THE COURT OF APPEAL - UNAPPROVED

Court of Appeal Record Numbers:2019/93
2019/94
Neutral Citation Number [2023] IECA 246

Faherty J.
Haughton J.
Binchy J.

BETWEEN/

ALLIED IRISH BANKS PLC AND EVERYDAY FINANCE DAC

RESPONDENTS

- AND –

CORMAC LOHAN

APPELLANT

AND

BETWEEN/

AIB MORTGAGE BANK AND EVERYDAY FINANCE DAC

RESPONDENT

AND

CORMAC LOHAN

APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 11th day of October 2023

1. This is an appeal from an ex tempore judgment, and resulting orders made by O'Regan J. on 8th February 2019 in the above entitled proceedings whereby:

1) In the proceedings entitled Allied Irish Banks Plc, ("AIB"), plaintiff, and Cormac Lohan, defendant (bearing record number 2016/2467S) ("the AIB Proceedings"), O'Regan J., did, pursuant to a notice of motion for an order for summary judgment, order that Mr. Lohan (the appellant in both appeals) should pay AIB the sum of €1,681,861.89, together with the costs of those proceedings and

2) In the proceedings entitled AIB Mortgage Bank ("AIBM"), plaintiff, and Cormac Lohan, defendant ((bearing record number 2016/2466S) ("the AIBM Proceedings"), O'Regan J did, pursuant to a notice of motion for an order for summary judgment, order that the appellant should pay AIBM the sum of €79,059.49, to AIB Mortgage Bank, together with the costs of those proceedings.

The AIB Proceedings.

2. The proceedings in each case were issued by way of summary summons on 21st December 2016. In the proceedings bearing record number 2467S, AIB sought judgment as against the appellant in the sum of €1,660,531.26. Judgment was sought in respect of six loan facilities said to be advanced by AIB to the appellant. Particulars of each of those facilities are provided in the summary summons, including the date of the facility, the account number, and the sum advanced in each case. In each case it is stated that: *"at all material times the plaintiff reserved the right to demand repayment in respect of the loan facility."*

3. At paragraph 9 of the summary summons, it is stated that the defendant has defaulted in repayment of the monies due and owing, and that despite demand being made, the

appellant has failed, refused and or neglected to discharge the monies due and owing. There is then set out, in tabular form, particulars of the debt claimed by AIB. There are four columns in the table, under the following headings: Loan Account Number, Principal Due, Interest and Charges and Total Sum Due as at 26th July 2016. The information in respect of each account is then provided under each heading. However, no particulars as to the computation of interest or charges are provided, nor does the summons cross refer to any other document in which this information is provided.

4. By notice of motion dated 4th May 2017, AIB sought judgment against the appellant in the sum of €1,671,488.07 comprising the principal sum of €1,669,545.77 together with continuing interest in the sum of €1,942.93. This motion was grounded upon an affidavit of Mr. Tom O'Neill, who describes himself as a case manager in the AIB. In paragraph 1, Mr. O'Neill deposes:

> *"I am employed by the plaintiff as a case manager and as such I have access to the computerised and other records of the plaintiff pertaining to these proceedings. I make this affidavit on behalf of the plaintiff and with its authority, from a diligent perusal of its books and records and from facts within my own knowledge save where otherwise appears and where so appearing I believe the same to be true".*

5. Mr. O'Neill then proceeds to describe the six loan facilities which he avers were made available to and accepted by the appellant ~~in each case~~, and he exhibits the offer letters pertaining to each facility. At paragraph 9 thereof, he deposes (in tabular form similar to style in the summons) as to the principal sum due in respect of each loan facility, the interest due in respect of each and the total amount due in respect of each loan facility. Mr. O'Neill exhibits copy statements relating to each of the accounts, and avers that the combined total due as of the date of his affidavit (28th April 2017) is stated to be €1,671,488.07.

6. In an affidavit sworn on 28th June 2017, the appellant avers that Mr. O'Neill is not a suitable deponent on behalf of AIB to swear the affidavit grounding the application for summary judgment, because he is neither an officer nor a partner of the Bank. He further avers that owing to the uncertainty of the true role of Mr. O'Neill, he is disqualified from availing against the rule against hearsay as provided in the Bankers' Books of Evidence Act 1879, as amended. The appellant further avers that for this reason, the affidavit of Mr. O'Neill should be dismissed insofar as he avers to any matter outside of his direct knowledge, and therefore the notice of motion grounded on the affidavit of Mr. O'Neill should be dismissed.

7. The appellant then further avers as to negotiations as between the appellant and AIB in late 2014 and early 2015. He avers that these negotiations culminated in an agreement on 19th February 2015, witnessed by his accountant, a Mr. Nick Linnane, and a Mr. Shane O'Donoghue and a Ms. Marie Lyons on behalf of AIB. He avers that this agreement was subsequently evidenced in writing, and he exhibits a copy of the same.

8. The appellant then proceeds to provide details of the agreement which he avers significantly reduced "the facilities and created new facilities and/or ordered the sale of properties over a certain period of time" and he avers that he has complied with the terms of the agreement and that AIB is estopped from withdrawing or resiling from the terms thereof. The appellant then further avers as to proceedings that he has issued as against both AIB and AIBM seeking specific performance of the agreement. The appellant avers that he has a good defence to the proceedings and that his appearance was not entered solely for the purposes of delay.

9. Mr. O'Neill, on behalf of AIB, swore a second affidavit, on 29th September 2017, in reply to the affidavit of the appellant. In paragraph 4 of this affidavit, Mr. O'Neill avers that it is not necessary for AIB to avail of the provisions of the Bankers' Book Evidence Acts in

order to provide the relevant evidence to ground its claim in the proceedings. He avers, at paragraph 5, that he is employed by both AIB and AIBM and that he had been authorised by AIB to swear the affidavit on its behalf. He avers that he is the case manager with responsibility for managing the current account and five loan accounts which the appellant maintains with AIB. Mr O'Neill exhibited a copy of a letter from AIB outlining his employment status which supports his averment.

10. Mr. O'Neill then proceeds to deal with the discussions as between the appellant and AIB, which he describes as being without prejudice discussions that took place in 2015 and early 2016. He avers that on foot of these discussions, a facility letter of 2nd February 2016 was sent to the appellant outlining an offer from AIB and AIBM to restructure the appellant's loans with both AIB and AIBM. He avers that that facility is the document exhibited by the appellant to his replying affidavit of 28th June 2017.

