



**THE COURT OF APPEAL
CIVIL**

Unapproved

No Redactions Needed

Court of Appeal Record No. 2018/338

High Court Record No. 2015/1159S

Neutral Citation No. [2022] IECA 78

Faherty J.

Collins J.

Pilkington J.

BETWEEN/

ALLIED IRISH BANKS PLC AND EVERYDAY FINANCE DAC

PLAINTIFFS/

RESPONDENTS

– AND –

THOMAS DORAN AND THOMAS SCANLON

FIRST DEFENDANT/APPELLANT

AND SECOND DEFENDANT

JUDGMENT of Ms. Justice Pilkington on the 31st day of March 2022

1. This is an appeal against the *ex tempore* judgment of Burns (T) J. delivered on 24 July 2018.
2. Pursuant to the order of the same date the court granted summary judgment against the first named defendant ('Mr. Doran' or 'the appellant') in the sum of €521,082.26 together with the costs of the application and a stay on the execution on foot of the judgment for 28 days.
3. The Notice of Appeal issued on 7 August 2018.

Summary Summons

4. The summary summons was issued on 19 June 2015 [2015/1159S] and an appearance entered by Mr. Doran on 18 December 2015.
5. The entirety of the pleading within the special indorsement of claim is as follows:-

“THE PLAINTIFF’S CLAIM IS FOR the sum of €521,082.26, being money payable by the Defendants and each of them to the Plaintiff for money lent in advance by the Plaintiff to the Defendants and each of them at their request and for interest agreed to be paid upon money due to the Plaintiff by the Defendants and each of them on foot of a loan account number 932396 17892106 opened and maintained by the Defendants and each of them by agreement entered into with the Plaintiff at its branch office at Ashbourne, County Westmeath, particulars whereof are as follows:-

Particulars

LOAN ACCOUNT Number 932396 17892106:

22/4/2015

Amount due at this stage: €521,082.26”

6. Thereafter the claim is for this sum together with interest ‘*on the principal sum due at current bank rates varying from time to time agreed to be paid by the Defendants and each of them to the Plaintiff until payment or Judgment*’, together with further or other relief and costs.

Notice of Motion to enter final judgment

7. By Notice of Motion dated 16 June 2016, the Bank sought liberty to enter final judgment before the Master of the High Court for the sum of €521,082.26. On 20 July 2016, a Notice of Motion issued in the High Court seeking judgment in that amount. Thereafter a Notice of Intention to Proceed issued on 7 February 2017. The reasons for the application being brought initially in the Master’s Court and thereafter in the High Court are aired within the affidavits, but are not relevant to this appeal.

8. By Order of Peart J. on 5 July 2019, pursuant to an ex parte docket dated 21 May 2019 and grounded upon the affidavit of Andrew McCrudden sworn on 10 May 2019, Everyday Finance DAC was added as a plaintiff to these proceedings and respondent to this appeal. Throughout this judgment, unless indicated otherwise, the plaintiffs/respondents will collectively be referred to as “the Bank”.

9. This affidavit of Andrew McCrudden also confirmed, at paragraph 6, that the Bank had obtained judgment in default of appearance against the second named defendant on 17 October 2016.

10. In respect of the motion for final judgment a number of affidavits were filed. The Notice of Motion is grounded upon the affidavit of Cathal Hardiman (manager of the Bank) sworn on 13 June 2016. There are then two short affidavits; the first by Eileen Grady, solicitor on 23 June 2016 on behalf of the Bank, confirming the court’s jurisdiction in proceeding against both

Mr. Scanlon and Mr. Doran, and by Mr. Hardiman on 7 November 2016 confirming his means of knowledge in respect of the matters deposed to within his grounding affidavit.

11. The first replying affidavit of Mr. Doran is sworn on 22 March 2017, the further supplemental affidavit of Mr. Hardiman sworn on 2 June 2017, the second replying affidavit of Mr. Doran sworn on 20 April 2018 and the affidavit of Paul Lynch (solicitor) sworn on behalf of the Bank on 23 July 2018.

