

**Unapproved Judgment
For electronic delivery**



THE COURT OF APPEAL

Record No: 2018/322

Edwards J.

Neutral Citation Number [2022] IECA 296

Whelan J.

Ní Raifeartaigh J.

Between/

**THE GOVERNOR AND COMPANY OF
THE BANK OF IRELAND**

Respondent

V

KIERAN DOYLE

Appellant

JUDGMENT of Mr Justice Edwards delivered on the of 21st day of December 2022.

Introduction

1. This is an appeal against the judgment and Order of the High Court (Meenan J.) dated the 10th of July 2018 granting summary judgment in favour of the respondent, and against the appellant, in the sum of €7,473,348.47 together with the costs of the motion and of the proceedings when taxed and ascertained.

The Background to the Proceedings

2. The uncontroversial background to the proceedings is that in or about 2007 the appellant, and three other individuals (I will identify them for the purposes of this judgment as S.O., C.H., and P.C., respectively) entered into a joint venture agreement (JVA) to invest in property and to develop it. While this joint venture agreement will be described in greater detail later in this judgment, it may be stated at this stage that it contemplated, *inter alia*, that finance for the venture would be sought from the respondent by way of a bank loan and that if such finance was secured the parties to the joint venture would be jointly and severally liable to the respondent in respect of it.

3. Evidence that the contemplated loan was in due course applied for, granted and advanced is to be found in the affidavit of Paul Diggin, a Senior Manager with the respondent, sworn on the 31st of January 2017. He states that by a facility letter dated the 23rd of December 2010 (“the facility letter”) the respondent offered to advance the sum of €7,550,000 by way of a full recourse loan facility (“the loan facility” or “the Facility”) to S.O., C.H., P.C., and the appellant, together trading as Greenhills Co-Ownership (collectively referred to as “the Borrowers”) for the purposes therein stated, including to refinance existing facilities at that time advanced to the Borrowers. The said facility letter, which was exhibited, incorporated the respondents’ general terms and conditions, which were also exhibited. The offer contained in the said facility letter was accepted by the Borrowers on diverse dates between the 10th of February 2011 and the 17th of February 2011. In particular, it was accepted by the appellant on the 17th of February 2011.

4. The following conditions applied to the loan facility thereby offered and accepted:

- a. that interest would accrue on the principal sum outstanding at the rate of 1.75% above the respondent's one-month cost of funds rate, pending review in accordance with the terms of the facility;
- b. that interest would be compoundable at such quarterly or other periodic rests as the respondent, in their absolute discretion, would determine, and in accordance with the respondent's practice for accounts from time to time;
- c. that all principal sums payable under the loan facility, together with interest accrued, were required to be repaid in full by the 21st of March 2011; and
- d. that the liability of the Borrowers under the loan facility was joint and several.

5. The respondent advanced the loan facility to the Borrowers pursuant to the facility letter, but it is contended by the respondent that the sums due pursuant to the facility letter were not repaid in full or at all by the 31st of March 2011. This led to the loan being called in.

6. In due course the respondent formally demanded repayment from the appellant of monies due arising from drawdown of the loan facility ("the debt"), and when repayment of that was not forthcoming, the respondent issued a Summary Summons against the appellant on the 10th of November 2016, which in its original form sought judgment against him in the sum of €7,815,536.77, being the sum allegedly due as of the 4th of November 2016, plus interest pursuant to the facility and/or statute.

7. Following the calling in of the loan, the appellant's co-debtors entered into negotiations with the respondent in relation to the debt. Arising from these negotiations the respondent entered into a Debt Resolution Agreement ("DRA") on the 14th of February 2017 with S.O., C.H., and P.C., but the appellant was not a party to that agreement. While this DRA will be described in more detail later in this judgment it provided, *inter alia*, for a

release for consideration of the appellant's co-debtors from continuing liability to the respondent in respect of the debt.

8. When the respondent's proceedings against the appellant came on in the High Court the appellant sought to have the claim sent to a plenary hearing on the grounds that he had an arguable defence (i.e., a credible defence based on more than mere assertion), on two potential bases. First, he contended that the DRA represented a release or accord for the purposes of s. 17 of the Civil Liability Act 1961 ("the Act of 1961") on which he could rely. Secondly, he contended that entry into the DRA amounted to a breach by his co-debtors of the previously mentioned JVA between them and the appellant, and that such a breach was induced by the respondent. However, the High Court was not satisfied, for reasons to be elaborated on later in this judgment, that either contention could be relied upon as providing him with an arguable defence

9. Accordingly, judgment was granted against the appellant and in favour of the respondent for €7,473,348.47, it being accepted by the High Court that the sum of €7,815,536.77 claimed in the Special Indorsement of Claim neither took account of a sum of €105,183.57 repaid to the respondent on the 29th of December 2016 from the realisation of a property known as "The Owl's Rest" securing the indebtedness of the Borrowers, nor did it take account of further sums of accrued interest to the date of the judgment not yet posted amounting cumulatively to €32,995.27. When the original sum claimed was adjusted to take account of these two figures, the adjusted claim amounted to €7,473,348.47.