11. Mr. O'Neill avers that it was a condition precedent of the facility letter of 2nd February 2016 that the appellant would return it, signed, within 35 days of 2nd February 2016. He further avers that the appellant failed to do so and he then refers to:

1) A letter from AIB to the appellant's accountant, Mr. Nick Linnane of 12 February 2016, whereby Mr. Linnane was informed that the facility letter of 2nd February 2016 had been sent to the appellant and that the defendant had 35 days to return the signed documents.
2) A letter of 9th March 2016 from AIB to the appellant pointing out that the appellant had not yet accepted the terms of the facility letter, and affording him a further 10 days within which to do so, and stating that otherwise the facility would be withdrawn.
3) An email of 7th April 2016 sent by AIB to the appellant, with a copy to Mr. Linnane, requesting the return of the offer letter duly signed.

4) Emails from the appellant whereby he referred to obtaining facilities from another bank.

5) A letter of 4th May 2016 from AIB to the appellant, informing him that the offer letter of 2nd February 2016 had been withdrawn as the appellant had failed to return the letter accepted by him.

6) Further emails as between AIB and the appellant exchanged between 20th May 2016 and 31st May 2016, whereby the appellant explained that the reason why the offer letter had not been returned by him was that it had been lost by his secretary, but that he had now located it and was, accordingly, returning ~~returned~~ the offer letter duly signed to AIB.

12. Mr. O'Neill exhibits copies of all of the correspondence referred to and relied upon by him in this affidavit.

13. The appellant responded to the second affidavit of Mr. O'Neill by way of an affidavit sworn by his accountant, Mr. Linnane, dated February 2018 (the precise date is not decipherable). Mr. Linnane deposes as to his being an accountant retained by the appellant in connection with the within proceedings. He refers to the discussion between the parties and avers that the discussions culminated in an agreement in February 2016. He avers that he and the plaintiff *"were delighted with the outcome"* of a meeting that he and the appellant attended with Mr. O'Donoghue and Ms. Lyons on 19th February 2016, at which agreement was reached as to the restructuring of the appellant's indebtedness. Mr. Linnane confirms that he has read the affidavits in the proceedings, and that he agrees with the contents of the appellant's affidavits, but he does not address the averments of Mr. O'Neill regarding the failure of the appellant to return the offer letter reflecting the agreement reached between the parties, duly signed, within the time provided, and as extended by AIB, or indeed the fact

that he had been kept informed by AIB as to the failure of the appellant to sign the offer letter.

The AIBM Proceedings.

14. By summary summons also issued on 21st December 2016,~~,~~ AIBM seeks judgment against the appellant in the sum of €76,152.76. The summons refers to two separate loan facilities each dated 24th January 2003 and each making available to the appellant the sum of €50,000. It is stated in the endorsement of claim that the appellant accepted each of the loan facilities and drew down the sum of €50,000 in each case. It is stated that the plaintiff, AIB Mortgage Bank, issued formal demand letters relating to the facilities on 2nd June 2016, demanding repayment of the total sum then due in respect of the facilities (together) amounting to €74,882.33, comprising principal in the sum of €74,065.85, and interest in the sum of €816.48. It is stated that as of 6th October 2016, the sum of €76,152,76 was due and owing by the appellant to the plaintiff, AIBM, comprising the principal sum of €75,941.13 and interest of €211.63. However, as in the case of the AIB proceedings, no particulars as to the computation of interest or charges are provided in the summons, nor does the summons cross refer to any other document in which this information is provided.

15. By notice of motion dated 4th May 2017, AIBM sought judgment against the appellant in the sum of €77,941.07 comprising the principal sum of €77,776.62 together with continuing interest of an amount of €165.08. This motion was also grounded upon an affidavit of Mr. O'Neill dated 21st September 2017 which is in very similar terms to the affidavit grounding the AIB motion of 4th May 2017, save as to the obvious differences relating to the facilities advanced and the amounts claimed. He deposes as to the two facilities advanced by AIBM to the appellant, and drawn down by the appellant on 19th February and 20th February 2003, being the same facilities described in the summary summons. He avers as to the failure of the appellant to make repayments on the two facilities

in accordance with the terms of the facility letters, and to the issue of a formal demand, made by letter of 8th August 2016, on behalf of AIBM, for payment of the combined sum then due of €75,433.13. He avers that the appellant has failed, refused and neglected to repay the sums due, which, as at the date of the affidavit, have increased to the total sum of €77,941.07. Particulars of principal and interest are provided, and, as in the case of the AIB proceedings, Mr. O'Neill exhibits copy statements relating to each of the accounts.

16. The Court was not originally provided with the motion papers relating to the amount claimed by AIBM and requested they be provided prior to commencement of the hearing. The papers were produced by the appellant on the morning of the hearing, but ~~omitted to~~ did not include the replying affidavit of the appellant. However, the court was informed that the replying affidavit is in substantially the same terms as in the proceedings between AIB and the appellant. The second affidavit of Mr. O'Neill filed in reply to the replying affidavit of the appellant was provided to the court, and this is in almost identical terms to that sworn by Mr. O'Neill in the AIB proceedings, save only as to the obvious differences relating to the loan accounts and the amounts claimed.

Judgment of the High Court

17. The application for summary judgment in each case came on for hearing before O'Regan J. in the High Court on 8th February 2019. A copy of the DAR transcript of those proceedings has been made available to the court. The trial judge first addresses the offer letter sent by the plaintiffs to the appellant in February 2016. It appears that counsel for the appellant was arguing before the court that the agreement had in fact been reached in February 2015. This is in conflict not just with the affidavits of Mr. O'Neill sworn on behalf of AIB and AIBM, but also the affidavit of Mr. Linnane provided on behalf of the appellant, but in any case, as the trial judge held, nothing turns on this. The trial judge found that what was material, and what mattered, was that the offer letter contained a condition precedent

that it was to be signed and returned by the appellant within 35 days, and he failed to do so. Nor did he do so within the extended time afforded to him by the plaintiffs. Accordingly, the trial judge found, there was "no fulfilment of the agreement". The fact that the appellant, according to himself, had signed it, that it had been lost by his secretary and not returned to the Bank until after the offer had been withdrawn by the plaintiffs, could not avail the appellant. The trial judge held that the period for execution as stipulated in the offer letter was part and parcel of the agreement; she held that "*any agreement that was achieved in February 2015 was, as per the case mentioned* [referring to a decision of the Supreme Court that she had mentioned earlier, being *Embourg Ltd v Tyler Group* [1996] IESC 5 *an agreement to enter an agreement into the future*" and that this was so was also reflected in the affidavit sworn by the appellant himself in which he averred that the document *i.e.* the offer letter of 2nd February 2016 "*captures the agreement*" reached between the parties. Therefore, the trial judge held, there was no arguable defence available to the appellant on the basis of the agreement reached between the parties of February 2016.