12. In addition, there is an affidavit of Mr. Doran sworn on 15 November 2012, prior to the institution of these proceedings and bearing a separate record number [2010/2596S]. This is considered separately.

Affidavits

13. The Grounding Affidavit of Mr. Hardiman is limited in scope. It essentially reiterates the matters set out in the summary summons. At para. 7, Mr. Hardiman avers that *“the Defendants and each of them were indebted to the Plaintiff in the sum of €521,082.26 on foot of the said loan account full particulars of which have been furnished to the Defendants by means of regular statements”*.

It further notes and exhibits the letters of demand issued on 5 May 2015. That letter of demand, addressed to Mr. Doran, is in the following terms:

“We refer to previous correspondence. It has been noted that the demand issued by our client on 24th November 2014 did not refer to the most recent credit agreement. Accordingly the said demand is hereby withdrawn.

We are advised by our client that the following amount is due and owing by you to its branch office at Ashbourne on foot of a Letter of Sanction dated 7th December 2010.”

Loan Account Number 932396-17892106:

22/4/2015

Amount due at this stage: €521,082.26

Thereafter, demand is made for that amount.

14. In his replying affidavit sworn on 22 March 2017, Mr. Doran, referencing the May 2015 letter of demand, takes issue with the 2010 letter of sanction ('the 2010 facility letter').

(a) At para. 5 he avers: *'Significantly I say that the Plaintiff does not identify the basis upon which the loan account is outstanding. I say that the Plaintiff simply says that "the Defendants and each of them maintain a loan account..." and that, as a letter of demand has gone unsatisfied, this amount is allegedly due and owing. I say that the only evidence adduced by the Plaintiff in relation to the alleged debt are letters of demand included at Exhibit A of Mr Hardiman's Affidavit. I say on a prima facie basis these are evidence only that the Plaintiff sought repayment in respect of an alleged debt and they are manifestly not evidence that the underlying amount sought by the Plaintiff is due and owing or that I have any connection to the loan account specified. I say, believe and am advised that on the Plaintiff's own proceedings, even taken at their height, there is no evidence before this Honourable Court that I owe the Plaintiff the sum sought.'*

(b) At paragraph 7; *'Strictly without prejudiceI say that the reason why the Plaintiff has proceeded in this fashion is due to the fact that I never signed the letter of sanction provided by the Plaintiff in respect of the loan. I say therefore that I am not a party to the loan the subject matter of these proceedings and I say believe (sic) and am advised there is no basis upon which the Plaintiff is entitled to seek recourse against me'.*

Mr. Doran then exhibits a facility letter dated 7 November 2008 (which appears only to be signed by Mr. Scanlon) and a letter of demand of 24 November 2014 (which appears to be

the demand withdrawn by the subsequent demand letter of 5 May 2015 quoted above). It appears this documentation is exhibited in support of his assertion that he is not a party to the loan.

(c) Mr. Doran then deals with documentation he obtained following what he describes as a data access request from AIB. He contends that the contents of this documentation shows that there is no basis upon which the Bank is entitled to summary judgment. Arising from this documentation he exhibits and makes reference to the following;

- (i) An internal file note of 8 December 2008 where the plaintiff bank appears to assert *“the agreement has been signed by T- Scanlon and now requires Mr. Doran’s signature, if you could organise same”*.
- (ii) In 2012 there is an internal e-mail exchange within AIB which appears to suggest that there is a difficulty in locating an executed letter of sanction on behalf of Mr. Doran.
- (iii) The final document within this exhibit is an undated *“standalone”* entry headed and set out as follows:-

“Doran and Scanlon

In relation to Thomas Doran and Thomas Scanlon debt of E504K – it was agreed in Nov 2008 to extend this loan for 12 mths. To date Doran has not signed the letter of sanction on the basis that he is not happy with his own letter of sanction. When the letter of sanction was issued – it stated that the limits were extended to May, 2010, and not November, 2009. On the basis that Thomas Scanlon has signed the letter of sanction and accepted the terms and conditions – no option here but to note the error the branch have made in relation to the term on the basis that Thomas Doran is proving a very difficult client and the Bank does not want to give him another excuse to not put the offers in place.”

