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| **Neutral Citation No: [2022] NICh 8**<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **HUD11762**<br><br>*ICOS No:* **2016/90482; 2016/90769**<br><br>*Delivered:* **01/06/2022** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**ULSTER BANK LTD**

**v**

**MICHAEL ADRIAN TAGGART**

**and**

**JOHN DESMOND TAGGART**

_____

**Jacqueline Simpson QC with Peter Hopkins BL (instructed by Arthur Cox Solicitors) for the Applicant**
**Monye Anyadike-Danes QC with Robert McCausland BL (instructed by RJW Law Solicitors) for the Respondent**

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**HUDDLESTON J**

*Introduction*

[1] The history of the litigation between the parties to this action is of considerable vintage. By way of a short summary in December 2009 Ulster Bank Limited and Bank of Ireland ("the Banks") issued proceedings against Michael and John Taggart ("the Taggarts") to enforce payment under two Personal Guarantees

("the PGs") that they had provided to the Banks in support of a group of companies loosely called "the Taggart Group". Mr John Taggart, I should say at the outset, (as the parties agree) was medically unfit to participate in these proceedings which were as a result advanced by Mr Michael Taggart on behalf of both of the Taggarts.

[2] The Taggarts counterclaimed, seeking over £100m from the Banks on the basis that they:

(i) had been induced to pay money (personally) into the Taggart Group to ensure its survival, and

(ii) had suffered substantial personal losses, which contributed to the Taggart Group being put into administration in October 2008.

[3] Mr Justice Burgess determined that particular action in favour of the Banks. The outcome of the case was that the Bank obtained orders for payment on foot of the PGs together with costs. For the purposes of this case I shall call this the "main Taggart action".

[4] Ulster Bank Limited ("Ulster Bank" and/or "the Bank") sought to enforce the Orders and, on 22 September 2016, it issued a Bankruptcy Petition against each of the Taggarts. The petitions were based on amounts outstanding in excess of £6m.

[5] The Taggarts obtained an Interim Order allowing them to put an Individual Voluntary Arrangement proposal ("IVA") to their creditors. The proposal advanced by Mr Taggart was that a third party (a new company of which Mr Michael Taggart's son is the director) would introduce £75,000 which, after costs, would net down to a dividend of 0.03p in the £ across the total unsecured creditors (in value terms) of £213,551,002. As part of that IVA Michael Taggart alleged that monies were owed to three particular creditors Messrs McCann, Iampolski and Sauer ("the three disputed claims" and the "the three disputed creditors" respectively). I observe in passing that the sums initially claimed for within the IVA were generally for substantially smaller amounts than the sums which are now in contention.

[6] On 9 March 2017 a Creditor's Meeting was held to determine, inter alia, what claims should be admitted for voting purposes. The notes of that meeting record that (i) the Ulster Bank objected to the three disputed claims and that (ii) the Taggarts, for their part, objected to the claim of Promontoria Eagle Limited ("PEL") as assignee of debts formerly owed to Anglo Irish Limited. In substance,

if each party's objections were upheld then (i) the three disputed creditors could not vote in favour of the IVA nor (ii) PEL against it.

[7] The Chairman, Mr Gill, decided to include both the three disputed claims and PEL's claim (despite the various challenges) and provided written reasons for their inclusion. In essence, under the provisions of Rule 5.20(6) Insolvency Rules (NI) 1991 ("the rules") he admitted the claims but noted the objections that had been made in respect of each of them.

[8] On the basis that PEL's claim was included, the creditors (together) rejected the application for the IVA. The Bank's position appears to have been that whilst it did not accept the validity of the three disputed claims there was no need for the Bank to take any further action as the IVA did not proceed. Matters, however, did not stop there.

[9] What followed next was that on 11 April 2017, the Taggarts issued an application challenging the admission of PEL's claim. PEL did not defend that challenge. The Bank then, however, issued a similar application in relation to the three disputed claims on the basis (it says) that otherwise:

> "… if the [Taggarts'] challenge is successful it [would] have [had] the effect that the IVA [would have been] approved, and therefore the [Ulster Bank] [wanted to have] the ability to challenge the admission of the [disputed claims] since if [Ulster Banks'] challenge is successful the IVA proposal will remain rejected."

[10] The application dated 28 April 2017 was initially listed for hearing before Master Kelly on 21 June 2017.

[11] The parties filed affidavits and outlined the basis of their claims and counterclaims, and added further supporting documentation that had not been made available to Mr Gill.

[12] Some procedural issues arose before Master Kelly which I do not rehearse in detail but suffice to say:

(i) The hearing, therefore, proceeded on the basis that it was an appeal against the Chairman's decision to admit the disputed claims (per Rule 5.20(6));

(ii) That no issue was taken as regards time (Master Kelly extended time as she was entitled to do pursuant to Article 344 of the Insolvency (NI)

Order 1989 – she put it "delay was minimal and no obvious prejudice caused so time was duly extended".) In any event no point on time was advanced before this court.

[13] The hearing proceeded on the basis that Master Kelly had only to consider three issues:

(i) Which party was required to "prove" the three disputed claims were valid?

(ii) What was the standard of proof to be applied to that issue?

(iii) Applying that test, were the three disputed claims valid?

[14] The Master determined those issues in the following way:

(i) She said the High Court had only the same, limited powers as the Chairman concluding that the High Court was (to use her words) "no more empowered … to investigate, analyse or adjudicate upon the disputed claims … than the Chairman …";

(ii) That it was the creditors at a meeting (and on appeal, to the High Court in turn) who bore the burden of proving that the three disputed claims "were plainly bad" ie on the facts of the present case it was the task of the Ulster Bank to prove that the debts were bad rather than for the Taggarts to prove that they were bona fide claims within the IVA; and

(iii) That on the evidence before the court, the Ulster Bank had *not* proven that the debts were plainly bad.

The Master also commented on the question of whether the debts were statute barred – a question which she said was "immaterial" in the circumstances. She expressed the view that "a debt which is statute barred is still a debt. The creditor's rights of legal redress may be compromised in the circumstances but the debt itself is not expunged."

**The Burden of Proof and Standard to be applied**

[15] Before coming to this court the parties had agreed that Master Kelly's judgment was wrong on each of those points. That consensus was based on the authority of *CFL Finance v Rubin* [2017] EWHC 111 (Ch) (at paragraph 13) which the parties agreed set out the proper test in the following formulation:

> "13. The function of the court on an appeal under Rule 5.22(3) [the English equivalent] is not simply to review the decision of the chairman which is sought to be impugned, but rather to form its own view on the basis of the evidence and arguments advanced before it. The characterisation and quantification of a debt for the purposes of rules 5.21 and 5.22 are to be effected as at the date of the creditors' meeting and not at some other time: Golstein v Bishop [2016] EWHC 2187 (Ch) per Warren J at [16-17]. The question whether the claim ought to have been admitted is to be decided on the balance of probabilities, and the burden lies on the party seeking to establish that the debt ought to have been admitted: Tradition (UK) Ltd v Ahmed [2008] EWHC 2946 (Ch), per Andrew Simmonds QC at [91]."
> (Emphasis added)

[16] On the same point, I was also referred to *McNally v Dymond* [2013] EWHC 1685 (Ch) at paragraph 21:

> "[21] It is a feature of the appeal process enshrined in rr 5.22(3) and 5.23(7) that an appeal may succeed even though the Chairman has acted impeccably ... Decisions have to be taken quickly and pragmatically at creditors' meetings. **The appeal process allows the court to consider the outstanding issues in a more measured way, with all interested parties having the possibility of adducing evidence, something which is rarely if ever possible in a creditors' meeting**."
> (Emphasis added)

[17] On the basis of those authorities the parties have therefore agreed the following propositions:

(i) that the burden of proof first lies on the party asserting a particular debt to prove that it ought to be admitted;

(ii) that if that test is discharged, the evidential burden may then shift to the party challenging its admission; and

(iii) that the ordinary civil standard applies throughout;

The task, therefore, set for this court is to investigate, analyse and adjudicate the three disputed claims through that agreed prism.