18. The trial judge then went on to address the indebtedness claimed by the plaintiffs. She referred to the affidavits of Mr. O'Neill, which she noted had not been contradicted by the appellant. She referred to the judgment of Charleton J. in the Supreme Court in *Ulster Bank Limited v. Rory O'Brien, Danny O'Brien and Michael O'Brien* [2015] IESC 96, apparently as authority for the proposition that the court is entitled to accept the uncontradicted averments of Mr. O'Neill as to the indebtedness of the appellant, because the appellant did not take the opportunity to deny the liabilities claimed in his replying affidavits (otherwise than in the context that they had been settled).

19. The trial judge also referred to the "one other issue raised" by the appellant, being non-compliance with the Bankers' Book Evidence Act. She considered that issue as also being dealt with by the Supreme Court *Ulster Bank Limited v. O'Brien.* The trial judge

observed that a further issue raised by the appellant was that Mr. O'Neill was not a party to the oral agreements leading to the offer letter, but she said that that did not amount to an arguable defence in the circumstances, and she therefore entered judgment in the amounts claimed by both plaintiffs. It appears no other arguments were made by the appellant before the High Court.

Notice of Appeal

20. The notices of appeal filed on behalf of the appellant in each case were identical and set out, in each case, seven grounds of appeal as follows:

(1) The learned judge erred in law in determining that no *bona fide* defence existed.

(2) The learned judge erred in law in determining that the condition precedent was not waived by the plaintiff in circumstances where no evidence was submitted to support this decision.

(3) The learned judge erred in law in determining no prior settlement agreement had been reached in circumstances where there was conflicting evidence on the factual matrix of the agreement. Two affidavits from two deponents described the event in favour of the appellant but the one affidavit of the plaintiff was preferred without valid cause.

(4) The learned judge erred in law by placing undue deference on the evidence of the respondent, and decided conflicts of facts on affidavit, in particular the learned judge erred in determining that the agreement of February 2015 was not enforceable despite two deponents averring to it.

(5) The learned judge erred in law in failing to apply the correct test to be employed on an application for summary judgment.

(6) The learned judge erred in law in failing to consider the appellant's evidence in its totality.

(7) The learned judge erred in determining that the agreement dated 2nd February 2016 was [The text in the notices of appeal finishes at this point].

21. In each case the appellant seeks orders setting aside the judgment of the High Court and, *inter alia*, an order to remit the proceedings to plenary hearing.

22. Respondents' notices were filed in each case by AIB and AIBM respectively. The grounds of opposition in the respondents' notices are identical. They are as follows:

(1) There was no error in law by the trial judge in determining that there was no *bona fide* defence to [either] claim.

(2) There was no error in law by the trial judge in determining that the facility letter of 2nd February 2016 which was an offer to restructure the original facility letters (which the respondent relied upon in the within proceedings) did not bind the parties in circumstances where there was sworn evidence in the affidavit of Tom O'Neill which set out that the appellant did not return the signed acceptance within a period of 35 days and the respondent, as it was entitled to, withdrew the facility letter of 2nd February 2016.

(3) The averments contained in the affidavits of the appellant and his financial advisor that there was a binding agreement reached in February 2015 to restructure the appellant's various facilities were contradicted by the appellant's own correspondence which was exhibited in the various affidavits that were opened to and considered by the learned trial judge.

(4) The learned trial judge was correct in rejecting the mere assertion of a binding restructure which was not supported by any objective evidence and was in fact contradicted by the appellant's own correspondence to the respondent.

(5) The learned trial judge applied the correct test in respect of granting summary judgment.

(6) The learned trial judge considered the affidavits filed on behalf of the appellant in full including an affidavit which was only served on the respondents' legal team on the morning of the hearing.

(7) Ground of appeal 7 is not understood as text is missing therefrom.

Developments subsequent to the decision of the High Court

23. Subsequent to the judgment of O'Regan J. giving rise to each of the aforementioned orders, the plaintiffs in each of the proceedings, AIB and AIBM, assigned, transferred and assured their interests in the loans and mortgage assets as defined in a Deed of Transfer made between Allied Irish Banks Plc, Allied Irish Mortgage Bank and others, of the one part and Everyday Finance DAC ("Everyday") of the other part dated 14th June 2019. The said loans and mortgage assets include the loans from AIB and AIBM to the appellant that have given rise to these proceedings.

24. Procedurally, what happened after the sale by AIB and AIBM of the loans to the appellant is, to put it mildly, messy. However, it is necessary to summarise it in some detail, having regard to the reliance placed upon these events by the appellant in his submissions to this court.

25. In September 2020, Everyday made what has been described as an "omnibus" application to the High Court, *ex parte,* to be substituted for AIB and AIBM in these and other proceedings in which AIB and AIBM were a party, and which related to loans sold to Everyday. So far as the within proceedings are concerned, that gave rise orders , made by Murphy J. , on 28th September 2020 whereby AIB and AIBM contend (although this is not accepted by the appellant) that Everyday was substituted for AIB and AIBM in each of the proceedings involving the appellant. Since the application was made *ex parte*, the appellant was not aware of the application to the High Court, but the order of Murphy J. had directed that it should be served by Everyday on the parties affected within 14 days from its

perfection. However, Everyday neglected to do so, at least within the 14 day period. The respondents maintain it was served at some stage, but were unclear as to when, but in any event nothing turns on this.

26. To complicate matters further, Everyday was not aware that, at the time it moved the application before Murphy J., these proceedings had already been concluded in the High Court and were the subject of appeals to this Court. The High Court was, therefore, *functus officio* and, so far as these proceedings were concerned, whatever application was necessary should (in each case) have been made to this Court.