There was a disagreement between counsel as to the likely date of this last memo within AIB's internal files and on the basis of the documentation furnished, there is no means of ascertaining its precise date.

15. The supplemental affidavit of Mr. Hardiman sworn on 2 June 2017 essentially sets out, for the first time, the basis of the Bank's claim. In summary, it is as follows:

- (a) The loan at issue was initially advanced on foot of a sanction letter of 14 May 2007 ('the 2007 facility letter') which, on its face, appears to be executed by both borrowers, Mr. Doran and Mr. Scanlon.
- (b) Mr. Hardiman also exhibits the letter from the defendants' solicitors, Whelehan & Co, dated 18 May 2007 which in turn encloses two items – a duly executed loan sanction "*with acceptance duly completed*" and a solicitor's undertaking to ensure that the loan would be secured by way of charge against the subject property. The letter of sanction dated 14 May 2007 is exhibited, addressed to Mr. Doran and signed by both himself and Mr. Scanlon on 18 May 2007 (it appears as '207' but is clearly intended to be 2007). As pointed out by Burns J. within her judgment, these documents furnished by Whelehan & Co. to the Bank confirm a signed acceptance (by both Messrs Doran and Scanlon) of the original letter of loan sanction dated 14 May 2007.
- (c) In accordance with the solicitor's undertaking, with regard to the land the subject matter of the security, Folio 24188F, a charge is registered in favour of AIB (other lands also appear to be charged in respect of Folio 14918F and 6581F in the Register of Freeholders County of Westmeath). A copy of this solicitor's undertaking is exhibited to the Affidavit of Paul Lynch solicitor sworn on 23 July 2018. The exhibits comprising the mortgage documentation, being a charge registered in favour of AIB and the registration of both defendants on Folio 24188F, all dated 4 July 2007.

(d) Also exhibited are the bank statements '*from the commencement of the loan on 30 May 2007*'. The first entry shows a deposit of €500,000 to Whelehan & Co. in respect of the '*Thomas Scanlon and Thomas Doran loan account*'. The last bank statement is dated 5 December 2014 and shows a debit balance of €517,572.88. The summons (issued 19 June 2015) seeks a sum of €521,082.26. Mr. Hardiman's grounding affidavit was sworn on 13 June 2016. All the statements reflect one unchanging loan account number up to the date of the issue of the summary summons in June 2015. As matters stand there is a (potential) discrepancy as to the figures as the last bank statement is dated some six months prior to the issue of the summons.

(e) At para. 9 of his affidavit, Mr. Hardiman avers that the loan was restructured from time to time "*and ultimately by Sanction Letter dated the 7th day of December 2010*". Copies of the 2010 facility letters to both defendants are exhibited and it is pointed out that the letter addressed to Mr. Doran bears his written acceptance.

16. Mr. Doran filed a further affidavit on 20 April 2018. Again, he reiterates that he did not sign the 2010 letter of sanction. He avers that the letter shows some form of facsimile or copy of his signature, but it was not placed there by him. He goes on to detail steps that were taken by and on his behalf (including a letter for voluntary discovery) seeking the original of this 2010 sanction letter. Ultimately matters rested with the Bank forwarding a copy of the 2010 sanction letter and informing Mr. Doran's solicitors that the original cannot be located. That remains the position.

17. The 2010 facility letter itself ends with the typed words; '*The terms and conditions applicable to this facility in this letter of sanction are accepted by me/us*' and then a handwritten date of '*19 January 2011*' is inserted. There is a signature above the typewritten name '*Thomas Doran*'. Mr. Doran exhibits a handwriting expert's report he has commissioned from Mr. David Madden of Document Examination Ireland. Mr. Madden is asked two questions with

regard to the 2010 facility letter; the author of the handwriting in respect of (i) the date and (ii) the signature.

With regard to the signature, his opinion is as follows:

“In my opinion it is inconclusive whether Mr. Doran did or did not author the “Thomas Doran” signature...

The signature ... compares very favourably with the known signatures from Mr. Doran and I did not find any sign of cut and paste on the photocopy document.... However, due to the very low complexity of the signature involved, the possibility of a simulation by a third party cannot be ruled out. To provide further clarity on this I would require access to the original questioned document.”