This initial approach was adopted in relation to the substance of this case through a preliminary hearing before McBride J at which it was endorsed.

**Analysing the Evidence**

[18] Notwithstanding the consensus as outlined there has been some dispute between the parties regarding the nature of the court's exact role in undertaking such an investigation. I, however, am satisfied that the role is correctly (and clearly) captured by Blackburne J in *Re A Company (No 004539 of 1993)* [1995] 1 BCLC 459 at 466 where the learned judge concluded that the court is not restricted to considering only the evidence which was before the Chairman but can consider any "new materials" which exist as at the date of the hearing. He puts it thus:

> "In my view, the task of the court, on an appeal … is simply to examine the evidence placed before it on the matter and come to a conclusion whether, on balance, the claim against the company is established and, if so, in what amount. I would only add that, in considering the matter, the court is **not confined to the evidence that was before the chairman at the time that he made his decision but is entitled to consider whatever admissible evidence on the issue the parties to the appeal choose to place before the court**." (Emphasis added)

[19] That is relevant in the present context because substantial additional information has been provided by both parties in the intervening period not just since the Chairman's meeting but also between the Master's hearing and this hearing.

[20] I was also taken to, and again endorse, the view expressed in *Tradition (UK) Ltd v Ahmed and others* [2008] EWHC 2946 (Ch) (at [91]) referred to above. In that case the Trial Judge also considered how a court should assess the evidence provided in what the judge describes as "Blackburne J's formulation":

> "… the court must decide the issues to which I have referred … on the balance of probabilities having considered all the evidence adduced by the parties at the hearing of [the appeal]. Moreover, it seems to me to follow that, if I am left in doubt whether the relevant

> claims are established, I should reject them and allow [the] appeal accordingly. The burden of establishing a claim against any debtor must lie on the creditor alleging it."

[21] Thus far I did not understand there to be any difference between the parties. The Bank, however, do go further and urge this court when assessing the evidence to only consider the evidence given by the alleged debtors and not whether "alternative explanations" could be valid and that if evidence appears "improbable" it should be rejected. In answering that contention my view is that all of that is encompassed within the assessment role to be undertaken by the court – to the usual civil standard. I consider that proposition relying on the judgment of Lord Brandon in *Rhesa Shipping SA v Edmonds* [1985] 1 WLR 948 at 995-956:

> "... the legal concept of proof of a case on the balance of probabilities must be applied with common sense. It requires a judge at first instance, … to be satisfied on the evidence that [something] is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden."

[22] I raise these points now because the concept, of discounting "alternative explanations" has significance in the present case where, on the respondents' case, the court is being urged to accept the debtor's acceptance (simpliciter) of the three disputed claims as adequate proof of their existence. At para 5 of the supplemental closing submissions of the respondent I am 'respectfully reminded' (a) that the debts between the respondents and Messrs Iampolski and Sauer are not disputed by the respondents and (b) that I should take such acceptance by the debtors into account as a material consideration for this court. I do not disagree with the view that the Taggart's perspective is something which I must take into account but I do not, however, accept it as fully determinative of the issue. To do so would be to render this court powerless in the investigative task to which both the rules and the authorities in point direct it.

[23] For the record, and whilst I am setting context, I should also like to make it clear that the various allegations and counter-allegations as between the parties regarding the mala fides or "improper motivations" behind this case (which also frequently were raised as a feature) are not something which are relevant to my consideration. I am satisfied that, as in the *Rhesa Shipping SA case*, what I need to do is "to focus sharply on whether the respondent's claims are corroborated either by the contemporary documents or other reliable evidence." I discount the allegations of bad faith and, indeed, victimisation as fundamentally unhelpful in that analysis. I do not consider those allegations to properly constitute evidence of the issues which fall to be determined and am not distracted by the colour which lies behind what I am being asked to undertake. In reality any "context" if I could call it that is encapsulated in the court's overall assessment of the evidence.

***The core issue***

[24] The Taggarts' case, as I have said, is heavily focused on their assertion that they accept they are liable to pay the three disputed debts which they say are due on foot of various personal guarantees ("PGs") and that the holders of those "valid debts" ie the three disputed creditors are, therefore, entitled to vote in favour of the IVA. If successful the IVA may be upheld. The Bank's position is that the three disputed debts are false and/or that the Taggarts are under no legal obligation to repay them, nor indeed, from a commercial perspective would they ever, in reality, do so. Counsel for the Bank extended this to the proposition that the court should consider the likelihood of the Taggarts repaying the three disputed claims.

[25] Given the guidance provided by the case law cited above and the respective positions adopted by the parties, the core issue for this court is to:

(i) Analyse each claim in turn;

(ii) Consider whether the debts are valid;

(iii) Conduct that task applying the civil standard of proof to the evidence that is available to this court.

[26] As to assessing the likelihood of the Taggarts 'repaying' the three disputed debts "in reality" that, I think, is going rather too far but I do not feel that I need to engage in that degree of speculation and, hopefully, the reasons for my discounting the need for any such endeavour will become clear.

*Personal guarantees generally*

[27] Given the nature of the arguments between the parties and the focus on the PG's it is necessary to first consider the law pertaining to personal guarantees and for that purpose I am largely adopting the summary suggested by the Bank's counsel which, in turn, is largely taken from Paget's Law of Banking 2014 Edition which I endorse. It can be summarised as follows:

(i) A guarantee is a secondary obligation ie the guarantor will be liable to a creditor only if the principal debtor or primary obligor does not perform on his or her obligation;

(ii) Therefore, if the "principal debtor's obligation turns out not to exist, or is void, diminished or discharged, so is the guarantor's obligation in respect of it" (Paget at paragraph 18.3).

To that extent the validity of a guarantee is entirely dependent upon the validity of the underlying debt;

(iii) Any personal guarantee must be in writing if it is to be enforced (Section 4, Statute of Frauds);

(iv) In certain circumstances a guarantor may be discharged from liability: eg if there has been a variation of the terms of the guarantee by the creditor (ie the rule in *Holme v Brunskill* [1887] 3 QBD 495);

(v) The guarantor's liability to discharge his obligations will only arise from the date of a demand:

> "The service of a demand will ordinarily then be essential before action in order to complete the [bank's] cause of action; and time for the purposes of the Limitation Act 1980 [or in relation to this jurisdiction the Limitation (Northern Ireland) Order 1989] will run from the service of the demand";

(vi) A claim under a guarantee might become statute barred if it is not claimed "in time" ie if not demanded within the relevant limitation period which applies to that guarantee as calculated from the date when the principal became obliged to pay the debt [*Paget* at 18.34]. Under our law that limitation period will vary depending on whether the guarantee is encompassed within a deed (in which case it will be 12 years) or in a

"simple" contract (in which case it will be 6).

[28] It is the Bank's case – derived from these 'basic rules' - that the type of evidence, therefore, which a court would expect to see in order to discharge the burden of proof in a case such as this would or could consist of:

(i) Proof of the primary debt which in turn is then the subject of the guarantee;

(ii) Proof that the obligations of the primary debtor have not been discharged by repayment, or variation etc;

(iii) Proof of the "demand" made upon the guarantor (ie when and what sum was demanded);

(iv) Proof that the demand remains valid ie that it has not become statute barred; and

(v) Proof of any response from the guarantor as to that demand ie by way of acceptance, denial, etc.