10. It is accepted by all concerned that the adjusted figure for which judgment was given did not take account of payments which were made by the appellant's co-borrowers, i.e., S.O., C.H., and P.C., on foot of the DRA. These had been outlined by Mr Paul Diggin, on behalf of the respondent, in a supplemental affidavit sworn and filed by him in the proceedings on the 15th of February 2018 (the day of the scheduled hearing).

11. As indicated at paragraph 1 above, judgment in this matter was granted on the 10th of July 2018. It was immediately appealed, and enforcement of the judgment was stayed on a consent basis pending the hearing of the appeal, which received a hearing date (remotely due to the Covid 19 pandemic) in late 2020. That chronology is significant because subsequent to the hearing in the High Court, but before the hearing of the appeal, the Supreme Court gave judgment in the case of *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84.

12. In that case, which involved an appeal by a defendant debtor against a summary judgment granted by the High Court in favour of a plaintiff bank which had lent him money, the appellant sought to set aside the judgment on the basis that the pleadings had been defective in respect of what was said to be a lack of detail concerning the liquidated sum claimed. In addressing the appeal, the Supreme Court found it necessary to examine the requirement in Order 4, Rule 4 of the Rules of the Superior Courts, relating to the particularisation of a claim to recover a liquidated sum in summary judgment proceedings, that the Special Indorsement of Claim “*shall state specifically and with all necessary particulars the relief claimed and the grounds thereof.*”

13. The long-standing view, first expressed by Cockburn C.J. in *Walker v. Hicks* (1877) 3 Q.B.D. 8, (at p. 9), that a defendant must have “*sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist*”, was reiterated.

14. It was accepted that a court in considering the adequacy of the manner in which a debt is particularised may be entitled to take into account any documentation which has been sent to the defendant in advance of the commencement of the proceedings. However, in such a case it is necessary for a plaintiff desiring to rely on previously supplied details to at least make some reference to those details in their Special Indorsement of Claim. It was held that a bald reference to the fact that a specified sum is due, without the provision of details as to how that sum has been calculated or arrived at, will not suffice to satisfy the requirement that

the person receiving the summons should have the “*necessary*” details to decide whether they should concede or resist.

15. The Supreme Court further considered what the obligation on a plaintiff claiming a liquidated sum in summary summons proceedings to produce *prima facie* evidence of their debt entailed in practical terms. In the case before it, a liquidated sum (€221,795.53) was asserted to be due in the Special Indorsement of Claim. No detail whatsoever had been given as to how it was calculated. However, a Statement of Account was adduced in evidence by the plaintiff bank as being a document previously supplied to the defendant, which Statement of Account suggested a closing balance in the same sum as that claimed in the Special Indorsement of Claim. The plaintiff bank sought to rely on this both as having provided sufficient particularisation of the debt and as proof that the sum claimed was due. However, there was no indication in the Statement of Account as to how the closing balance figure was calculated.

16. In his judgment (with which the other members of the Supreme Court bench agreed), Clarke C.J., stated:

“6.6 However, I am not satisfied that it would have been obvious to a reasonable person as to how the sum of €221,795.53 was calculated. That amount is not specified as deriving from any particular form of calculation based on other figures contained in the Statement of Account. A subsidiary issue arose as to whether the calculation might be obvious to a skilled financial expert. It seems to me that some care needs to be exercised in relation to that submission. If the basis of the calculation had been set out in a form where the way in which the sum was said to have been arrived at was clearly specified, then I would be more than satisfied that such an exercise would have been sufficient, both as to particularity for the purposes of pleading and to provide sufficient evidence to establish a prima facie case. If someone then wished to

suggest that the calculation was wrong either because the methodology was not in accordance with the contract or because of an alleged error in the calculation itself, then that might or might not have required some expert assistance and evidence.

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

6.8 It does not seem to me that it is necessary to be prescriptive about precisely how a financial institution should set out such information, but it is obvious that the system which generated the Statement of Account must have had some inbuilt methodology for calculating the closing balance. The problem is that the relevant methodology is not clear from the document or from any other evidence. A defendant who wishes to proceed to a plenary hearing has to do more than merely assert a defence. This obligation cuts both ways. The particularisation of the amount of the claim must also

go beyond mere assertion on the part of a plaintiff if they are to benefit from the use of the summary procedure.”

17. Ultimately, in the *O'Malley* case, the Supreme Court allowed the appeal and remitted the matter back to the High Court, “*on the basis that Bank of Ireland (sic) can apply to amend the special indorsement of claim to include such details as they may think are appropriate in the light of this judgment and (sic) can also tender such further evidence as may be appropriate to fill the evidential gap identified.*”

18. In the present case the appellant contends that the respondent has, in effect, admitted that the summary summons upon which it sought summary judgement was insufficient to meet the requirements specified by Clarke C.J. in *Bank of Ireland v. O'Malley*. *Prima facie* that would not appear to be so, having regard to assertions to the contrary, appearing in both the affidavit of Paul Diggin sworn on the 14th of October 2020, and in the respondent's written submissions to this Court. At paragraph 70 of the latter document it is stated that those submissions were being advanced “*without prejudice to the contention that the particulars contained in the original summary summons were sufficient to enable the defendant to understand the case he had to meet and to satisfy his mind whether he ought to pay or resist.*” Be that as it may, whatever about any effective concession having been made, certain action was undoubtedly taken by the respondent ostensibly, in response to the judgment in *Bank of Ireland v. O'Malley* and on an *ex abundanti cautela* basis at the very least, which I will now proceed to describe.