18. With regard to the handwritten date on the 2010 facility letter, Mr. Madden states:

“In my opinion it is strongly probable that Mr. Doran authored the date on the document.”

19. The internal documentation procured by Mr. Doran from AIB pursuant to a data protection request is again exhibited as set out within his previous affidavit.

Judgment of Burns (T) J.

20. In her *ex tempore* judgment, Burns J. points to the original letter of sanction of 14 May 2007 and in particular the defendants’ solicitors’ letter of 18 May 2007 furnishing the duly completed letter of acceptance in respect of that facility and the standard undertaking with regard to the pledging of security.

21. Burns J. went on consider the test set out by the Supreme Court in *IBRC v. McCaughey* [2014] 1 IR 749, neutral citation [2014] IESC 44 (*‘McCaughey’*). On the basis of that authority

(and the cases quoted within it), she considered whether Mr. Doran's assertion that he had an arguable defence was sufficient to withstand the Bank's application for summary judgment.

22. Accepting the arguments advanced by Mr. Doran, including the views expressed by his handwriting expert in respect of the 2010 facility letter, Burns J. was nevertheless of the opinion Mr. Doran's claim failed to raise any arguable defence. This was on the basis that the loan agreement was entered into in May 2007 and security put in place at that time. The necessary documentation to effect this was executed by Mr. Doran. The subsequent letters of sanction (including that in 2010) merely dealt with a re-structuring of this original loan facility.

23. In the view of the learned trial judge the bank statements disclosed that the monies remain due and owing on foot of that original loan agreement as are set out within the letter of demand of 24 April 2015. No defence had been raised regarding Mr. Doran's liability in respect of the original facility in 2007 and the defence raised dealt solely with issues surrounding a re-structuring of that original facility which did not, in her view, constitute an arguable defence. Accordingly the Bank was entitled to summary judgment.

The Appeal

24. Mr. Doran's Notice of Appeal asserts simply that the trial judge erred in law in concluding that the evidence he placed before her was not sufficient to warrant remittal of the matter to plenary hearing. It asserts if he can prove that he did not sign the 7 December 2010 letter of sanction then he has a good defence in law in respect of the proceedings.

25. However, in the written and oral submissions to this court, the case advanced is not just that Mr. Doran has a credible defence to the proceedings but in addition that the pleadings within the special indorsement of claim, and the documentation referred to within it, are insufficient to provide an evidential basis to entitle the Bank to obtain summary judgment.

The Law

26. Within *McCaughey*, Clarke J. (as he then was) summarised the criteria the court might adopt when considering what constitutes a credible defence as follows:

*“5.5 Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607 It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant.*

*5.6 Finally, I should touch on one matter which turned out to be of some specific relevance in the circumstances of this case. As was pointed out by this court in *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21, in the context of an application to dismiss as being bound to fail under the inherent power of the court first identified in *Barry v. Buckley* [1981] I.R. 306, the courts, in hearing such applications, must be mindful of the fact that a party may, by a successful application, be shut out from having their claim determined at full trial, and are required to be more flexible in relation to the consideration of arguments or materials brought forward on appeal (see para. 9.1 of the judgment). It seems to me that like considerations potentially arise in the context*

of a summary judgment motion for precisely the same reason in that, if successful, the defendant will be shut out from having a full trial of the issues raised by his defence. While it remains important that a defendant put forward his full case on the summary judgment motion, and while it follows, therefore, that the courts will be reluctant to allow a different or additional case (backed up by evidence) to be run on appeal, nonetheless, some proportionality between the consequences of granting summary judgment and the rigour with which the rules applicable to new evidence on appeal ought be enforced, needs to be achieved.”

27. In *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 ('O'Malley') (delivered after the judgment of Burns J.) the Supreme Court considered, in a claim for summary judgment, the implications that might arise where a court is satisfied that no credible defence has been raised, but upon a finding of what *O'Malley* describes as an evidential gap within the pleadings.