27. Subsequently, according to an affidavit sworn by Mr. Raymond Lambe of OSM Partners, now acting on behalf of Everyday, the within appeals were mentioned at a call over, and it became apparent that the appellant was unaware of the order of Murphy J., and objected to the order for substitution that had been made. Mr. Lambe avers that in the circumstances, he considered that the appropriate relief was to make an application to this Court seeking an order re-joining AIB and AIBM as co-plaintiffs/respondents to these appeals. That application came on before Costello J. in this Court on 5th March 2021. The appellant objected, and the application was refused by Costello J. who directed that an application should, in the first instance, be made to Murphy J. in the High Court to vary her order of 28th September 2020. Mr. Lambe avers as to the efforts he made to do this, but ultimately, he avers, that the matter fell into abeyance and the application to Judge Murphy was not made.

28. Instead, Everyday brought a further motion to this Court seeking almost the same reliefs that it had previously sought, and which had been refused by Costello J. On this occasion, however, the appellant consented to the orders sought, and so, by orders made on 1st April 2022 in each of the proceedings, it was ordered that AIB and AIBM be re-joined as a co-plaintiff to the relevant proceedings (in which each had been a plaintiff in the court

below, prior to the order of Murphy J.) and as a co-respondent to the relevant appeal, and that the proceedings and the appeals be carried on between, firstly, Everyday Finance DAC and AIB as plaintiffs/respondents and Cormac Lohan as defendant/appellant and, secondly, Everyday Finance DAC and AIB Mortgage Bank as plaintiffs/respondents and Cormac Lohan as defendant/appellant, and the order in each case further directed that the title to the proceedings be duly entered in the Central Office of the High Court with the proper officer.

29. Lastly, from a procedural point of view, the notice of motion seeking the reliefs had in each case also sought an order that the respondent's notice already filed by Everyday in the appeals be deemed to be the respondent's notice of the co-respondents. The orders made by the court on 1st April 2022 are silent as regards this relief. The fact of there being only one respondent's notice, filed in each case by AIB and AIBM respectively is a matter upon which the appellant placed some reliance at the hearing of this appeal and which I address further below.

Bank of Ireland Mortgage Bank v O'Malley

30. One other development of significance following the judgment of the High Court is the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, a decision handed down by Clarke CJ. on 29th November 2019. In *O'Malley,* the Supreme Court was required to consider the adequacy of pleading of the plaintiff/respondent for the purposes of an application for summary judgment. The Court further considered the adequacy of the evidence relied upon by the applicant bank. It concluded that neither the manner in which the sum claimed was pleaded nor the evidence advanced in support of the claim were adequate.

31. The appellant seeks to rely on the decision of the Supreme Court in *O'Malley* for the purposes of this appeal, arguing that the summons issued by AIB and AIBM do not meet the standards set by the Supreme Court in that case. Since *O'Malley* was subsequent to the

decision of the High Court in this case, the appellant could not, of course, have relied on that decision in the court below, although that is not to say that he could have not made just the same arguments advanced by Mr. O'Malley as regards the adequacy of the banks' pleadings. In any case, I will address this argument in more detail below.

Submissions of appellant

32. The most striking thing about the submissions of the appellant – both written and oral – is that neither address, at all, any of the grounds of appeal as set forth in the appellant's notice of appeal. In answer to a question from the court, the appellant confirmed that it remains the case that he relies upon his grounds of appeal. However, since he made no submissions in support of those grounds, there is nothing to be said about them under this heading, and I will address them in the discussion and conclusions section of this judgment.

33. The submissions of the appellant were directed towards developments since the hearing in the High Court. Firstly, it is submitted that neither AIB nor AIBM have any standing to contest this appeal. It is contended that, following the sale of the appellant's loan facilities to Everyday, neither AIB nor AIBM have any ongoing interest in those facilities and, therefore, they cannot have any interest in the subject matter of this appeal.

34. It is also submitted that, for the same reason, the proceedings are moot "as against" AIB and AIBM, because there is no live controversy between the appellant and AIB and AIBM, and reliance is placed upon *Lofinmakin v. Minister for Justice* [2013] IESC 49, [2013] 4 IR 274.

35. So far as Everyday is concerned, it is contended that the order made by Murphy J. did not substitute Everyday into these proceedings; it substituted Everyday as a party in an entirely different and unrelated case, and the only reference to the appellant in the

"omnibus" order of Murphy J. is contained in a schedule to the order, but the order itself makes no reference to the schedule in the body of the order. Costello J. directed that Everyday return to Murphy J. to rectify these irregularities, but it failed to do so.

36. So far as the order of 1st April 2022 is concerned, it is submitted that the appellant consented to AIB and AIBM being re-joined to the proceedings, but there is no order - in either the High Court or this Court - joining Everyday to the proceedings.

37. It is further submitted that the Deed of Transfer was not effective to transfer to Everyday the benefit of the judgments obtained by AIB and AIBM in the High Court, because there is no reference in the Deed of Transfer to the judgments obtained by AIB and AIBM.

38. The appellant further submits that only one respondent's notice has been filed in each of the proceedings, on behalf of AIB and AIBM respectively. No respondent's notice has been filed on behalf of Everyday, and accordingly for that reason also it is not properly before the court in either appeal.

39. The appellant places significant reliance upon the decision of the Supreme Court in *O'Malley,* as well as a subsequent decision of the High Court (Holland J.) in *AIB v. Doorly* [2022] IEHC 317, both of which were handed down subsequent to the hearing in the High Court. It was submitted that *O'Malley* makes clear that the obligation to provide adequate information as to the accuracy of the calculation of the amount claimed in an application for summary judgment arises at two points in the process – in the summary summons itself, and in the affidavit upon which the application for judgment is grounded. It is submitted that the summary summons in this case does not particularise adequately how the sum claimed was calculated.

