealing is established, that in itself constitutes an admission. If this is a correct reading of that part of the judgment, I respectfully cannot agree with it.

106. With the greatest respect I also cannot see how this point is directly relevant when examining whether the Bank succeeded in adducing admissible evidence to prove the amount due by Mr. Fergus, something which it was obliged to do in accordance with law. The simple fact that there was documentation which portrayed a lengthy business relationship between the parties does not, in my view have any bearing on whether the evidence of Mr. Moroney was admissible. At all times there was an onus on the Bank to establish the debt and such onus cannot possibly shift or be dispelled on the basis of correspondence or a lack of denial by the appellant. Not only does this in my view contradict the well-established rules of evidence, but would also lead to a situation whereby banks could avoid their obligation to properly prove the sums which they assert. In any event, I do not believe that this is a correct understanding of how and where this concept fits in.

107. The notion of a course of dealing between parties is relevant only when an issue or dispute arises relating to contractual terms. McDermott on *Contract Law* (Bloomsbury Professional, 2nd Ed., pgs. 83-86 and 474-477) goes through certain specific scenarios in which a course of dealing between the parties could be relied upon to establish, clarify or exclude such terms: firstly, where an ambiguity arises in the terms of a contract and secondly where a party seeks to incorporate or exclude contractual terms based on their dealings with the other party. In such a situation, there are a number of considerations which a court will look to, not least of which shall be the consistency of the particular course of dealing.

108. It should also be noted that where the transaction is between an individual customer and a large business, the courts are much less likely to allow a course of dealing to be relied upon by the latter. Clarke on *Contract Law in Ireland* (Thomsons Reuters Ireland, 8th Ed., p. 250) discusses this in relation to the case of *Hollier v. Rambler Motors* [1972] 2 Q.B. 71, in which the owner of a car left it in to be repaired by the defendants some three or four times over a number of years and on each occasion, the receipt given to him had a clause limiting the defendant's liability: however, on the last occasion, being the one in question, he was not given any such receipt. The garage then burnt down and the plaintiff was able to recover for the loss of his car as the Court of Appeal refused to allow three or four isolated instances between consumer and business entity to constitute a course of dealing. Further, when dealing with ambiguous terms, s. 5 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 provides that any clause which could give rise to any uncertainty must be interpreted in whichever way is most favourable to the consumer.

109. Interestingly, a discussion on this topic occurred in two relatively recent cases involving the company Irish Asphalt Ltd: *James Elliot Construction Ltd v. Irish Asphalt Ltd* [2014]

IESC 74 (Unreported, Supreme Court, 2nd December, 2014) and *Noreside Construction Ltd v. Irish Asphalt Ltd* [2014] IESC 68 (Unreported, Supreme Court, 2nd December, 2014). In *James Elliot*, the general concept of incorporating a party's terms and conditions through a previous and consistent course of dealing was described as "hardly controversial" (at para. 142): however, it was also held that it would be necessary to consider in each case the individual facts and circumstances. In that case, the existence of some 1,190 delivery dockets did not achieve incorporation in circumstances where the dockets did not actually set out the terms and conditions relied upon and also because these themselves were not contractual documents (para. 141 – 150). A similar conclusion was reached by the court in *Noreside Construction*.

110. As is quite clear, there is no dispute as to the existence of the contractual terms which governed the relationship between the bank and Mr. Fergus in this case. The dispute on Issue No. 3 is one of interpretation, not of existence. Therefore, I cannot see any room for the application of this principle on the facts of this case.

111. One final point if I could make it: the analogy with the manufacturer of alcoholic beverages (Laffoy J., at paras. 36-37 of her judgment in *O'Brien*) and with the supply of potatoes (Charleton J., at paras. 10-11 of his judgment in the instant case), is in my view misplaced. Of course the 1879 Act does not apply to either situation: it was never intended to: of course not every delivery man or sales assistant has to make an affidavit grounding a debt. Authorisation, source of knowledge and access to records may be sufficient to raise a *prima facie* case. The legislature did not intervene with such business activities. It did so in the banking sector for sound reasons prevailing at the time, and presumably its continuing intervention must likewise be so based. The amendment created in 1989 only reinforces this belief when the opportunity was also taken of updating certain provisions of the Act, so as to reflect modern technology. Therefore, legislative intervention continues to apply in this area.

112. The reasons are not difficult to find. These are embedded in the crucial role which banks play in society as a whole. In the recent past we have seen at first hand the enormous consequences which follow from a dysfunctional banking system. Whilst I readily acknowledge that the 1879 Act is indeed minor in comparison to the overall regulatory regime in this sector, nonetheless the Oireachtas certainly thinks it still has a part to play. It therefore seems to me that if the *Moorview – 2010* line of authority is correct, the provisions of the 1879 Act will effectively be disregarded. I cannot see any logical reason why a bank or other institution to which the Act applies, would endeavour to comply with its statutory provisions when in almost all circumstances a much easier alternative process is readily available. I therefore hold the view as above set out.