28. In *O'Malley* there was no dispute that Mr. O'Malley had the benefit of funds from the bank and was in arrears. His essential complaint was that the bank should not be entitled to summary judgment as its pleadings were defective, due to an absence of detail which meant that he was unable to ascertain how the outstanding sums were calculated. That absence, he argued, was such that the bank had failed to discharge its evidential burden of proof. The bank argued that the requirement of RSC O.4 r. 4 had been met with sufficient evidence being pleaded within the indorsement of claim, coupled with the statement of account and the loan offer.

29. Clarke C. J. stated;

'4.2 It does seem to me that the trial judge had some concerns as to whether there was sufficient detail to be found in the special indorsement of claim on the summary summons and did have regard, therefore, to the evidence put before the court by Bank of Ireland for

the purpose of assessing whether the claim was sufficiently particularised. In those circumstances, it seems to me that there is an inextricable link between the pleading and the evidence such that it is appropriate to allow Mr. O'Malley to argue on this appeal that the detail in either or both of the pleadings and the evidence was insufficient to justify granting judgment to Bank of Ireland'

30. Clarke C.J. went on to underscore the obligation on any plaintiff seeking summary judgment;

"5.3.....There are, therefore, two questions. The first is as to whether the plaintiff has put sufficient evidence before the court to establish a prima facie debt. If the answer to that question is no, then the plaintiff cannot be entitled to summary judgment in any event. If, however, the answer to that question is yes, then the court must go on to consider, in accordance with the established jurisprudence, whether the defendant has put forward a credible defence."

31. The court, whilst satisfied that it could take into account any documentation which had been sent to a defendant in advance of the commencement of the proceedings, indicated that those details supplied previously must be referred to in some manner within the special indorsement of claim itself.

32. On the facts of *O'Malley*, Clarke C.J. held :

"5.8 However, in my view, the special indorsement of claim in this case was not sufficient. There are absolutely no details of how the sum said to be due is arrived at. There are more than adequate particulars as to how it is said that monies generally are due having regard to the asserted loan, drawdown, failure to pay and calling in of the balance. But why the particular amount due should be the sum claimed is not at all clear. I cannot see that a person receiving such a summons could have the "necessary" details to decide whether they should concede or resist."

Thereafter, the Court set out what, in general terms, would be required of a plaintiff financial institution seeking summary judgment in such circumstances. At para. 6.7, Clarke C.J. stated as follows:

“6.7 But it does not seem to me to be too much to ask that a financial institution, availing of the benefit of a summary judgment procedure, should specify, both in the special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest. Indeed, if it really is as simple as counsel suggested, then I cannot see any reason why Bank of Ireland should not have set out those calculations. A person confronted with a claim or a court confronted with a question of whether there is prima facie evidence for that claim is entitled to at least enough detail to know the basis on which the sum claimed is calculated. The defendant is entitled to that information to decide whether there is any point in pursuing a defence or, indeed, potentially expending monies on procuring professional advice in that regard. The court is entitled to that information to enable it to form an assessment as to whether there is sufficient evidence to say that the debt has been established on a prima facie basis. Neither the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court.”

33. In *O'Malley*, the evidential gap identified by the court did not result in a remittal to plenary hearing, but rather a remittal to the High Court on the basis that the bank could apply to amend its special indorsement of claim to include such details as it considered appropriate in light of the court's judgment.

34. *O'Malley* is clear that the *prima facie* evidence as to the debt must be adduced by the party seeking it. Moreover, in *AIB v. O'Callaghan & anor* [2020] IECA 318, Haughton J. at para. 10 states:

"I pause here to say that had the appellants taken issue in the High Court with the level of particulars furnished in the Summary Summons it is likely that it would have been found wanting in several respects. In particular it gives no detail as to the earlier lending of which the 2009 Loan Sanction was a renewal; it fails to identify or plead the Terms and Conditions applicable to any of the lending; it refers to "full particulars whereof have been furnished to the defendants" but fails to identify the statements or other documents where these are to be found, and therefore falls short of incorporating Bank statements, a shortcoming that is not made good by the one page statements exhibited by Mr. McGuinness...Had issue been taken it is more likely than not that the Bank would have been given an opportunity to amend/furnish fuller particulars."