19. By a Notice of Motion issued on the 11th of September 2020, the appellant sought leave from the Court of Appeal to deliver an amended Notice of Appeal adding an additional ground of appeal to the effect that the appellant would seek to rely on the decision in *Bank of Ireland v. O'Malley* to contend that the High Court judge had erred “*in making an order for summary judgement against the defendant in the circumstances where the plaintiff failed to*

set out sufficient detail in pleadings or evidence to allow the defendant know the case he must meet at trial.”

20. The motion was heard on the 9th of October 2020 and the appellant was granted leave by this Court to amend his Notice of Appeal in the manner proposed. The new ground of appeal was in addition to eight grounds of appeal originally pleaded and therefore becomes Ground of Appeal No. 9. However, in addition the respondent was granted liberty to issue a motion seeking leave to amend its summary summons to further particularise the basis of its claim. The respondent duly issued such a motion (grounded upon the previously mentioned affidavit of Paul Diggin sworn on the 14th of October 2020, which the respondent also relies substantively upon in this appeal), which came on for hearing on the 16th of October 2020. The respondent was granted leave to amend its summary summons in the manner sought and the amended summary summons which is presently before this Court was served on the appellant’s solicitors.

21. The appellant contends that notwithstanding any amendments made to the summary summons the claim remains inadequately particularised having regard to *Bank of Ireland v. O’Malley*. It is therefore convenient to deal with Ground of Appeal No. 9 at this point.

Ground of Appeal No. 9

22. The Special Indorsement of Claim to the amended summary summons, after setting out details of the offer of finance, of the facility letter, of the borrower’s acceptance of the facility letter, of the issuance of the loan and of the fact that the sums payable under the facility were not repaid in full or at all by a specified date, goes on to plead:

“9. In what follows, where relevant sums owed by the Defendant on various dates are referred to, these are calculated by reference to the details set out in statements of account produced by the Plaintiff in connection with the Facility furnished to the

Borrowers for account number [specified] between 28 February 2011 and 30 December 2016 (“the Statements of Account”)

10. As at 16 July 2014 the Borrowers were indebted to the Plaintiff under the Facility in the sum of €7, 979,874.26, on which date the Plaintiff issued a letter formally demanding repayment in full by the Defendant by 3pm on 18 July 2014, on which date the sum due for principal and interest accrued since the previous rest state under the Facility would be €8,002,814.96.

11. Despite that said letter of demand, neither the sum demanded nor any sum was paid by the Defendant or by any of the Borrowers.

12. Between the aforesaid letter of demand and 4 October 2016, two properties securing the indebtedness of the Borrowers were sold (241 Malahide Marina, yielding net proceeds of sale of €318,712.22 in September 2015, and 7 acres at Streamstown, Malahide, yielding net proceeds of sale of €202,342.90 in June 2016) and additional interest accrued on the Borrowers’ principal indebtedness, in consequence of which, as at 4 October 2016, the Borrowers were indebted to the Plaintiff under the Facility in the sum of €7,787,748.38. On 5 October 2016 the Plaintiff (expressly without prejudice to the aforesaid demands made on 16 July 2014) issued a letter formally demanding repayment in full by the Defendant forthwith of the sum due for principal and interest accrued (including interest would not apply to the account since the relevant rest day) under the Facility, being €7,804,271.20.

13. Neither the sum demanded, nor any sum was since paid by the Defendant or by any of the Borrowers.

14. The Defendant failed on foot of the said demand to pay the said sum demanded or any sum.

15. The sum due as of 4 November 2016 was €7,815,537.77, which said sum was claimed in the summary summons issued herein on 10 November 2016 (“the Original Summons”).

16. On 29 December 2016, €105,183.57 of the proceeds of sale of the property known as Owl’s Rest securing the indebtedness of the Borrowers was applied to reduce the borrower’s principal indebtedness. As a consequence, the sum then due and owing was €7,716,737.02.

17. From the period 29 December 2016 to 31 January 2017 interest in the sum of €26,611.45 accrued on the outstanding amount but was not posted to the account.

18. Therefore the sum remaining due and owing as of 31 January 2017 after all just credits and allowances was €7,743,348.47.

19. Following the commencement of the proceedings the Plaintiff determined to charge no further interest to the Borrowers’ account after 31 January 2017. The Borrowers’ indebtedness under the Facility therefore remained unchanged until 13 March 2017, on which date of payment in the sum of €40,000.00 was received from the Borrowers. Further, total payments of €270,000.00 were subsequently made by the Borrowers between March and August 2017 as follows:

(a) On 15 March, 2017, a payment of €10,000.00 was made;

(b) On 17 May, 2017, a payment of €200,000.00 was made;

(c) On 8 August, 2017, a payment of €10,000.00 was made;

(d) On 31 August, 2017, a further payment of €10,000.00 was made.