40. In answer to the reliance placed by the respondents upon the decision of this Court in *Allied Irish Banks PLC v. O'Callaghan* [2020] IECA 318, in which case this Court rejected

an attempt by the appellant to rely upon *O'Malley* in an appeal, in circumstances where the appellant had raised no objection as to the adequacy of the particulars in the High Court, or in the grounds of appeal from judgment in the High Court, counsel submitted that in *O'Callaghan,* the appellant had made a different argument, and purported to raise a defence to the amount claimed. In this case, on the other hand, the appellant is not trying to raise a defence, but simply wishes to rely on his entitlement – per *O'Malley* – to be provided with adequate particulars of the sum claimed from the outset of the proceedings. It was submitted that if this Court dismisses the appeal, the respondents will, in effect, "get away with" non-compliance with the applicable standards identified by the Supreme Court in *O'Malley.*

41. Finally, it was argued on behalf of the appellant that the respondents – and in particular AIB and AIBM – have been guilty of an inexcusable delay in progressing these proceedings. It is submitted that following the issue of the proceedings in 2016, there was considerable delay in bringing the matters to court and that since the appeal there have been two hearing dates lost due to the delay of the respondents in regularising procedural deficiencies. It is submitted that there has been culpable delay on the part of the respondents and the appellant relies upon the decision of Irvine J. (as she then was) in *Flynn v. Minister for Justice* [2017] IECA 178.

Submissions of respondents

42. It is submitted by the respondents that the appellant put up a very limited defence in the High Court. He advanced no argument at all on the facts i.e. he did not deny having drawn down the loans or deny that the amounts claimed in each case were due. He advanced two arguments, both of which were rejected by the trial judge, and in doing so the trial judge applied the correct legal test to applications for summary judgment being that identified by

Hardiman J. in *Aer Rianta v. Ryanair Limited* [2000] IEHC 205 [2001] 4 IR 607, and later elaborated upon by McKechnie J in *Harrisrange Limited v. Duncan* [2002] IEHC 14. It is submitted that the trial judge correctly asked whether or not the appellant had made out an arguable defence to the respondents' claims, and correctly found that he had not.

43. It is further submitted that the appellant, in asserting in his replying affidavit that his loans had been restructured by way of a subsequent agreement, implicitly accepted that he had borrowed the monies claimed by the respondents, and, furthermore, it is submitted that the failure of the appellant to contradict any of the particulars of debt evidenced in the affidavits of Mr. O'Neill amounts to an admission of interest having regard to the principles referred to in the judgment of Charleton J. in the Supreme Court in *Ulster Bank Ireland Limited v. O'Brien & Ors.* [2015] IESC 96. Reliance is placed upon paras. 17, 21 and 23 of that judgment, but for present purposes it is sufficient to set out just para. 23:

> "*Civil proceedings for the enforcement of debt are an exercise of the constitutional right to litigate. Such a case carries procedural solemnity and is attendant with safeguards as to service. Within that context, the swearing of an affidavit and its service in court proceedings which make allegations that a sum is due, can be accepted in the absence of denial, where the form and the content of what is deposed to and the exhibits supporting it carry sufficient indications of reliability. Part of the matrix of facts to be considered is whether the documentary evidence establishes a relationship whereby the obligation to pay for goods or services or to repay a debt, are properly referenced and exhibited. In that regard the procedural safeguards of court proceedings as to service, coupled with the ability to make an appearance and to formally deny the existence of a debt, and where otherwise to contest liability to pay by reference to a collateral contract or if some defect in goods and services, or some other appropriate defence, may give rise to an ability in the court to act against the*

party failing to make any denial. As a matter of law, where circumstances indicate that a reasonable person would have responded to an allegation in the context of an appropriate commercial relationship where money is due, but does not so respond, an admission may be set up. The court may act in that situation."

44. As far as the decision of the Supreme Court in *O'Malley* is concerned, it is submitted that the ground of appeal now pursued under this heading is a new ground which the appellant could have, but did not, pursue in the High Court. No issue was raised by the appellant at all in that court about the adequacy of particulars of the debt and it is submitted that the appellant should not be allowed to raise this issue now. Had he raised this issue in the court below, the respondent might well have sought an adjournment in order to provide such additional particulars as might be necessary, but not having done so, the appellant should not be permitted to do so now.

45. In this regard, the respondents place reliance upon the decision of MacMenamin J. in the Supreme Court in *Ennis v. Allied Irish Banks Plc* [2021] IESC 12. *Ennis* was also a case involving an application for summary judgment. Judgment was granted against the appellant in the High Court, but, on appeal, he sought both to introduce new evidence and also to advance new arguments not made in the High Court. MacMenamin J. reviewed the authorities concerned with such applications, and in the course of his judgment gave detailed consideration, in particular, to the seminal judgment of Finlay CJ in *K.D. v. M.C.* [1985] 1 IR 697, to the judgment of O'Donnell J. (as he then was) in *Lough Swilly Shellfish Growers Co-operative Society Limited Anor v. Bradley Anor.* [2013] IESC 16; [2013] 1 IR 227 and to the judgment of Clarke J. (as he then was) in *Irish Bank Resolution Corporation (in special liquidations) v. McCaughey* [2014] IESC 44; [2014] 1 IR 749. In the context of plenary proceedings, MacMenamin J. referred to the general principle identified by Finlay CJ in *K.D. v. M.C.*, that being that an appellate court should not hear and determine an issue which *"has*

not been tried and decided in the High Court" (p.701, *K.D. v. M. C.*) noting that Finlay C.J. added that : "*To that fundamental rule or principle there may be exceptions, but they must be clearly required in the interest of justice".*

46. MacMenamin J. noted that in *Lough Swilly,* O'Donnell J. spoke of a certain *"sensible flexibility"* regarding the raising of new grounds of appeal, and he observed that Clarke J. in *IBRC v. McCaughey* had stated that because a motion for summary judgment had the potential of shutting out a defendant from the right to have a full trial between the parties, an appellate court was required to be *"more flexible in relation to the consideration of arguments or materials brought forward on appeal."*

47. MacMenamin J. concluded, his review of the authorities at para. 39, stating as follows:

> *"Drawing these strands together, it can be said that the general criteria applicable to admitting new arguments in appeals proceedings are as outlined in K.D., but as developed in Emerald Meats, Lough Swilly, and Ambrose. Admission of new evidence is, generally, governed by the principles in Murphy v. Minister for Defence, as explained in subsequent case law. In proceedings where the procedure is akin or analogous to interlocutory proceedings, such as in Lopes, and including judgments in summary proceedings, courts will be somewhat more flexible in admitting new arguments on appeal, and may consider new evidence, but exercise caution because of the potential consequences*."