113. In any event in conclusion, it is quite apparent that I favour the approach adopted in *Hunt, Dermody* and *Stapleton.* Accordingly, the 1879 Act must be complied with. Self-evidently, Mr. Moroney was not an "officer of the bank" at the time he tendered this evidence. He was as described by the trial judge "a former official of the bank". Incorrectly in my view, she cited *Moorview – 2010* as an authority to qualify him to give

evidence. She was mistaken in this regard. Consequently, that evidence should not have been permitted. I would therefore allow the appeal in this case.

Issue No. 3: The Validity of the Guarantee (para. 23 above)

114. This submission centres on whether or not the guarantee of 1st June, 2006, is invalid and unenforceable: this assertion has a number of aspects to it. Firstly, the correct identity of the Principal Debtor, secondly, the attachment of a sheet after the execution clause, thirdly, whether in light of subsequent guarantees dealing with further restructuring of the company's debts, such document can truly be considered as a continuing guarantee for all of its liabilities and finally, whether the subject guarantee satisfied the requirements of the Statute of Frauds (Ireland) 1695.

115. In a review of the principles generally applicable up to that time, Lord Hoffman in *ICS Limited v. West Bromwich BS* [1998] 1 W.L.R. 896, took the opportunity of reconsidering those principles and as a result, reformulated what the correct approach might be, in a variety of circumstances, to the interpretation, *inter alia*, of commercial documents. That approach was first adopted in *Analog Devices B.V. v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 I.R. 274, and in several subsequent decisions including *Viridian Power Ltd & others v. Commissioner for Energy Regulation & Other* [2012] IESC 13 (Unreported, Supreme Court, 23rd February, 2012), *Flynn v. Breccia* [2017] IECA 74 (Unreported, Court of Appeal, 8th March, 2017). In essence, the importance of the text must remain to the forefront of any construction dispute, but equally so that text must be considered in the context which it has been entered into.

116. Arising out of these principles, I am satisfied that as part of the correct interpretive approach to documents such as the guarantee in issue, the court is empowered by way of construction, to correct certain mistakes, but only in well-defined circumstances. Firstly, there must be a clear-cut mistake and secondly, it must be self-evident as to what the appropriate correction should be. See *Moorview Developments Limited v. First Active Plc* [2010] IEHC 275 ("*Moorview – 2010*").

117. In the instant case there was but one company ever involved. It was Fergus Haynes (Developments) Limited. It has not been suggested that there was another company, separate and distinct from the Principal Debtor, which had the same name but where the word "Developments" was not in parenthesis. Neither party considered the omission of the parenthesis to have any affect. This is self-evident from an examination of the guarantees, where some did have the parenthesis, and some did not. All such guarantees emanated from the respondent and all conferred benefit on the only corporate entity involved. By executing these guarantees over several years Mr. Fergus must be taken as understanding that, despite the different descriptive references, the only legal entity involved was that of which he was the promotor. In fact, the comparable issue in *Moorview – 2010* was a good deal more stark than that presenting in this case. There the guarantees entered into were in respect of a company described as "Moorview Properties Limited" whereas the correct identity of the company intended was "Moorview Developments Limited". Notwithstanding what might be described as a much more serious mistake, nonetheless, the error was corrected under the approach above stated.

Therefore, I do not believe that the submissions made on this aspect of the case are correct.

118. The approach of the learned trial judge to the rather strange situation surrounding the insertion of the unsigned sheet prior to the execution clause and the attachment of the same sheet, this time, signed after the execution clause but before the back sheet, was in my view entirely correct. She held that any alleged part of the guarantee which appeared after the execution clause could not be said validly to form part of the guarantee itself. She therefore excluded it from forming any part in the contractual arrangements between the parties. In those circumstances the approach adopted could not in any way affect the validity or enforceability of the guarantee if otherwise its integrity remained in place.

119. Mr. Fergus relies on *Mahoney v. McManus* [1981] 180 C.L.R. 370, in support of a submission that by reason of the existence of further guarantees, subsequent to the 1st June, 2006, the guarantee of that date upon which judgment was given, was superseded for all purposes. In my view, the judgment of Gibbs C.J., in that case, is not an authority for the proposition advanced and if anything, supports the construction approach adopted in this case. In essence, each guarantee must be interpreted according to its own terms and conditions but the same must be viewed in context. As such, it is of little value to conduct a comparative analysis of the end outcome where different contractual instruments are in play. Therefore, I am quite satisfied that the conclusion adopted by Finlay Geoghegan J. in the High Court was correct on this aspect of the appeal.

120. It is difficult to see how any argument can be advanced on the Statute of Frauds (Ireland) 1695. Even assuming that the contractual document is correctly described as a "guarantee" only, and not also as an indemnity, it appears to me to be self-evident that its terms comply with the requirement of s. 2 of that Act. Those requirements, insofar as are relevant, provide that the agreement upon which the action is brought, or some note or memorandum thereof, must be in writing and must be signed by the person charged therewith, or signed by some other lawfully authorised person. In my view, it is self-evident from a consideration of the document that these conditions are fully satisfied.

121. Consequently, on issue No. 3, I do not believe that the submissions advanced are sustainable as a matter of law.

Conclusion

122. For the reasons above set forth, I would allow this appeal on Issue No. 2, but dismiss it on Issues No.'s 1 and 3.