20. On 28 November, 2019, an additional payment of €250,000.00 was made, thereby reducing the sum due to €7,223,348.47.

21. On 5 December, 2019, €218,065.00, being the net proceeds of the sale of the Greenhills Site, which was secured against the indebtedness of the Borrowers was

applied to reduce the Borrowers' principal indebtedness. The sum left due and owing as a consequence was €7,005,283.47.

22. Taking the said payments into account, the Borrowers are, after all just credits and allowances, indebted to the Plaintiff under the Facility in the sum of €7,005,283.47.”

23. The appellant contends in the context of the present appeal that notwithstanding the amendments made the respondent has failed to set out sufficient particulars of how the proportions of the proceeds of the various sales being attributed to the loan were determined or calculated. He says that such a lack of particulars prevents the defendant knowing whether he should challenge the sum claimed and prevents the Court from determining whether the plaintiff is entitled to the sum claimed. Further, he says that no documentary evidence is before the Court, which would allow this calculation to be made or to determine whether the respondent was legally entitled to apply funds in the alleged manner.

24. More fundamentally, however, he says that the Court of Appeal must determine the appeal on the basis of the pleadings and evidence that were before the High Court. He says that it is not open to the respondent to seek summary judgement in the Court of Appeal, based upon amended pleadings, in the first instance. His case is that the respondent failed to properly particularise their claim when seeking summary judgment in the High Court and that the respondent also failed to provide sufficient evidence to allow the High Court to determine the issues raised or to allow the defendant to know whether it should challenge the sum claimed. The appellant wants the Court of Appeal to allow the appeal and to remit the matter to the High Court for a rehearing based on the now amended summary summons.

25. The respondent's reply to this is best encapsulated by quoting from the transcript of the hearing of the appeal. It was submitted to us by Mr Fitzpatrick S.C. that:

“The application for summary judgment was heard before Mr Justice Meenan in February 2018 and at that stage the defendant did not argue that the particulars of the debt which I set out in my summary summons did not comply with the requirements of Order 4, Rule 4 of the rules of the court. You can't blame them for that because at that stage Bank of Ireland v. O'Malley hadn't been decided and the summons was wholly in keeping with the practice of the time but they didn't raise the point of Order 4, Rule 4 and all Bank of Ireland v. O'Malley did was to explain what the requirements of Order 4, Rule 4, were. Nothing was said about that until the defendant ... sought leave from Ms Justice Costello to file an amended grounds of appeal to raise for the first time in argument that the particulars of debt as cited in the summons didn't comply with the requirements of Order 4, Rule 4 and were not in accordance with the judgment in Bank of Ireland v. O'Malley. ... I argued that it was appropriate for us to be given leave to deliver the amended summary summons because the question of whether O'Malley had been complied with was now one of the issues in the case and the amendment was therefore necessary within the meaning of the Order 28, Rule 1 to enable the real issues of controversy to be adjudicated upon. And Ms Justice Costello granted me leave to deliver an amended summary summons so that the issue of compliance with O'Malley having been raised the week before could now properly be determined. So I was given leave by Ms Justice Costello to deliver the amended summary summons and I did that. I was given leave to do so on the basis that the question of whether O'Malley was complied with would be determined before this Court on the basis of the amended summary summons. Because the argument I made to Ms Justice Costello was that it would be a total waste of time for that, if the argument was now raised by my friend in the grounds of appeal, amended grounds of appeal and for the argument to take place in an artificial

way on the basis of a summons which was issued long before O'Malley and which if was accepted, would simply result in the case being sent back to the High Court where I would then seek leave to file an amended summary summons, we then fight it out in the High Court and then one way or another we end up back before the Court of Appeal. And I suggested to the Court that the most appropriate way of dealing with this was for me to be given leave to file the amended summary summons and to make the arguments on O'Malley before this Court.

So that was the application which was made and that was the, I'm sure the Court won't find any of that in the order, but that was the application that was made. So it would defy reality and what was discussed before Ms Justice Costello. And I think it was Mr Woulfe who dealt with it on behalf of the defendant on that day, and it wasn't argued, at that stage it wasn't said that even if the amended summary summons was delivered that the hearing before the Court of Appeal should take place on the basis of the original summons only. But in any event, it would defy reality if me having been granted leave to deliver the amended summary summons so the Court on this appeal could determine the real matters in controversy in accordance with O'Malley, if the Court was not entitled and was debarred from looking at the amended summary summons which I have been given leave to deliver.”