48. The respondents rely on the following passage at the concluding part of his judgment, where, at para. 71 he stated:

> *"Courts are unlikely to be impressed where legal points are not made at first instance when they should have been. To allow for any different regime would be a recipe for procedural chaos. Courts will not be impressed, either, by last minute applications to*

entertain additional material .... Such applications can give the impression or appearance of drip-feeding or holding back…"

49. In *Ennis,* MacMenamin J. concluded that had the appellants made the points to the High Court that he sought permission to rely upon in the Supreme Court, there was no doubt that the case would then and there have been transferred for a plenary hearing. The respondents submit that this factor appears to be what tipped the balance in that case of allowing the admission of new evidence and the making of new arguments.

50. However, the respondents submit that in this case, there was nothing to prevent the appellant from advancing in the court below, the arguments that he now wishes to advance on appeal. Moreover, the appellant does not even raise these issues in his grounds of appeal. The respondents rely upon the decision of Haughton J. in this Court in *Allied Irish Banks Plc v. O'Callaghan* [2020] IECA 318. In that case, as here, the appellant, in reliance on *O'Malley*, sought to argue, for the first time on appeal, that the plaintiff/respondent had failed to particularise adequately its claim in the pleadings. Haughton J. addressed this issue at para. 61 as follows:

"The decision in O'Malley was handed down some six months after the decision of the trial judge in the present appeal. However, it was at all times open to the appellants to agitate any concerns they had as to the adequacy of the particulars endorsed on the Summary Summons in this case, before the High Court. As I noted earlier in this judgment the adequacy of particularisation of the claim in the Summary Summons was not raised in the High Court. Had it been raised – as it could have been under the Rules of the Superior Courts and existing jurisprudence on the level of particularisation required in a Summary Summons - it is likely that the trial judge would have afforded the Bank an opportunity to amend the Summary Summons and/or file additional affidavit evidence. A lack of particularisation was also not a Ground of

Appeal. In my view therefore the appellants should not be permitted to raise this entirely new issue/argument at this stage. This is particularly so in circumstances where no denial is made in respect of the draw down of the sums borrowed originally in 2005, or the sums drawn down pursuant to the loan sanction dated 29 January 2009 upon which the proceedings are based or where the appellants have never claimed prejudice of any kind arising from the level of particularisation in the proceedings. Furthermore, as Clarke CJ. observes in para. 5.5 of O'Malley "…a court may be entitled to take into account, in assessing the adequacy of the manner in which a debt claim is particularised, any documentation which has been sent to the defendant in advance of the commencement of the proceedings." The court was therefore entitled to take into account the three bank statements exhibited by Mr. McGuinness in his first affidavit. Minimalist as they were, they do on their face indicate that they were addressed to the appellants, they all bear the date 1st June 2017, and they set out the balances due as at that time."

51. The respondents also rely on the decision of this Court (Noonan J.) in *Promontoria (Arrow) Limited v. Mallon* [2021] IECA 130. In that case, Noonan J. cited *O'Callaghan* with approval and considered the more flexible approach discussed by MacMenamin J. in *Ennis* and observed:

"*However, lest it be thought that the Ennis decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although MacMenamin J. allowed for greater flexibility in non-plenary cases, he said (at paragraph 15 of his judgment) that the K.D. principle remained "the general principle" i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the*

High Court. He also said that while there were exceptions, they must be "clearly required in the interests of justice".

52. The respondents further rely upon the judgment of Murray J. in this Court in *Feniton Property Finance DAC & Pepper Finance Corporation (Ireland) DAC v. Eugene McCool* [2022] IECA 217 where, at para. 118, Murray J. stated:

"In this case, unlike in O'Malley, the point as to deficiency of the pleadings was not raised in the court below. Had it been raised in the High Court, the deficiency could have been addressed by the amendment of the summons to include short reference to the bank statements in which these particulars were to be found. This court has consistently decided that it should not permit a party who could have raised a pleading issue as to the particularisation of a claim in the High Court to do so for the first time on appeal, not least of all because had such a point been made it would have been open to the trial judge to afford the plaintiff an opportunity to amend its claim (Allied Irish Banks v. O'Callaghan [2020] IECA 318 at para. 61 and Promontoria (Arrow) Limited v. Mallon & Shanahan at paras. 25 and 26). All of the cases addressing the power of the court to permit a party to amend its pleadings stress the flexibility with which that jurisdiction should be exercised, and it is hard to my mind to see any exigency of justice that would, in the circumstances of this case, have required the refusal of an application to make a purely technical amendment to the summons. This ground of objection, accordingly, must fail."

53. As to the appellant's arguments regarding *locus standi*, it is submitted that all of the appellants have locus standi in the appeal; in the cases of AIB and AIBM, this is with respect to the costs of the cases at first instance, and, on appeal, with respect to the entitlement of Everyday to seek leave to execute on foot of the judgments as lawful successor in title to the loans. The respondents acknowledge that they failed to return to the High Court as directed

by Costello J. in order to reinstate AIB and AIBM to the proceedings, but they submit that any deficiency in this regard was made good by the order made, on consent, by Costello J. on 1st April 2022.

54. In circumstances where the appellant's facilities with AIB and AIBM were sold to Everyday, it is submitted that the appropriate manner of proceeding is for the successor in title to the facilities (Everyday) to be added as co-respondent, as distinct from the substitution of Everyday for AIB and AIBM in both sets of proceedings. This approach was endorsed by Finlay Geoghegan J., in this Court, in *Irish Bank Resolution Corporation Limited v. Halpin* [2014] IECA 3.

55. As to delay, the respondents deny any unconscionable or unreasonable delay. The appellant entered an appearance to the proceedings on 13th February 2017, and in each case a notice of motion seeking liberty to enter final judgment issued on 4th May 2017. It is acknowledged that there has been some delay following the substitution of Everyday to the proceedings on 20th March 2020, but it is submitted that both sides share some responsibility for this delay. Moreover, the respondents submit that the appellant has taken no steps to have the proceedings struck out by reason of delay.

56. Finally, the respondents submit that it is difficult to understand the appellant's arguments that the appeals are moot in circumstances where the appellant is prosecuting his appeals. However, if the appeals are moot, then the judgments obtained are final and conclusive.