35. Mr. Doran contends that upon the facts of this case there is a credible defence which should result in a remittal to plenary hearing.

36. Both *O'Malley* and *McCaughey* cited *First National Commercial Bank plc v. Anglin* [1996] 1 IR 75 [1996] IESC 1 as endorsed in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607, [2001] IESC 94, quoting the statement by Hardiman J. within *Aer Rianta* (p. 627) as follows:

"... the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case?; is there either no issue to be tried or only issues which are simple and easily determined?; do the Defendant's affidavits fail to disclose even an arguable defence?"

37. In *McCaughey*, Clarke J. (as he then was) was mindful that, as noted by Finlay Geoghegan J. in *Bank of Ireland v. Walsh* [2009] IEHC 220, the use of the term “credible” in relation to a defence has a very narrow meaning.

38. In determining whether a credible defence exists, in summary judgment proceedings, it is a relatively low bar that must be satisfied. As stated by Collins J. in *Allied Irish Banks plc v. Cuddy* [2020] IECA 211:

“67. The relevant test is not, at this stage, one of “cogent evidence” and/or “written evidence”. It is, rather, whether “credible” evidence is before the Court in the particular sense indicated in the authorities. That is not to suggest that the absence of such documentary evidence is irrelevant; it may be a factor, and an important factor, in assessing the credibility of a defence but absence of documentary evidence does not necessarily require that the court refuse leave to defend.

68. In addressing that test, it is evident from the authorities that mere “assertion” is not sufficient. Where precisely the line between credible evidence and mere assertion is to be drawn cannot, I think, be delineated a priori. Rather, a case-by-case assessment has to be made to decide on which side of the line any given case properly falls.

69. Ultimately, what the Court must ask itself is whether it is “very clear” that there is no defence disclosed on the material before it.”

Issues

39. In considering whether there is any credible defence to this summary judgment claim, it is clear that the defence relates solely to Mr. Doran’s contention that the signature to the 2010 facility letter is a forgery and that, arising from this, he is not bound by its terms. It has been

said against Mr. Doran by counsel for the Bank that it was only when the letter from his solicitor (Whelehan & Co.) made clear that monies were advanced pursuant to a 2007 Facility Letter that he restricted his possible defence to the 2010 letter of sanction. Certainly, Mr. Doran's initial replying affidavit of 22 March 2017 was very general in his averments that he does not owe the money and that he never signed the letter of sanction (date unspecified).

40. Mr. Doran says that he will require a remittal to plenary hearing to seek discovery, in particular, to further enquire into the circumstances surrounding the execution of the 2010 letter of sanction.

41. As Burns J. points out in her judgment, this facility was clearly put in place in 2007, the monies were advanced at that time and the Bank's security put in place. Mr. Doran, aside from his contention that the indorsement of claim is not properly particularised, does not deal in any substantive manner with the facility clearly advanced to him in 2007.

42. Taking Mr. Doran's argument at its height, even if the 2010 facility letter cannot be relied upon, then it is difficult to see that a credible defence is thereby raised to the effect that Mr. Doran's entire indebtedness to the Bank can be set aside. It may have implications for the calculation of interest arising on foot of the various facility letters, where the interest rates clearly vary, but that is not to suggest that the overall facility must be set aside in such circumstances.

43. The Bank objected to Mr. Doran seeking to adduce a fresh ground of appeal before this court which was not raised in the High Court; specifically, that the indorsement of claim and the documentation referred to within it did not satisfy the burden of evidential proof the Bank must satisfy in a summary judgment application.

44. The Bank also objected and filed short additional submissions arguing that the affidavit of Mr. Doran sworn on 15 November 2012, well before the institution of these proceedings and in respect of other proceedings bearing record number 2010/2596S, should not be admitted

without leave of this court. In any event counsel for Mr. Doran did not place any reliance upon it and the matters contained within it are clearly of no relevance to the matters within this summary judgment appeal. The court has not had regard to it.