26. I have considered the arguments advanced by the appellant and by the respondent. It seems to me that a fundamental difficulty for the appellant is the fact that he failed to raise the issue of the adequacy of the particularisation of the Special Indorsement of Claim before the High Court. As Noonan J. pointed out in *Havbell DAC v. Hilliard* (unreported, Court of Appeal, 18 December 2020) and reiterated in *Promontoria (Arrow) Ltd v. Mallon and Shanahan* [2021] IECA 130 at para 18, the *O'Malley* case did not introduce new law but

rather was a restatement of the law as it existed for well over a century. This point was made to us by counsel for the respondent at the hearing of the appeal, and it does not appear to have been meaningfully engaged with by counsel for the appellant. While it is true to say that Ms Justice Costello, at a directions hearing, granted leave to the appellant to amend his Notice of Appeal to include what is now Ground No. 9, the mere granting of such leave could in no way tie the hands of the full panel of the Court assigned to hear the appeal, to do other than to permit the additional ground to be argued *de bene esse*. It remained, and remains, a decision for the full panel as to whether the justice of the case requires that the appellant should be allowed at this point to rely upon a matter that he did not rely upon in the High Court but which he could have relied upon.

27. I consider that it is relevant that there has been no denial that the loan facility in the present case was drawn down, that the monies have not been repaid and that no prejudice was asserted before the High Court arising from the level of particularisation that was provided. None of the claims now being made and alluded to earlier at paragraph 22 of this judgment were raised before the High Court.

28. By the same token it must be accepted, as was acknowledged by Noonan J. in *Promontoria (Arrow) Ltd v. Mallon and Shanahan*, that the threshold for introducing new arguments on appeal in summary judgement cases is probably somewhat reduced from that applying in plenary proceedings, as was made clear by the Supreme Court in *Ennis v. Allied Irish Bank plc* [2021] IESC 12. In that case it was noted by MacMenamin J. that it was well settled since *K.D. v. M.C.* [1985] 1 I.R. 697 that save in the most exceptional circumstances, an appellate court should not hear and determine an issue which has not been tried and decided in the High Court, although there may be exceptions in the interests of justice. He went on to explain at paragraphs 18 and 19 of his judgement why it is essential that all points available to be argued are put before the court of first instance:

“18. But, although a grant of leave to argue new points, or raise new evidence, may arise in the interests of justice, it must be viewed from another perspective.

*Exceptions are not to be seen as a licence for lax procedure. There are serious competing considerations which will also concern a court when new arguments are sought to be raised on appeal. A person entitled to win a case should not be faced with the prospect of losing it because a valid and decisive point was not made at the trial at first instance. There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only encourage either sloppiness, imprecision, or lead to attempts to take tactical advantage (per Clarke J. (as he then was) in *Ambrose* [*Ambrose v Shevlin* [2015] IESC 10], paras. 4.11 - 4.13). 19. Whilst agreeing with what had been said in *Lough Swilly* [*Lough Swilly Shellfish Growers Co-operative Society Ltd v Bradley* [2013] 1 I.R. 227], in *Ambrose*, Clarke J. went on to emphasise that a case which would necessarily involve new evidence, and not simply a new legal argument, would place much greater weight on the side of the equation which lay against permitting a new point to be raised for the first time on appeal. There, the risk of real prejudice will be significant. Speaking in the context of that appeal, he pointed out that the prospects of a new trial would be difficult to avoid, and that the need to encourage a party to bring forward its full case at trial would carry more weight (para. 4.14).”*

29. Commenting on these passages in his judgement in *Promontoria (Arrow) Ltd v. Mallon and Shanahan*, Noonan J. observed:

“Although this was said in the context of plenary trials, it seems to me that they apply, albeit to a less strict degree, in summary proceedings where, as noted by

MacMenamin J. at para. 21, 'the courts tend to adopt a more flexible approach in applications to raise new arguments.' MacMenamin J. referred in this regard to Lopes v. Minister for Justice, Equality and Law Reform [2014] IESC 21; [2014] 2 IR 301; Irish Bank Resolution Company (in special liquidation) v. McCaughey [2014] IESC 44; [2014] 1 IR 749; Moylist Construction Ltd v. Doheny [2016] IESC 9, [2016] 2 IR 283 as examples of cases of the 'more flexible approach' in non-plenary cases. 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'."

30. I consider that it is relevant that, had the issue of the level of particularisation that was provided been raised before the High Court it is likely that the High Court judge would have afforded the respondent an opportunity to amend the summary summons and/or file additional affidavit evidence.

31. It also seems to me that the particularisation point that the appellant seeks now to rely upon is very much a technical point, and one which really has no bearing on the core disputes between the parties to be determined in the present appeal. I consider that the alleged particularisation deficit now being highlighted, even if it exists, would not in the circumstances of this case disable us from adjudicating on the real issues in controversy between the parties on this appeal.

32. Having weighed the considerations for and against, I have come to the view that the appellant should not be permitted to rely on inadequate particularisation of the claim before the High Court in this appeal. In doing so I must express agreement with, and I adopt as being also apposite in this case, the observations which I have just quoted from the judgment of Noonan J. in *Promontoria (Arrow) Ltd v. Mallon and Shanahan*. I am not persuaded that the interests of justice clearly require that the appellant should be allowed to rely this late in the day upon the alleged failure to adequately particularise the claim before the High Court in circumstances where he does not point to any meaningful prejudice. Moreover, even if the matters which I have alluded to at paragraph 22 above could qualify as such prejudice, he would in that event be required to explain why it is that the prejudice lately being alleged was not relied upon in the High Court. No such explanation has been proffered.