Discussion and decision

Locus standi and mootness arguments

57. The most obvious starting point in this discussion is the argument that none of the respondents are properly before the court. It has to be said that it is somewhat surprising that this argument was advanced at all, in circumstances where the appellant consented, on 1st April 2022, to an order re-joining AIB and AIBM in each of their proceedings *"as a co-plaintiff to the proceedings and as a co-respondent to the within appeal and that the proceedings and the within appeal be carried on between "Everyday Finance DAC and AIB/AIB Mortgage Bank as plaintiffs/respondents and "Cormac Lohan" as defendant/appellant – the title hereof to be duly entered in the Central Office at the High Court with the proper officer*."

58. While there was a somewhat confusing background leading up to the application that led to this order, all of that confusion was fully resolved upon the making of this order. As the order makes clear, AIB and AIBM were re-joined to the proceedings and each of the proceedings were to be carried on jointly with Everyday as a co-plaintiff and as a co-respondent to the appeal. The order is clearly based on the assumption that the order of Murphy J. had the effect of substituting Everyday for AIB and AIBM, and if the appellant took issue with that, he should not have consented to the order, and it is certainly not open to him to re-open the issue now. Following upon the order of 1st April 2022, there can be no doubt about the entitlement of AIB, AIBM and Everyday to participate in and oppose the appeals. While counsel for the respondent submitted that the Court must ask itself the question as to how Everyday come to be in the appeal, the answer to that question is provided by that order.

59. This conclusion disposes of all arguments as to the standing of AIB, AIBM and Everyday. However, it must also be observed that the submission that the appellant, in April 2022, merely consented to an order re-joining AIB and AIBM to the proceedings but not to one joining Everyday, is at odds with para. 21 of the appellant's own written submissions,

which states: "In or around March 2022 the appellant consented to allow Everyday be joined and in the alternative that AIB/AIBM be re-joined and that the respondent's notice be allowed to used(sic) for all respondents."

60. I should add however that in holding that AIB, AIBM and Everyday were all properly before the Court for the purposes of the appeal, I make no finding as to the effectiveness of ~~to~~ the Deed of Transfer to effect a transfer of the judgments obtained by AIB and AIBM against the appellant, to Everyday. It is unnecessary to address this argument in the circumstances in light of the orders made by Costello J. on 1st April 2022, resulting in AIB, AIBM and Everyday being the respondents to the appeal. That it is unnecessary to consider the effectiveness of the Deed of Transfer any further in these circumstances is explained by Finlay-Geoghegan J. in *Irish Bank Resolution Corporation Limited v. Halpin* [2014] IECA 3. In that case, Kenmare Property Finance Limited was the successor in title to IBRC to the loans at issue. In making an order joining Kenmare as a second plaintiff in the proceedings, and respondent to the appeal, the Court stated as follows:

> "29. *Subsequent to the hearing and determination of the two appeals, depending on the outcome of same, if either judgment is set aside, there may be matters remitted to the High Court for a further hearing and determination, in which case Kenmare as a second named plaintiff will be entitled to pursue its claim against the defendant and establish its entitlement to judgment in the High Court at a future date. If that were to occur, there may be a further application to the High Court to strike out the IBRC as a plaintiff in the proceedings. This decision does not in any way seek to prejudice any such future application.*
>
> *30. If, on the other hand, on the hearing of the appeals, they are dismissed, then the existing High Court judgements in favour of IBRC will remain in place. Kenmare as the second named plaintiff in the proceedings will then be entitled to*

pursue any application in the High Court for execution of the judgments in favour of IBRC and on such an application the alleged entitlement of Kenmare as a signee or transferee of the judgments to enforcement can be determined at first instance as is appropriate."

61. The conclusions above also dispose of the argument that the appeals are moot so far as AIB or AIBM are concerned. Those parties remain in the proceedings by reason of the order of Costello J. of 1st April 2022, they have an interest in the order for costs made by the trial judge and there remains at least the potential for an issue between those parties and the appellant as regards the effectiveness of the Deed of Transfer in assigning the benefit of the judgments of the High Court to Everyday, i.e. if the Deed of Transfer were found to be ineffective, it would mean that AIB and AIBM remain entitled to enforce the judgments.

No respondent's notice filed by Everyday

62. The appellant also submitted that Everyday is not entitled to participate in these appeals, not having filed its own respondent's notices. That submission must be rejected for several reasons. Firstly, it is at odds with para. 21 of the appellant's own submissions referred to at para. 59 above, in which it is stated that the appellant consented to the respondent's notice filed on behalf of AIB and AIBM being used for all respondents. This is entirely consistent with what is stated on the face of the order (in each case), just before the curial part of each order, where it is stated: "and on hearing counsel for the plaintiff and the court being informed that the defendant is consenting to the relief sought in the said notice of motion". The third relief sought in each of the motions issued on behalf of Everyday, both in March 2021 and November 2021, seeks an order that the respondent's notice already filed be deemed to be the respondent's notice of the co-respondent i.e. Everyday. So therefore it

is clear that, even though this is not reflected in the curial part of the order, the appellant consented to an order that the respondent's notice already filed in each case should be deemed to be that of Everyday.

63. It could not be more clear that in these circumstances Everyday is entitled to rely on the respondent's notices filed by AIB and AIBM and so this submission must also be rejected.

Inadequate particulars of debt - A new argument

64. As is apparent from the above, the appellant made no argument in the High Court that the particulars of the amount claimed by AIB and AIBM were in any way inadequate. Nor is this issue raised in the grounds of appeal. That being so, it is not unreasonable to infer that the appellant considered the particulars of the amounts claimed to be adequate up to the point in time that he became aware of the decision of the Supreme Court in *O'Malley.* It is not, I think, unfair to describe this argument as somewhat opportunistic.

65. Be that as it may, the appellant is entitled to advance an application to the court to consider this new ground of appeal in light of the jurisprudence applicable to such applications as has been summarised above, and in particular in *Ennis, Lough Swilly* and *IBRC.* I am very mindful of the fact that in *IBRC,* Clarke J. urged caution in rejecting applications of this kind in summary judgment proceedings and stressed the need for proportionality between the consequences of granting summary judgment on the one hand, and the need to enforce rules applicable to new evidence on appeal on the other.