[29] The Bank argued at some length that these basic proofs were absent from the evidence provided by (i) the Taggarts and (ii) Messrs Iampolski, Sauer and McCann and as a result the claims made in respect of each of the disputed claims are baseless. I shall deal with it in more detail below but core to the Bank's argument is that (a) the legal formalities around the formation of the PGs have not been adhered to (this raises a question of the applicable law of each to which, again, I will refer below) and (b) even if that is not accepted, the claims under each are now statute barred.

***The three disputed claims***

[30] In reply, the fundamental position adopted by Messrs Taggarts' counsel is that they say that "the respondents recognise, accept and submit to the debts [and] that is a significant factor which the court should take into account." The implication (although it is not stated in those exact terms) is that the court should not investigate further. If that is the respondent's proposition then I fear I do not accept it. I think it is abundantly clear from the rules and the authorities to which I have made reference that the obligation of the court in a case such as this is to conduct an investigation and determine the validity of the debt(s) and, so, the claims in the IVA. That is what rule 5.20 ultimately provides for. The exercise for the court, as I have said, requires an examination of the evidence that was before

the Chairman and/or that which has been provided since in relation to each of the three disputed claims. In that context, it behoves the court to examine, therefore, each claim in turn.

(1) ***Mr Iampolski's claim***

[31] Mr Iampolski claims $25,000,000.00 USD (£20,641,000 as at the date of the Creditors' meeting) on foot of a Guarantee dated 22 September 2004 "for [a] development of Businessbanca in Moldova" ("the Moldovan Guarantee"). Under the terms of the Moldovan Guarantee (which is a simple single page document):-

- The "Banker" and beneficiary of the guarantee is defined as Mr Iampolski personally;
- "the guarantors" are defined as Messrs Taggart (each of them);
- the primary debt being guaranteed is described as being "... in consideration of the Banker [ie Mr Iampolski] pursuing the development of BusinessBanca S.A. project in Moldova…"
- it provides that it could be called or triggered "in the event of the Banker having insufficient funds to complete the project" [implying] … "in particular the mandatory requirement to increase the Bank's capital …" - the position being that a demand could have been made in order to "facilitate completion" of the project.

[32] Taking the guarantee on its face, the Bank suggests that, in very simple terms, the Moldovan Guarantee therefore is conditional upon proof that:

(i) The Banker (ie Mr Iampolski) had "…. [pursued] the development of Businessbanca SA project in the republic of Moldova";

(ii) He [had] insufficient funds to complete the project";

(iii) he was the subject of a call to "increase the bank's capital ..." ("the Bank" in this context being Businessbanca SA) together with proof that Mr Iampolski failed to meet that call or demand; and/or

(iv) that monies were still needed to "facilitate completion" of the unnamed or unidentified project.

Taking that interpretation of the text of the document, the Bank's position is that if all those conditions were met the Taggarts would be then liable to pay "up to" $25m in which case there would be a further need prove what sum or portion of the £25m was "outstanding" to thereby define the exact amount of the guarantor's liability.

[33] In considering the Moldovan Guarantee the Bank says that it is clear on its face that it is littered with spelling errors and, as the Bank calls them, "non-sequiturs." For example the Taggarts are said to be entering into the document on a "jointing and severely basis" (as opposed to the normal "joint and several" basis). There are other errors - both misspellings and syntax. It also highlights other basic errors – such as the fact that the Taggarts' middle names are not included which is surprising given the drafter's declared long-term role as the Taggarts' private conveyancing solicitor.

[34] It transpires from the evidence that this document was prepared by Mr Kevin Downey, a Derry based solicitor, who it is admitted holds a practising certificate in Northern Ireland. Notwithstanding that particular restriction the document (as drafted by him) is expressed to be subject to the laws of Luxembourg.

[35] Mr Downey provided an affidavit in relation to his involvement and appeared and gave evidence. His affidavit evidence is not particularly detailed or helpful. Indeed although it is now apparent that he prepared this he does not even initially refer to the Moldovan Guarantee or his part in it. He was cross-examined as to the circumstances by which the guarantee came to be drafted by him and, in addition, why it was expressed to be subject of the laws of Luxembourg.

[36] He was able to confirm that he used an existing precedent. Some of the typographical errors, and indeed, unorthodox legal usage had their origins in that precedent. He acknowledged the typographical errors, similarities in typeset and "legal non-sequiturs." He acknowledged his failure, as the draftsman, in getting the Taggarts' names correct. Mr Downey accepted that he was not qualified in relation to the laws of Luxembourg. He was not able to provide any file or attendance note in respect of the preparation of the document, nor was he able to assist the court in relation to the question if the requisite formalities had been observed as regards its execution. He confirmed that he retained no file or indeed any details regarding this or indeed the other guarantees which he prepared (again see below). The Bank's counsel, in her closing, raised a number of points which, although they applied directly to the Iampolski guarantee are of equal

applicability (on the Bank's case) to each of the three disputed claims.

[37] In broad terms she questions the enforceability of the document and raises fundamentally the questions (a) whether the formalities of execution have been adhered to in light of the governing law of the document and/or (b) whether it is statute barred.

[38] Due to the importation of the law of Luxembourg into the document and in relation to the question of foreign law and its impact upon valid execution Ms Simpson relied upon section 114 of the Judicature Act 1978. That provides that a suitability qualified person can give evidence of foreign law. She also raised the point on statutory limitation and the calculation of any relevant limitation period under the Foreign Limitation Periods (NI) Order 1985 (per Article 3). She pointed out that, in the present case, no expert view in relation to the laws of Luxembourg had been provided to the court in relation to the required formalities. She pointed out that no clarity had been provided on the question of the appropriate limitation period. Indeed, the question (other than as raised by the Bank's counsel) was not considered or addressed by the respondents. In that context, the court was taken to the case of *Iranian Off-Shore Engineering and Construction Company v Dean Investment Holdings* [2018] EWHC 2759 (Com) which provides authority for what the court should do in such circumstances. The court in that case dealt with the "evidential presumption" of English law quoting Dicey (("Dicey, Morris & Collins) (15th Edition) Rule 25(2)). That "rule" can be summarised as follows:

(a) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means;

(b) In the absence of satisfactory evidence of foreign law, the court will apply English Law (in this case Northern Irish law) to such case.

[39] The purpose of counsel laying this foundation was so she could advance the argument that fundamentally the respondents have failed to discharge the burden of proof upon them that the PGs are valid and so the claims must fail.

Specifically, she contends beyond that in the absence of evidence of the governing law and so applying the presumption of local law that the court needs to be satisfied:

(i) that in terms of the requisite formalities, there is proof of due execution either under common law (ie by producing evidence of the document having been signed, sealed and delivered) (in accordance with the actual

jurat clause which appears in the document itself) or in the case where the execution of a document post-dated the Law Reform (Miscellaneous) Provisions (NI) Order 2005 ("the 2005 Order") then proof (applying Article 3(2)) that the document was (a) expressed to be a deed; and (b) signed:

(a) By the individual executing the document in the presence of a witness who attests the signature; and

(b) its delivery as a deed by the individual executing it or by a person authorised to do so on his behalf; and/or

(ii) that any demand under the PG is not statute barred by virtue of the provisions of the Limitation (NI) Order 1989 – which, as I have said, is 12 years in the case of a duly executed deed and 6 years in the case of a contract.

[40] As to these specific points, as I have said, the position of the Bank fundamentally is that, firstly, there is no evidence that the proper formalities as regarding the valid execution of the PG were complied with (under either Luxembourg or local law) and, secondly, that any claim under it is statute barred.