33. In the circumstances I would dismiss Ground of Appeal No. 9.

Other Grounds of Appeal.

34. It is convenient at this point to set out the other grounds of appeal relied upon by the appellant. His notice of appeal pleads:

1. The High Court judge erred in law and in fact in refusing to allow the cross examination of the deponents of the affidavits filed on behalf of the plaintiff, pursuant to Order 37 of the Rules of the Superior Courts, in particular, but not limited to those deponents present in court on the day of the hearing in the High Court.
2. The High Court judge erred in law and in fact in finding that there was no breach, by S.O., P.C. and C.H. (“The Other Borrowers”) of the Joint Venture Agreement dated 16 May 2007 with the defendant (“the joint venture agreement”) as a result of the Other Borrowers entering into the debt resolution agreement, dated 14 February 2017, with the plaintiff.

3. Without prejudice to the generality of the foregoing, the High Court judge erred in law and in fact in finding that, because the Other Borrowers had an obligation under the Joint Venture Agreement to indemnify the defendant, entering into the Debt Resolution Agreement did not and/or could not result in a breach of the Joint Venture Agreement.
4. The High Court judge erred in law and in fact in finding that the Debt Resolution Agreement did not constitute a release of or accord with the Other Borrowers by the plaintiff.
5. The High Court judge erred in law and in fact in finding that the entirety of the proceeds of sales under the Debt Resolution Agreement were credited to the amount due under the Loan, the subject matter of these proceedings (“the Loan”).
6. Without prejudice to the generality of the foregoing, the High Court judge erred in law and in fact in finding that the entirety of the proceeds of sales under the Debt Resolution Agreement were credited to the amount due under the Loan, in the circumstances where the plaintiff redacted evidence of where the proceeds of sales under the Debt Resolution Agreement were applied.
7. High Court judge erred in law and in fact in finding that payments under the Debt Resolution Agreement were to the benefit of the defendant.
8. The High Court judge erred in law by refusing to make an order in favour of the defendant for costs in so far as they arose prior to the 25th of July 2017, in the circumstances where the plaintiff concealed the Debt Resolution Agreement until this date.

Grounds of Possible Defence relied upon before the High Court.

34. In the proceedings before the High Court the appellant did not seek to dispute either that the monies advanced on foot of the facility loan had been borrowed, or that there had

been a failure to repay them to the respondent. However, as already outlined, the appellant contended that he had an arguable defence to the respondent's claim on two grounds. As the rejection of his contentions in that respect are the basis of Grounds of Appeal Nos. 2, 3 and 4 it is convenient to deal with those next.

35. First, he contended that a Debt Resolution Agreement, dated the 14th of February 2017, between the respondent and the borrowers is a release or accord for the purposes of s. 17 of the Act of 1961. Ground of Appeal No. 4 relates to this. Secondly, he contended that entry into the "Debt Resolution Agreement" amounted to a breach of a "Joint Venture Agreement" between the appellant and the Other Borrowers and that such a breach was induced by the respondent. Grounds of Appeal Nos. 2 and 3 relate to this.

Background to the Debt Resolution Agreement

36. The first reference in the evidence to the Debt Resolution Agreement is in the affidavit of the appellant sworn on the 30th of March 2017. That affidavit was sworn by him in response to the affidavit of Paul Diggin, sworn on behalf of the respondent on the 31st of January 2017 grounding the motion for summary judgment hearing. In his affidavit the appellant sets out the background to the loan transaction at issue in these proceedings. He describes the Co-ownership agreement entered into with his co-borrowers S.O., C.H., and P.C., (the parties thereto may be collectively referred to as "the Greenhills co-ownership") in respect of a development site at Greenhills Road, Drogheda Co, Louth ("the Greenhills site") and exhibits an unsigned copy of same. That agreement had provided, *inter alia*, that the Greenhills Co-ownership would purchase the Greenhills site from the appellant in the event that a condition precedent was met, namely that planning permission was obtained to develop it. He then refers to the Joint Venture Agreement entered into by the same parties on the 16th of May 2007 for the development of the Greenhills site and exhibits a copy of that.

37. The appellant's affidavit refers to the fact that planning permission for the Greenhills site was granted on 29 July 2008 "*which was in essence one week after the collapse of the economy.*" He says that as a result, the development did not proceed and the respondent appointed a receiver over the Greenhills site in or around March 2014.