66. However, this very issue has surfaced and been addressed in no less than three appeals before this Court since *Ennis,* being the cases to which I have already referred above when summarising the submissions of the respondents i.e. *Allied Irish Banks Plc v. O'Callaghan,*

Promontoria (Arrow) limited v. Mallon and *Feniton & Ors. v. McCool.* The approach of this Court to such a ground of appeal being advanced at such a late stage is most succinctly summarised by Murray J. in para. 118 of his judgment in *Feniton.* Indeed each of the passages quoted from each of those cases at paras.50-52 above apply with equal force to the circumstances of this case.

67. The authorities make clear that there may be exceptions to the general rule, but that such exceptions must be "clearly required in the interests of justice". At the hearing of this appeal, the appellant did not advance any reasons as to why his application was required to be granted in the interests of justice. Instead, he relied on *O'Malley* in a general way and submitted that if the court would not entertain the point, the respondents would escape the consequences of failing to provide adequate particulars of the amount claimed.

68. It is not difficult to see why the appellant might have had difficulty in arguing that the interests of justice necessitate that his application be granted. Firstly, as Haughton J. pointed out in *O'Callaghan,* had the appellant raised this point in the High Court, it is very likely that AIB and AIBM would have sought an adjournment in order to enable them to amend their pleadings in each case, and it is very difficult to see any reasons why those applications would not be granted.

69. Secondly, on the appellant's own case, he had engaged, with the assistance of his accountant, in detailed negotiations with AIB and AIBM with a view to concluding a settlement of his liabilities. It is inconceivable in those circumstances that he was not very much aware of the extent of his indebtedness to the respondents prior to the issue of proceedings. For these reasons, I am satisfied that the appellant should not be permitted to advance this argument as a ground of appeal.

Grounds of Appeal per the Notice of Appeal.

70. I turn now to the grounds of appeal. As already mentioned, somewhat unusually, no submissions directed to the grounds of appeal were advanced. At the same time, counsel made it plain that the appellant is not abandoning any of his grounds of appeal. Accordingly, it is necessary to address them, however briefly.

71. Firstly, there is a general assertion that the trial judge failed to apply the correct test applicable to applications for summary judgment. It is not said how the trial judge so failed. The trial judge examined the evidence and was satisfied that the settlement agreement relied upon by the appellant in the defence of the proceedings was not binding because the appellant had failed to execute and return the agreement (i.e. the new facility letter(s)) within the period specified in the letter(s). The affidavit evidence before the trial judge, including that of the appellant, could have led to no other conclusion.

72. The settlement agreement exhibited by the appellant himself clearly stated that it had to be signed and returned by the appellant by a specified date. The appellant was reminded of this, before the expiration of that period, by the respondents, and his accountant was also copied with this correspondence. Following the expiration of the specified period, the respondents very reasonably afforded the appellant three further opportunities to return the agreement duly signed. When he failed to do so by the expiration of the last date offered by the respondents, they withdrew the offer of the agreement. It was only then that the appellant returned the offer letter(s) signed, offering by way of excuse that it had been mislaid by his secretary. There cannot be any doubt that in these circumstances no binding agreement had been entered into between the parties such as to afford the appellant a defence to the proceedings. This conclusion disposes of all of the appellant's grounds of appeal as set out in his notice of appeal.

73. The trial judge also considered, albeit briefly, the argument that AIB and AIBM were not entitled to rely on the Bankers Book Evidence Act so far as the evidence of Mr O'Neill is concerned. This issue is not referred to at all on the grounds of appeal, and, strictly speaking, does not therefore fall to be addressed. However, if I had to address it I would uphold the decision of the trial judge to reject this argument, but perhaps for a different reason than that given by the trial judge. Very simply, AIB and AIBM were not relying on the Bankers Book Evidence Act so far as the evidence Mr O'Neill was concerned. It is clear from the affidavit sworn by him in reply to that of the appellant that Mr. O'Neill had all the necessary authority and knowledge to swear the affidavits that he did in support of the applications for judgment.

74. Since these were the only defences advanced by the appellant, and since he had not denied his indebtedness to the respondents – other than by reference to the alleged settlement agreement – the trial judge concluded that the appellant had no arguable defence to the claims of the respondents.

75. The test for the granting of applications of summary judgment has been expressed in different terms over the years. However, there has been no material change to the test as described in the judgments of McGuinness J. and Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Limited* [2000] IEHC 205 [2001] 4 IR 607 wherein Hardiman J. put it thus (p.623) -

> *"In my view, 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 case?"*

76. The trial judge was clearly satisfied and expressly stated that "there is no arguable defence". While this may not be the fullest expression of the test, it cannot be said, in my

view, that the trial judge erred in law in failing to apply the correct test; she applied the correct test, however succinctly.

Delay

77. Finally, the appellant argued that the respondents had been guilty of inordinate and inexcusable delay. This ground was put forward by way of submission only. No formal application to dismiss the proceedings was advanced. In order to succeed with an application of this kind, it is necessary for a defendant to identify the relevant periods of delay and explain why responsibility for the delay rests with the plaintiff. The defendant must also establish to the satisfaction of the court that the delay has been unreasonable and inordinate (if culpable delay is being relied upon) or, if not, that the delay has been such that he can no longer receive a fair trial of the issues raised by the proceedings, as per the *O'Domhnaill v. Merrick* [1985] ILRM 40 line of authority.

78. No such application was brought, and no meaningful effort was made to identify the delays relied upon or where the responsibility lay for those delays. Indeed I would go so far as to say that it was somewhat surprising that this submission was advanced at all in the absence of a properly formulated application.

79. For all of the foregoing reasons I would dismiss this appeal. Since this judgment is being delivered remotely, Faherty J. and Haughton J. have authorised me to indicate their agreement with it. So far as costs are concerned, my provisional order is that since the respondents have been entirely successful in resisting this appeal, they are entitled to an order directing the appellant to pay all of their costs incurred in connection with the appeal. If the appellant wishes to contend for a different order that he may, within a period of 14 days from the date of delivery of this judgment, request a brief hearing for the purposes of

making submissions as to why the court should make a different order than that indicated above. If, however, following such a hearing, the court makes an order in the terms of the provisional order already indicated, the appellant may be held liable to discharge any additional costs incurred by the respondents in connection with the additional hearing.