[41] Lest that position not find favour, the Bank also advances detailed arguments focusing on the specifics of the guarantee itself and the factual matrix around it. In that context it suggests that the creditor seeking to enforce the PG should be able to provide proof of the following:

(i) that the development had been 'pursued';

(ii) that there had been a demand to increase the capital funding of the Bank triggering a call on the Taggarts;

(iii) the quantum of any shortfall – on the basis that the guarantee was valid only **up to** $25m and therefore the "short-fall" would need to be proven as it was only <u>that amount</u> that would be recoverable;

(iv) that if there had been a demand for that amount and (as required by the document) that it had been in writing;

(v) proof as to the timing of the demand and, as a consequence of that; and

(vi) that the debt or the demand itself was not statute barred.

Again, on that detail the Bank says that the respondents have failed to discharge the burden of proof which rests upon them and so the claim to admit Mr Iampolski's claim in respect of this alleged debt should be dismissed.

***The evidence provided to the Chairman***

[42] From the evidence that was initially made available to the Chairman, it would seem that Mr Iampolski did not provide any confirmation of his claim on the basis that he was "too busy" to access it. Subsequently, through correspondence between his agent (Ms Fontaine) and the Chairman and his staff, it was claimed that relevant documents were unable to be sourced as "everything was archived by the National Bank of Moldova."

[43] Through continued email correspondence between the Chairman and Ms Fontaine she provided a history of the primary debt indicating it related to a real estate development in Chisinau, Moldova. She provided some limited development documentation which referred to "Chisinau, Moldova" but the remainder of the documents (which the court reviewed) were either undated or referred to a period preceding the date of the Guarantee (ie 2000-2001) with no obvious link to it.

[44] On the question of Mr Iampolski's *locus standi* to seek payment under the Guarantee, Ms Fontaine claimed (through her correspondence with the Chairman) that it arose by virtue of his shareholding in BusinessBanca SA held "via his Luxembourg Holding Company "Transventure"..."

[45] Ms Fontaine did not, however, provide any clarification as to how Mr Iampolski could enforce the Guarantee given his status "as a shareholder" in a holding company (ie Transventure) which "had acquired the rights of BusinessBanca..." There was nothing provided to explain or clarify either that interpretation or the linkage between the two.

[46] That was a particularly live issue given that the Guarantee (as drafted) was on the basis not that BusinessBanca itself was the beneficiary but that it was Mr Iampolski himself "as banker" who was the actual beneficiary and, therefore, one might expect that the information could or would come directly from him.

[47] The Bank also provided the court with a newspaper cutting referring to the closure of Buisnessbanca which suggested that the debts of BusinessBanca had all

been repaid. That being the case it obviously raised a question as to if/to what extent the alleged secondary obligation under the Guarantee remained a liability of the Taggarts as guarantors (if at all).

[48] In the terms of the question of limitation Ms Fontaine's emails claimed that "a demand" was made:

(i) Sometime circa 2004 to mid-2005; and

(ii) That no payment was made by the Taggarts (or their Bank).

Impliedly, (say the Bank) if a claim had been made it would appear to have been rejected by the Taggarts at that time and, presumably, a cause of action would have arisen at that point which would now be statute barred.

[49] The presentation of this information prompted the Chairman to ask for further information from Mr Taggart to which no reply was immediately received. Mr Taggart has since adopted the argument that it was for the Bank, to "make its case" on his understanding of the legal position at that time. Mr Taggart subsequently, however, filed an affidavit upon which he was cross-examined by the Bank's counsel. Through that the Bank now makes the following points:

(i) That Mr Taggart stated that the development which was the subject of this particular guarantee was to be in Bratislava ie not Moldova;

(ii) That the development related documents he separately exhibited referred to Slovakia as opposed to Moldova; and

(iii) that he claimed that the guarantee arose in relation to "Taggart Developments Slovakia" - which apparently was a company set up in that jurisdiction to "purchase plots of land in order to build a project";

[50] The Bank says that no evidence has actually been produced that "squares" with the terms of the Moldovan Guarantee and that there is no clear linkage between the purported obligation of the Taggarts and Mr Iampolski and/or BusinessBanca.

[51] The Bank, therefore, in short argues that the documentation which Mr Taggart himself has produced undermines his own case.

[52] Mr Iampolski also filed an affidavit dated 28 January 2021. In that affidavit Mr Iampolski says "due to the financial crash the Bank lost its banking licence and

I purchased the debts of the Bank". He did not explain the points raised by the Bank (see above at para [41]) nor has he provided an explanation of how he is named as the beneficiary of the Guarantee in this particular context and/or how exactly he is entitled to the underlying debt. The Bank's position is that despite having raised all of these issues well in advance of the hearing neither Mr Iampolski nor the Taggarts have addressed them through the evidence provided to the court either by way of clarification prior to the hearing of the action, or indeed, through the course of this hearing itself. On this basis the Bank says that the evidential threshold in respect of the detail of the Iampolski Guarantee through a consideration of the factual matrix around it has not been met.

***Mr Sauer's claim***

[53] The second disputed claim is in respect of the claim which Mr Ed Sauer asserts based on foot of a guarantee dated 3 March 2006 for a sum of €15m which was to "facilitate completion" of three named projects in Luxembourg, namely:

(i) The Villeroy and Boch Development;

(ii) The Pegasus Project; and

(iii) The Sappira Project. (emphasis added)

[54] The exact guarantee again constitutes a single page document which was also drafted, on his own evidence, by Mr Downey – on the instructions of the Taggarts. Michael and John Taggart are cited as the guarantors and Mr Ed Sauer as the developer. The document was drafted on the basis that "in the event of the Developer having insufficient funds to complete the said projects the Guarantors on a "jointly and severely" (sic) basis (to which comment has already been made above) "to hereby guarantee that the Guarantors shall on demand in writing from the Developer paid (sic) to the Developer up to the sum of €15m to facilitate completion and the guarantors affirm that the liability under this guarantee shall be jointly and severely and this deed shall be governed by the laws of Luxemburg (sic)."

[55] Mr Downey's evidence was to the effect that he used the same precedent – "warts and all" across what appears to be all three of the PGs that are now in dispute.

[56] Moving forward to the IVA and a consideration of the evidence before the Chairman the proof of debt form initially submitted on behalf of Mr Sauer:-

- Listed Opava SA as the creditor (ie a corporate entity) rather than Mr Sauer himself;

- Claimed an amount of £15m (sterling as opposed to Euro) citing that the claim was in respect of the "Villeroy and Boch development" [ie with no mention of any others];

- As a guarantee to "raise funds on bank"; and

- Identified the relationship between the Taggarts and the creditor as a "professional one."

[57] The Chairman, as he had done with the Iampolski guarantee, sought further information by way of an email of 2/3/2017. In that he sought:

> "(i) A detailed background on each of the projects listed on the guarantee … please confirm if there was a shortfall;
>
> (ii) Copies of correspondence in relation to the crystallisation of the guarantee provided – ie copy demand letter confirming amount demanded on foot of the guarantee.
>
> (ii) Detailed breakdown of how the guarantee balance has been calculated."

[58] In his reply of 8 March 2017 Mr Sauer indicated he was supplying the available documents which included an Ernst & Young analysis of the original project. He also indicated that the documentation was limited because the majority had been destroyed by a fire (for which he produced a certificate evidencing the fire in question). Beyond that very little else was provided.

[59] The Bank makes the following objections in relation to this guarantee:

(i) It points out that originally the claim was made by "Opava SA" <u>not</u> Mr Sauer and highlights the distinction between the personal and corporate status;

(ii) It highlights that the proof of debt form was initially lodged in respect of £15m sterling and made reference solely to the Villeroy and Boch

Development (*ie* excluding reference to the other two which were listed within the Guarantee itself and purported (at least in part) to be the reason for it); and,

(iii) indeed, included a handwritten note that the "*development was on hold*" – therefore raising a question of the existence of any underlying debt.