38. In the next section of his affidavit he complains that the grounding affidavit of Mr Diggin does not set out the full terms of what occurred between the appellant and the respondent, nor does it detail the efforts that he had made to cooperate with the respondent. He alludes to a meeting with Mr Diggin, and a Mr Shane O'Keeffe also of the respondent's bank, at the Mespil hotel on the 16th of April 2013 at which he was requested to provide additional security within a matter of days, and which he duly provided. He states that it was recommended to him that the investors should engage a named financial adviser. He states that this financial adviser, who was it seems duly retained, negotiated a 'standstill agreement' on his behalf with the respondent dated the 11th of March 2015, and he exhibits a copy of same. At paragraph 16 of his affidavit he then states:

"I say that it was my understanding that this document was in fact a settlement agreement in full and final settlement of the loan facility. The standstill agreement provided that I was to make a payment of €50,000 within three months of executing a debt resolution arrangement, along with the sale of a number of properties, the proceeds of which would be applied to the debt. I signed the standstill agreement as I felt under huge pressure and extreme stress, however with the benefit of further financial advice, I now realise that I was not, and am not, in a position to fulfil the terms of the standstill agreement."

39. There is then a further affidavit of the appellant sworn on the 4th of May 2017, which repeats much of what he had stated already but which contains the following additional material averment:

“12. I met with SO at his offices on the 24th of November 2016 at 11am. At this meeting I told Mr O that Bank of Ireland had issued these proceedings against me. Mr O informed me that he and the other two co-investors had made a deal with Bank of Ireland which, I believe, involved them not paying back any of the loan, the subject matter of these proceedings, but paying money in respect of other loans. This is borne out by the plaintiff not issuing proceedings against my co-investors, while the amount claimed to be owing under the loan agreement has not been reduced.”

40. Yet a further affidavit was sworn by the appellant on the 16th of June 2017 in which he states (*inter alia*):

“2. I make this affidavit to clarify a matter in my previous affidavits.

Accord with and release of S.O., P.C., and C.H., by the Plaintiff

3. I say that when I met with S.O. at his offices on the 24th of November 2016 at 11am, he told me that he P.C. and C.H. would not be paying back the loan, the subject matter of these proceedings, because they had reached an agreement with the plaintiff and the terms of that agreement was that none of S.O., P.C. or C.H. would be pursued to repay the loan by the plaintiff.

4. This agreement reduced the claim of the plaintiff as against S.O., P.C. and C.H. by the entire value of the loan.

5. This accord and release was done by the plaintiff despite the fact that the plaintiff was aware that not repaying the loan would be a fundamental breach of the Joint Venture Agreement and would cause me damage.”

41. The appellant said the affidavit of the 16th of June 2017 was replied to by an affidavit sworn on behalf of the respondent by a Mr Alan Redmond on the 25th of July 2017. He exhibited a somewhat redacted version of the Debt Resolution Agreement (“DRA”) entered into between the respondent and the appellant’s co-borrowers, S.O., P.C., and C.H. as “AR1”.

The Debt Resolution Agreement

42. The DRA is dated the 14th of February 2017 and was entered into between The Governor and Company of the Bank of Ireland (“the Bank”) and the individuals listed in Schedule 1 to that agreement, being S.O., P.C., and C.H. The document commences with some general recitals, followed by a “definitions and interpretation” section (Clause 1). The appellant’s co-borrowers, S.O., P.C., and C.H., are referred to collectively therein as “the Borrowers.” “Finance Documents” are those documents listed in schedule 2 to the DRA and include the facility letter pursuant to which the respondent made available the loan facility to the appellant and the borrowers. Clause 1 also defines “Debt Resolution Date” as being the later of (a) satisfaction of each of the Conditions of the agreement; and (b) the date falling one hundred and twenty (120) days following the fifth anniversary of the DRA.

43. The next section of the document (Clause 2) is entitled “Repayment” and it sets out that S.O., P.C. and C.H. jointly and severally agree and undertake to pay or procure the payment of the sale proceeds of certain properties (the identities of which are redacted), and certain rental income from certain properties (the identities of which are redacted) to the Bank immediately upon receipt and, pending such payment, shall hold all such proceeds on trust for the Bank. It goes on in addition to provide that S.O. and C.H. jointly and severally similarly agree and undertake to pay or procure the payment of the sale proceeds of certain (other) property (the identity of which is redacted) to the Bank immediately upon receipt and, pending such payment, shall hold all such proceeds on trust for the Bank. Further, it goes on to provide that S.O., P.C., and C.H., respectively, should each individually make certain further payments to the Bank.

44. Clause 3 is entitled “Application of Payments”, and sets out how monies received would be applied, and the order in which they would be applied. Included in the list of liabilities to which payments would be applied are those arising under “the Greenhills Facility”. In the case of some payments, the DRA envisages the application of those payments to the Greenhills facility only after certain other liabilities have been satisfied. In the case of certain other payments, it envisages immediate application of such payments towards liabilities arising under the Greenhills facility.

45. It may be helpful to set out the terms of sub-clauses 3.1 to 3.3 inclusive:

“3.1 The Owl’s Rest Sale Proceeds and the [redacted] Sales Proceeds (receipt of both is acknowledged) which are paid or have been paid to the Bank pursuant to Clause 2 (Repayment) shall be applied:

- (a) firstly, in or towards payment of any accrued interest and fees due but unpaid under the [redacted] Facility; and
- (b) secondly, in order towards payment of any principle due but unpaid under the [redacted] Facility;
- (c) thirdly, in or towards payment of any accrued interest and fees due but unpaid under the Greenhills Facility; and
- (d) fourthly, in or towards payment of any principle due but unpaid under the Greenhills Facility.