45. In *AIB v. Ennis* ('*Ennis*') 2021 [IESC] 12 the Supreme Court considered the entitlement of a party to adduce new arguments and/or new evidence in an appeal from the entry of summary judgment. The court endorsed the comments in *McCaughey* (paragraph 5.6) as cited at paragraph 27 above and also, in particular, the comments of Clarke J. (as he then was) in *Ambrose v. Shevlin* [2015] IESC 10 that, in considering the criteria to be considered for the admission of new evidence, a court would place a much greater weight against its admission than one where a new legal argument was advanced.

46. In distinguishing the position as to the criteria to be applied on appeal from the entry of judgment in plenary proceedings (in particular *Lough Swilly Shellfish Growers Co-operative Society Ltd & anor v. Bradley & anor* [2013] IESC 16) from that of a summary judgment, the court noted that a summary procedure is decided on affidavit evidence only, it being the only evidence before the parties and also available to either party without the additional interlocutory steps open within plenary proceedings, such as discovery. The court following its review of the authorities, *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21 and *Moylist Construction Ltd v. Doheny* [2016] IESC 9 and the quotation from *McCaughey* quoted above, held that the relatively limited evidence potentially available to a party in summary judgment proceedings necessitated a more flexible approach in considering the question of adducing new evidence.

47. On the facts of this case no new evidence was sought to be adduced on appeal. The new argument relies upon existing documentation in contending that the pleadings within the indorsement of claim give rise to an argument as to whether it is pleaded with sufficient specificity as considered within *O'Malley*.

48. Whilst this argument was not reflected within the Notice of Appeal, the point is raised within Mr. Doran's written submissions of 1 December 2020 citing the *O'Malley* judgment. Whilst opposing the appellant's entitlement to raise it, the plaintiff was on notice of it within the submissions (and dealt with the argument within its own submissions of 24 December 2020). Moreover, it was in a position to deal with the argument in its submissions to the court. Whilst not raised before the High Court the judgment in *O'Malley* had not been delivered and thereafter this argument has assumed a greater importance in summary judgment cases.

49. In considering the flexible approach advocated in *Ennis* the court is satisfied that this is an appropriate case to consider the new argument advanced by the appellant in the determination of this appeal. It was not one which took the Bank by surprise and is an argument which features in many summary judgment cases.

50. The issue in this case is therefore whether the pleadings and any documentation referred to within it satisfies the evidential burden of proof required of the Bank in seeking summary judgment.

51. In considering the indorsement of claim in light of the judgment in *O'Malley*, there is no calculation of interest within this pleading or in any other document furnished to Mr. Doran. The interest rate clearly varied throughout the duration of the facility. In the second affidavit of Mr. Hardiman, the 2007 and 2010 facility letters terms and interest rates are set out; in the 2007 facility letter '*Prime rate varying, plus 1.25% per annum, currently 5.125% per annum*', the 2010 facility letter as '*Base lending rate varying, plus 1.75% per annum, currently 2.74% per annum and includes a Funding Premium of 1.4%*'.

52. The statement of account is not referenced within any pleading and the only facility letter pleaded is that which issued in 2010, which is in turn the only facility letter referred to within the 2015 letter of demand. None of this information, or any figures reflecting the amount

of interest charged, is reflected or specifically referred to within any of the pleadings. In short the Bank, within its pleading, has failed to deal with the evidential gap identified.

53. In such circumstances, in my view, it follows that the entry of summary judgment by the High Court judge must be set aside with a direction that the proceedings can now be remitted to the High Court to enable the Bank to make such application as it considers appropriate to amend its pleadings in light of the court's findings within this judgment.

54. In light of the court's finding, my preliminary view on the issue of costs is that Mr. Doran, having succeeded in his appeal in resisting the entry of summary judgment, is entitled to his costs in the High Court and in this court, to be adjudicated in default of agreement, with a stay upon the execution of those costs pending resolution of these proceedings. If, however, any party wishes to seek a different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, but any party seeking such a hearing will run the risk that if they are unsuccessful they may incur further costs. If no indication is received within the twenty-one-day period, the orders of the Court, including the proposed costs orders, will be drawn and perfected.

55. Faherty and Collins JJ. concur with this judgment which is being delivered electronically.