[60] As it transpires, the actual guarantee itself was also only made available at a much later date – Mr Taggart provided it on 29 January 2020 (ie well over a year later) as an annexure to one of his affidavits claiming that it had been found in a room full of files in his office.

[61] As to its form the Bank raised the similarity – in terms of grammatical errors, typesets and incorrect legal usage as it has raised in respect of the Moldovan/Mr Iampolski Guarantee (as above).

[62] In terms of detail the Bank observe:

(i) That the supporting documents as supplied refer to Sapphira SA and <u>not</u> Opava SA (presumably a separate corporate entity);

(ii) That within those documents the only reference to the Villeroy and Boch development (which purported to be part of the consideration or rationale for the PG) was to it being a "nearby occupier" rather than being more directly relevant to the development itself (for example as a tenant or occupier);

(iii) That the drawings which were furnished were dated 2010 and therefore dated after the creation of the PG and/or referred to a development in rue de L'Aiere (not d'Hollerich) (ie a different location) and/or to one which was completed in May 2009;

(iv) That Mr Sauer in his affidavit dated 8 January 2021 said that the "development did not materialise." He says that he is "relying [on the Guarantee] [to get] back monies that were owed to [him] but not yet recovered."

(v) That the documents supplied referred to "Project Nexity" <u>by</u> Sapphira SA (as opposed to Project Sappira).

(vi) Mr Taggart described that the funding for his Luxembourg development was provided by Dexia Banque but under the terms of the Guarantee as

drafted it was suggested that it was Ed Sauer "who was acting as a developer" and that the PG would be triggered "in the event of the developer having insufficient funds."

(vii) On the available evidence the flow of cash from the Taggart Group was to "Luxcontrol" "Foyer Assurances" or "Noel Lourdes" none of which seemed to refer to or be capable of being cross-referenced to the documentation which it had originally been provided and even then was for relatively insignificant amounts.

[63] In relation to the provenance of this document, according to the evidence of Mr Downey it was drafted by him on the instructions of Mr Taggart (who subsequently approved it notwithstanding the various errors referred to including those relating to he and his brother's names). It was collected by Mr Sauer (from Mr Downey's Derry office) but that Mr Downey did not see or witness its execution and therefore could not confirm as to its execution and/or delivery either in compliance with the common law or Article 3(2) of the 2005 Order (which given the date of the PG (in 2006) would have been in point).

[64] In addition, the Bank also raised the technical points on limitation – namely that based on Mr Sauer's affidavit if there had been a demand that triggered a call or demand it was (on his evidence) occasioned by "the crash that was across the European real estate" market which as a result placed it in 2007/08 and that whether it executed as (i) as a deed or (ii) as a simple contract the respective time limits of 12 and/or 6 years would have thus expired.

[65] Ultimately, therefore, the Bank (as it did with the Iampolski Guarantee) argued that the evidential threshold for the validity of the PG (and therefore the claim in the IVA itself) had not been established either at a macro level (ie on question of compliance with formalities regarding execution or, indeed, considering issues of limitation) or in terms of the content of the actual detail of the document itself and its terms when viewed in the light of the evidential matrix of the circumstances around it.

***The McCann personal guarantee***

[66] The factual history surrounding the basis of the claim to be admitted under Mr John McCann's personal guarantee is somewhat more complex. The original proposal as advanced in the IVA referred to two amounts - £4m and £35m – and was based on two separate personal guarantees. The comments of the Chairman in relation to these were that:

> "He noted that the claim submitted was considerably higher than the Statement of Affairs figure … but that he received substantive documentation from Eugene Boyle, Chartered Accountant [and consultant] to the creditor in support of the claim including [confirmation] in writing that he had overseen payments to the debtors … in 2008 and 2009."

[67] The Chairman in his affidavit evidence confirmed that on 1 March 2017 Mr McCann submitted a proxy and proof of debt form in respect of £39m (initially "backed" by the alleged guarantees for £4m and £35m) and then on 8 March 2017 he did the same in respect of an increased total claim of £65,580,000. Mr Gill concluded:

> "I came to the view that given the volume of material produced by Mr McCann and the fact that the debtors recognised this liability I could not at a creditors' meeting conclude that the claim of Mr McCann was plainly bad … I decided to admit liability for voting purposes but mark it as objected to in accordance with Rule 5.21."

[68] Accordingly, the debt was admitted for that purpose and is now challenged by the Bank in its entirety.

[69] The documents to which Mr Gill referred and which were submitted were indeed considerable and consisted of:

(i) A Mezzanine Loan Agreement dated 29 February 2008 prepared by Mills Selig for a loan "not to exceed £2.75 million" but which, in point of fact, included a loan of £750,000 which had already been made by Mr McCann to the Taggart Group on 21 December 2007;

(ii) A "Joint and Several Guarantee and Indemnity" in favour of Mr McCann dated 29 February 2008 drafted by Mills Selig and entered into by the Taggarts guaranteeing the obligations of Taggart Holdings Ltd ("THL") under the Mezzanine Loan Agreement but subject to an unusual provision that with effect from the date that the creditor (ie Mr McCann) became the beneficial owner of 50% of the share capital in THL that he would not thereafter be entitled to make a demand on foot of the guarantee;

(iii) A letter dated 2.4.2008 signed by Michael Taggart on behalf of THL referring to a further loan of £460,000 to be made "today" on the terms of the Mezzanine Loan Agreement;

(iv) A Deed of Assignment of Loan dated 14.3.2008 between (a) Gordon Patterson and James Patterson (collectively "the Pattersons"); (b) John McCann; (c) THL; (d) John D Taggart; and (e) Michael A Taggart referring to a loan of £4m made by the Pattersons to THL (with accrued interest) the benefit of which was then being assigned to John McCann;

(v) A Settlement Agreement of the same date between John McCann (1) and THL (2) which recites a £6m figure owed to the Pattersons and acknowledges that it be off-set against the value of a 50% shareholding in Taggart Holdings Cairnshill Ltd ("THC") to be transferred to Mr McCann;

(vi) A Deed of Guarantee (again prepared by Mr Downey) dated 28 January 2008 (and again being an unsophisticated single page document based on his "standard" precedent) in the following terms:

- That it was made between Michael Taggart and John Taggart as Guarantors (i) and John McCann (ii).

- That Mr McCann (as Lender) had agreed to lend THL £35m.

- That in consideration of Mr McCann agreeing to lend THL the sum of £35m that the Guarantors (and here I quote from the text of the document) "agreed to and do hereby guarantee that if the loan is now (sic) repaid to the Lender by the Company in accordance with the terms agreed between the Lender and Company the Guarantor shall <u>on demand in writing from the Lender pay to the lender up to the sum of £35m or such sum of the Lender is still owed</u> at the date of the <u>demand</u> by the Company including all interests and costs." [Emphasis added]

- That the guarantee was joint and several.

- That it was to be governed by the laws of Northern Ireland;

The guarantee itself purports to be signed, sealed and delivered by

Michael Taggart and John Taggart in the presence of Mr Downey. There is no evidence of its execution by Mr McCann.

(vii) A Statement of Account provided in relation to a First Friend's loan showing a principal debt of £8m and accrued interest (calculated at 21%) rendering an amount due (as at 15.3.2017) (*ie* the date of the meeting) in the sum of £41,847,814.56;

(viii) A copy of a judgment in the case of *Friends First v McCann* per Burgess J;

(ix) A Statement of Account produced by Mills Selig for the "proposed acquisition and/or investment in THL – Project Swan;"

(x) A covering email from Mr O'Boyle on behalf of Mr McCann which included the payment schedule detailing the balance to March 2017 of approximately £65.5m owed by the Taggarts;

(xi) The revised Proof of Debt form to reflect that balance;

(xii) A statement from Mr Boyle (an accountant on behalf of Mr McCann) that the guarantee for £35m was to "cover my client for any loss or future loss in the Taggart Group" and in which he indicated that since 2008 there had been regular meetings between Mr McCann and the Taggarts suggesting that it was Mr McCann's view that he would work with the Taggarts in an attempt to allow them to rebuild their businesses so that they could put forward some form of repayment plan.

[70] Turning then to the respondents, in his affidavit evidence Mr Taggart has discounted that there ever was a £4m guarantee and does not acknowledge that element of Mr McCann's initial claim as set out in the Proof of Debt Form. Taking that into account, the Bank's position is that there are, therefore, two guarantees which remain in dispute, namely:

(i) The £35m guarantee prepared by Mr Downey (as above);

(ii) The £2.75m guarantee prepared by Mills Selig and negotiated with the Taggarts then instructed solicitors Messrs Tughans;

both as referred to above and in respect of which copies were made available. The total sum claimed in the IVA is, however, £65.58m.

[71] As to the £35m guarantee the Bank say that for it to be valid (even in line with the 2005 Order) it would need to have been expressed as a deed and signed and delivered. They say Mr Downey has not confirmed that those formalities were complied with and accordingly there is no evidence of its formal validity in terms of execution in accordance with either the common law or the 2005 Order.

[72] Further, there is no evidence that it was signed by Mr McCann – even to evidence its "acceptance" in contractual law terms.

[73] More fundamentally the Bank also say that there was no evidence that the £35m loan (much less the larger sum claimed) had ever materialised – the Bank say that if it had the Taggart Group would never have gone into administration. This point was also accepted by Burgess J in the main Taggart Action.

[74] It is noted that none of the other contemporaneous documents (including minutes of approval etc) refer to or indeed even allude to the £35m guarantee as prepared by Mr Downey - a fact which must be considered unusual given both the detail of the other transactional documents and the surrounding circumstances at that time. That is rendered more acute as the Taggarts' instructed lawyers at that time were Tughans and were negotiating the bulk of the documentation with Mills Selig in turn acting for Mr McCann.

[75] The Bank assert that the evidential basis behind the alleged £35m PG has not been established through any of the voluminous documentation furnished and, at most, Mr McCann "drip fed" much smaller amounts into THL and then with an expectation of acquiring 50% of that Company.

[76] As to the Mills Selig guarantee (for the amount of £2.75m) the Bank say that this related fundamentally to and is inextricably linked to a transaction in respect of the acquisition of Taggart Homes Cairnshill Ltd by Mr McCann. Under that arrangement the Pattersons (who were owed a considerable sum by the Taggart Group):

- Assigned their debt to John McCann;
- Were paid by Mr McCann; and
- Mr McCann, in exchange, acquired the Pattersons' shares in THCL (which they had effectively taken ownership of as security for the amount owed to them by the Taggarts) and, ultimately, therefore came to own 100% of

the issued share capital of that Company.

[77] The basis advanced is that Mr McCann used the loan which he had obtained from First Friends to acquire his stake in THC Ltd as a precursor to his ultimate intention of buying John Taggart's 50% share in THL. The "debt" the Bank says was satisfied by Mr McCann's ultimate acquisition of the shares in THCL.

Again based on both the fundamental flaws of the document in terms of execution and validity and/or the failure to advance cogent evidence of the existence and/or continued validity of the debt the Bank argues that the burden of proof has not been discharged.

***Discussion***

[78] The parties having (largely) agreed the test which they wish the court to apply do seem to depart on its application. The respondents have criticised the approach of the Bank in "[seeking] to turn the Appeal into a commercial trial of the 'three disputed debts.'" What counsel for the Taggarts accept on one hand is that this is a de nova hearing based on the updated evidence but on the other assert that this court "must give due regard to the Master's ruling where the Master has produced a written judgment and the matter before the court is a matter in the peculiar expertise of the Master."

[79] I was taken to the decision in *McRandall v McRandall* [2000] NIJB 272 in relation to an appeal in a matrimonial ancillary relief application which, counsel pointed out, was approved by the Court of Appeal in *H v H* [2015] NICA 77. I must say that I find that the approach which was advanced to me slightly strange given the history of the case - particularly given that both parties have accepted that the Master was wrong in her original determination.

[80] Setting that aside the respondents (per their closing) largely rely on:

(a) The fact of the execution of the PGs "considerably before the respondents' IVA ...";

(b) That the documents in question were professionally drafted and witnessed;

(c) That there is affidavit evidence to support the claims for/on behalf of the creditors; and

(d) That the respondents continue to acknowledge their indebtedness.

[81] Based on the bad faith which the respondents purport to attribute to the Bank, it is asserted, that this court should accept the position adduced on each of those points – without further inquiry - and, fundamentally, leave the matter to the supervisor of the IVA in terms of the ultimate validity of the three disputed claims.

[82] I have already said that as a proposition, even though I have simplified it somewhat, I am afraid that it is not an approach which I can endorse. The authority of *Rubin* (supra) has been accepted by both parties as not only being relevant to this case but as providing the actual basis upon which the appropriate test should be applied. That case goes much further than has been suggested by the respondents. Paragraph 13 provides (as I have highlighted before) that:

> "13. The function of the court on an appeal … is not simply to review the decision of the chairman which is sought to be impugned, but rather to **form its own view on the basis of the evidence and arguments advanced before it**." (Emphasis added)

[83] I take that quote (including the emphasis) directly from the respondents' written closing. As suggested in *McNally* (supra) the whole underlying rationale for the approach set out in the rules, incorporating the ability to appeal to this court, is that this court is in a position "to consider the issues in a more measured way …" than (certainly) the Chairman. That is certainly the position in a case such as this.

[84] Having agreed the test the burden was on the Taggarts and/or the disputed creditors to establish the validity of the disputed debt(s). As to the latter Arthur Cox on behalf of the Bank wrote to each of the three creditors on 19 June 2017 (copying in the various affidavits) inviting them to comment and/or to come on record. None have chosen that course other than to provide the specific affidavits which I have mentioned. Both Mr Iampolski and Mr Sauer replied (by email) to that correspondence in almost identical terms:-

> "We have provided all of the information to the Insolvency Practitioner. We do not wish to correspond with you in this matter further as we are supportive of the proposal and understand that you are against the proposal denying us some form of redress in financial terms …"

Not for the first time in correspondence and the documentation passing between the parties in this case this approach seems to have such a degree of similarity for

it to be difficult not to conclude that there has been some degree of collusion between the parties. If so, it has not, however, perhaps had the desired effect.

[85] The Taggarts either on their own or through their legal team and/or the individual creditors have had ample opportunity to come on record and/or establish the requisite evidence base for their respective claims and so discharge the burden of proof which they themselves have accepted rests upon them. The claims themselves are for very significant amounts and it is reasonable to expect cogent evidence would exist to justify them. In addition, as the Bank's counsel advances, the Bank's contentions were known long before this (delayed) hearing. Notwithstanding that knowledge, fundamentally, I find that the Taggarts and so the creditors have failed to discharge the burden of proof that rests on them for the reasons which I will set out in the following sections of this judgment. To paraphrase the court in *Ahmed* – even taking into account the voluminous papers, legal submissions and oral evidence I am left in more than considerable doubt as to the validity of any of the claims and so reject all of them in their entirety.

***The Iampolski claim***

[86] In considering the Guarantee advanced to support this claim I note the purported application of the laws of Luxembourg to the document. Mr Downey who prepared it certainly acknowledged that he was neither qualified, nor had he any expertise, in Luxembourg law. No other opinion or evidence was adduced to the court as to (a) the appropriate formalities to be observed in terms of the execution of such document as this under those laws or (as ancillary to that) (b) the limitation period applicable thereunder. Both are relevant considerations, in my view, when considering the overall validity of the professed enforceability of a guarantee whether in general terms or specifically with reference to an IVA proposal such as in the present case. I observe that the production of an affidavit from a suitably qualified practitioner on these points is entirely standard in transactions involving foreign law (dealing with either or both points) and would one assumes have been easy for a motivated creditor to arrange. Given the clear adoption of Luxembourg law and its applicability the court could determine that the lack of such evidence on enforceability a fiori renders the claim (as the Bank suggests) inadmissible.

[87] Even if I were to adopt the presumption of local law (as in the *Iranian Off-Shore* case (as above)) Mr Downey's evidence was not able to assist the court in confirming therefore that the PGs – purportedly drafted as deeds – were validly executed as deeds either (as I say) under the law of Luxembourg or, in the alternative that the document was "signed, sealed and delivered" in compliance with local law requirements (in line with the drafting of the jurat clause) either at common law or, alternatively, under the provisions of the 2005 Order. There

remains, therefore, a fundamental question over the validity of all of the documents upon which the court has not been satisfied. The onus to do so rested squarely with the respondents.

[88] On the question of limitation in my view, a statute barred claim is not a valid debt. It is not enforceable as a debt and, particularly within the context of a statutory process such as an IVA, nor can it be a "bona fide debt" (as per *Ahmed* etc above). The assessment with which the court is tasked must include a consideration of whether an alleged debt still remains enforceable. The lack of a legal obligation cannot, in my view, be substituted by a moral one (as the Taggarts implicitly suggest). The only exclusions to that are perhaps the wholly exceptional circumstances outlined in *Re A Debtor* (No 574/1995) [1998] 2 BCLC 122. In the specifics of that case a statute barred claim *was allowed* but only because under Jewish law a moral obligation was considered to equate to a legal obligation. Those unique circumstances do not apply here. I did not understand Mr Taggart's counsel to argue to the contrary on that specific point and certainly no contrary authority was advanced to me during the course of the hearing or in closing written submissions. In my view, to take a contrary view would, I suggest, be to open the floodgates of potential abuse in relation to the IVA process itself and flow contrary to the list of authorities to which I have referred.

[89] Those considerations should, in my view, be sufficient to deal with the question of Mr Iampolski's PG and, thus, his claim but lest there be any doubt on the subject I make the following findings:

(i) I was not satisfied to the requisite standard of the existence of an underlying debt to which the PG would "attach" (if I may use that terminology). I have come to this conclusion for the following reasons:

- The PG under consideration spoke in terms that it was "[provided] in consideration of … that Mr Iampolski would pursue the Businessbanca SA project in Moldova." To that extent it is at a specific intention geared to a geographical location – ie Moldova.

- Mr Iampolski's affidavit and the documents annexed to it, however sparse, (due to the fire) all related to the purchase and/or development of land in Slovakia;

- In short there is no coherent documentation to satisfy me that the PG which has been furnished supported a development in the manner alleged and/or that is consistent with the terms of the PG itself.

- There is a disconnect (to put it neutrally) between Mr Iampolski as the named creditor beneficiary under the PG and the relationship he allegedly has with BusinessBanca. The email correspondence from Ms Fontaine suggests – but does not provide any clarity - as to how an interest or debt originally vested in the Bank either remains valid and/or accrues to Mr Iampolski/his holding company without any substantiation whatsoever. His own affidavit did nothing to address or explain this issue although he was perfectly well aware of it as being in contention.

- On the specifics of the actual debt alleged it is significant that the PG itself was valid "up to a sum of $25m." Given the co-extensive nature of guarantees a PG couched in these terms necessitates proof of the quantum of the underlying debt. The debt under the PG is secondary to that principal obligation and so, for it to be valid, the quantum of the underlying debt must be established. No such clarity or evidence has been provided to satisfy me that the debt exists much less its value.

(ii) On the basis before the court it would seem that any demand for such a debt (if it existed) must have been caused by the closure of BusinessBanca which is confirmed as being in 2005 – raising, therefore, the legitimate question of how limitation would apply in those circumstances. On the balance of probabilities I would say that the debt/claim is statute barred taking 2005 as the latest date for a demand and even allowing for the potential of a 12 year limitation period (which again, itself was not proven to me on the facts).

(iii) The inquiry of the court is further piqued by the article that was produced by the Bank which stated that upon its closure all of the creditors' debts in relation to business banker were "honoured" thereby suggesting the total lack of an underlying debt. Given what I have already said, I do not feel I need to deal specifically with this point but, again, it would suggest the absence of a principal debt to which the secondary obligation under the PG would attached.

[90] All of those issues are uppermost in the court's mind before it even turns to consider the poor quality and confusion which arises as a result of the drafting of the PG itself. Those irregularities are focused on the numerous mistakes in the use of legal terminology, addresses, typography and detail across this and the Sauer PG (commented on below) specifically:-

- The reference to the guarantee being entered into "jointing and severely" which obviously is an incorrect transcription of the legally acknowledged phrase "jointly and severly" (and which is also replicated in the Sauer Guarantee).

- The evident misspelling and other typographical errors within the document itself (and which again comes to be repeated elsewhere).

- The failure to include the full legal names of Messrs Taggart notwithstanding Mr Downey's obvious familiarity with them.

- There is a sense (and I put it no more strongly than that for I do not feel that I need to given my other findings) that the PG was drafted after the event to "fit" with the overall context. I observe that the date in each of the guarantees under examination has been typed in (and then significantly in the same typeset) rather than being written in hand – a fact which I consider strange given that none appear to have actually been fully executed in Mr Downey's office (or even in his presence). That feeling of unease is compounded by the fact that Mr Downey made no reference to the Iampolski guarantee in his affidavit evidence to this court even though it was (even at that stage) in contention yet (according to his oral evidence to the court) it formed the basis of the document upon which he subsequently prepared the later Sauer guarantee. Issues such as these have not been addressed or explained to the court's satisfaction.

[91] In essence, all the issues, which were eloquently elucidated by the Bank's counsel were highlighted and were clearly known to the parties before the present hearing (the parties were put on notice as early as 2017) yet, in my considered view, little or no attempt was taken by either Mr Taggart, in the course of his evidence to the court, or, indeed, his lawyers in relation to the written submissions which had been presented to meaningfully address any of those legitimate concerns.

[92] In all those circumstances, therefore, I have no hesitation in concluding that the burden of proof of satisfying this court in relation to the validity of the disputed debt which purportedly arises in favour of Mr Iampolski has not been discharged.

***The Sauer claim***

[93] I turn then to the PG asserted by Mr Sauer as the basis of his claim. Similar observations apply to those which I have mentioned above in respect to Mr Iampolski's claim:

(i) The document was purportedly subject to the laws of Luxembourg so exactly the same considerations apply to those which I dealt with above at paras [89] and [90] save that, given its date, the 2005 Order would indisputably have been in place and more potentially have applied to its execution.

(ii) In terms of compliance with legal formalities relating to the creation of the document itself Mr Downey gave evidence that he had drafted the document, that it was approved by Mr Taggart, that he had shown it to Mr Sauer (who happened to be in Northern Ireland) who, appearing "happy with it", took it away. There is nothing before the court confirming that it was ultimately signed, sealed and delivered as a deed, in compliance with common law requirements, nor indeed, with the requirements set out in the 2005 Order.

At a very basic level whether one considers the questions of local or foreign law, therefore, I do not accept the overall enforceability of the document. Turning, however, to specifics:-

(iii) As indicated above in accordance with its terms the PG was entered into "in consideration of the Developer pursuing the development of the Villeroy and Boch project, the Peagus Project and the Sappira Project and in the event of the Developer having insufficient funds to complete the said projects the Guarantors jointing and severely and to hereby guarantee that the Guarantor shall on demand in writing from the Developer pay to the Developer up to the sum of €15m."

(iv) The supporting documentation which was provided spoke principally of the Villeroy and Boch development as being "nearby" and provided no clarity as to the relationship between the development cited in the documents or, indeed, the developers and corporate entities involved in the context of what was a simple single page guarantee.

(v) According to Mr Taggart's evidence he undertook a development in Luxembourg through a Luxembourg SPV, the actual funder of which was Dexia Banque.

(vi) The evidence provided to the court in relation to the actual cash transfers which were made do not assist the court in clarifying the position and indeed, if anything, disprove some of the averments which have been in the affidavit evidence which was made available to the court;

(vii) The evidence provided by Mr Sauer whether in his affidavit evidence or otherwise fundamentally failed to explain how Mr Sauer in his personal capacity was the beneficiary of the PG as opposed to Opava SA (the corporate entity) who was actually cited in the Proof of Debt form as the beneficiary.

(viii) No clarity has been provided in relation to the actual amount of the debt itself;

(ix) The timing of the production of the PG itself also raises concerns. Initially, there was no reference to its existence within the information which Mr Sauer provided to the Chairman's initial requests. Neither Mr Sauer nor Mr Taggart made reference to it in their respective earlier affidavits at the time and, in fact, the document itself only came to light amongst Mr Taggart's files a year later according to his fourth affidavit (29/1/2020).

(x) Regardless of who might be able to enforce the PG Mr Sauer in his own affidavit initially said that "the development did not materialise" raising some doubt as to the very existence of the underlying debt. On an allied point no evidence was provided to the court of an initial demand in writing (as required under the terms of the PG itself) something which the court considered essential in relation to the claim under the PG for the reasons provided.

(xi) Regardless of whether the document, as provided, was executed as a deed or as a simple contract, the same issues regarding limitation also apply to this scenario. Mr Sauer, in his affidavit, placed the "trigger point" as the economic crash of 2007/08. Whether a claim arose at that point under a contract or under a deed is immaterial because in both cases (applying local law) any claim would be statute barred.

I remain unsatisfied that the document constituted a Deed and as a contract conclude that it failed for lack of (i) consideration and (ii) evidence of acceptance and (iii) and the correct identification of the parties to it.

[94] Again, the court reminds itself that the question which it must determine is if it is satisfied on a balance of probability as to the validity of Mr Sauer's claim. Taking into consideration the matrix of issues which were presented to the court I answer this question in the negative in relation to the Sauer claim.

***The McCann claim***

[95] At a macro level the same considerations apply to the £35m McCann PG as drafted by Mr Downey. In this case there is no evidence of "the acceptance" of the document by Mr McCann and beyond that there is certainly no evidence before the court that the document was executed as a deed either in accordance with common law or under the provisions of the 2005 Order. Issues of limitation also arise.

[96] For the same reasons as above I do not consider it to be a valid basis for the claim but beyond that and looking at the underlying detail there are also substantial issues:

(a) There was no proof whatsoever that the underlying sum of "£35m" was ever advanced to THL Limited much less the larger sum claimed of £65.58m. In the main Taggart action (based on a review of the considerable documentation involved in that case) Burgess J came to that conclusion. A large section of that documentation (as recited above) was also made available to the court in this case. A consideration of those suggest that the £35m was never advanced. None of the other contemporaneous documents passing between Tughans (for the Taggarts) and Mills Selig (for Mr McCann) make reference to the purported payment or indeed the Deed and indeed one wonders why Mr Downey (who was unconnected with that transaction) was even involved. In any event, had the £35m been made available then it is not likely that THL would have become insolvent. I conclude that there is no cogent evidence before me that such payments as are alleged were actually made;

(b) Mr McEneaney's affidavit (as the person who purported to arrange the payments on behalf of Mr McCann) does not make any allegation that £35m was advanced. Given his assertion that he was a co-participant (on behalf of Mr McCann) at that time that absence is, I feel, significant. The point is also made clear in the sworn Statement of Affairs relating to Taggart Homes Limited and THL given by the directors (ie the Taggarts themselves) on oath at the relevant time (and clearly prior to these proceedings).

[97] I do not feel it necessary to rehearse all of the documentation to which reference has been made above and, as I say, in the main Taggart action. It is clear to me that the underlying commercial rationale for Mr McCann was a hope that he would be able to buy Mr John Taggart's 50% shareholding in THL at a point when the company itself was desperate for funding. The unusual drafting of the joint and several guarantee confirms that (see above at para [69(ii)]). That was Mr McCann's overall goal and his purchase of, firstly, 50% of the issued share capital of TH Cairnshill Limited (and the balance from the Patterson family) was simply a signpost along the way. The second guarantee in contention (ie that for £2.75m)

related fundamentally to that transaction and, again, it is clear that Mr McCann received value for that through the ultimate purchase of the shares and thus control of THCL itself. I do not consider it necessary to rehearse all of the moving parts in relation to that transaction. That position is ultimately confirmed by the registration of Mr McCann/his entity as the sole owner of the issued share capital of that company. That being so the £2.75m guarantee "fell away".

[98] More fundamentally, and reverting to the issue of where the burden of proof lies, the position, at the outset was that it was for Mr McCann/the respondents to prove the validity of their claim on a balance of probabilities. Fundamentally, they have failed to discharge that burden. Where reliance has been placed on affidavit evidence - for example in the case of Mr McEneaney's affidavit - the documented sequence of events has thrown into doubt the alleged payment as now asserted by the Respondents in the manner suggested – or at all. In the case of Mr Downey's affidavit and subsequent oral evidence it raises more questions than it answers. Considerable reliance was also placed upon the oral evidence of Mr Taggart before this court. He gave evidence as to all three of the disputed claims. I find Mr Taggart's evidence, at best, highly partisan. By his own admission he had not re-read (or even read for the first time) some of the core documentation which was central to the claims which were being advanced. A good deal of that documentation, as I say, had arisen and been considered in the main Taggart action. One might expect him to have been familiar with the main issues – certainly as they related to the present case. He was not, and, as I say, overall I found his evidence too partial to be credible. A review of the documentation and indeed the correspondence is also suggestive of a degree of collusion which further reduces Mr Taggart's credibility. I feel no need to comment on that further. Overall I am satisfied that the evidential burden in respect of the debts has not been met and the evidential threshold not been achieved.

***Conclusion***

[99] For all of those reasons I conclude that the respondents' case for the inclusion of the three disputed debts fail. Fundamentally they are based on documents which I am not satisfied comply with the requisite formalities to be enforceable. In the alternative I have concluded upon a detailed review of each that each claim on a balance of probabilities is statute barred and does not, therefore, amount to a valid claim. They are not, again to use *Ahmed*, a bona fide claim.

[100] Beyond that looking at the specifics of the drafting of the guarantees themselves and the requisites thereunder (such as demands being made in writing) and importantly the factual matrix around each I am not satisfied on the

evidence that at that detailed level any of the claims stand up to any degree of scrutiny.

[101] Indeed I conclude that none of the claims are valid or should be admitted. The burden to satisfy the court falls to the respondent and despite the paper chase upon which the parties have engaged fundamentally I remain unsatisfied in respect of each.

[102] That is my determination on the matters which were placed before me for adjudication but, if required, I am happy to hear the parties in relation to any applications that may arise from these conclusions.

[103] It only remains for me to express my thanks to counsel for their detailed and helpful submissions.