3.2 The [redacted] Rental Income and the [redacted] Sales Proceeds which are paid to the Bank pursuant to Clause 2 (Repayment) shall be applied:

- (a) firstly, in or towards payment of any accrued interest and fees due but unpaid under [redacted] Facility; and
- (b) secondly, in or towards payment of any principal due but unpaid under [redacted] Facility;

(c) thirdly, in or towards payment of any accrued interest and fees due but unpaid under the Greenhills Facility; and

(d) fourthly, in or towards payment of any principal due but unpaid under the Greenhills Facility.

3.3 The [redacted], the SO Initial Payment, the PC Initial Payment, the PC Instalments, the CH Initial Payment, the CH Subsequent Payment, the SO Subsequent Payment shall be applied:

(a) firstly, in or towards payment of any accrued interest and fees due but unpaid under the Greenhills Facility; and

(b) secondly, in or towards payment of any principle due but unpaid under the Greenhills Facility.”

46. Clause 4 of the DRA entitled “Security and Amendment to Steelworks Facility” is not directly relevant to the issues arising on this appeal. Clause 5 entitled “Borrower Undertakings” sets out various undertakings given by the borrowers. Clause 6, entitled “Representations” sets out various representations made, and warranties given by the borrowers to the Bank. Clause 7, entitled “Anti-Embarrassment”, then sets out disclosure covenants and undertakings with respect to acquisitions of further assets by the borrowers.

47. Clause 8, entitled “Conditions and Forbearance” then contains the core of the DRA and it is appropriate to set out certain of its terms:

“8.3 Subject strictly to the fulfilment of each of the conditions to the Bank’s satisfaction (or waiver, as the case may be, of any of the conditions at the Bank’s sole discretion), the Bank agrees that, with effect from the Debt Resolution Date, it shall forbear from pursuing SO for the balance of the remaining Borrower Liabilities and the Banks recourse to SO shall be limited to any assets the subject of security created pursuant to the Security Documents.”

48. Clauses 8.4, and 8.5, respectively, were in substantively identical terms to clause 8.3, but related to P.C. and C.H., respectively.

49. Clause 9 is entitled “Absolute Bar”, and provides:

“This Agreement may be pleaded and tendered by the Bank as an absolute bar to any defence offered by any defaulting borrower in any proceedings brought by the Bank in relation to this Agreement or the Finance documents. If any of the conditions is not met to the satisfaction of the Bank, each Borrower agrees that the Bank is entitled to apply to the court on 2 Business Days’ notice for the purpose of entering judgement against him in such sums as may be due from him under or in connection with the Finance Documents, plus the costs of the proceedings. For the avoidance of doubt, each Borrower hereby consents to such judgement.”

50. Clause 10 is entitled “Reservation of Rights”, and subclause 10.1 provides:

“For the avoidance of doubt, each Borrower acknowledges and accepts that:

- (a) this Agreement shall not in any way impair or prejudice, or be construed as constituting a waiver or release or satisfaction of, any of the Bank’s rights or remedies under or in connection with the Finance Documents whether arising under their terms, at law or equity or otherwise;
- (b) if the Borrowers are in default of their obligations under this Agreement, the Bank is not precluded from commencing the exercise of such rights and remedies, including, without limitation, demanding repayment of all sums due to it by the Borrowers pursuant to the Finance Documents or otherwise arising and instituting such proceedings or taking such other steps as are necessary to recover the sums due to it from the Borrowers; and
- (c) all of the aforementioned rights and remedies, whether or not subsisting on the date of this agreement, are hereby expressly reserved by the Bank”

51. Clause 11 then deals with “Costs”, Clause 12 deals with miscellaneous matters under the heading “General”, Clause 13 deals with “Waiver”, Clause 14 deals with “Invalidity and Severability”, and finally Clause 15 deals with “Notices”.

The Joint Venture Agreement

52. The Joint Venture Agreement (“JVA”) is exhibited as “KD2” to the affidavit of the appellant sworn on the 30th of March 2017, and it is proposed to describe it in essential terms.

53. The JVA is dated the 16th of May 2007. The parties to the JVA are KD (i.e., the appellant), S.O., P.C. and C.H. respectively, and are collectively described therein as “the Co-Owners”. The first schedule to the JVA sets out the respective names, addresses, Joint Venture Contribution and Property-Owning Percentages of each of the co-owners. Clause 3 of the agreement sets out certain definitions, while clause 4 sets out certain recitals, namely that:

- “4.1 The Co-Owners are the legal and beneficial owners of the Thomas Lappin site and the Maurice Keane site and are entitled to become the legal and beneficial owners of the Newport site as tenants in common in the Property Owning Percentages.
- 4.2 KD is the sole legal and beneficial owner of the Greenhills Road Property which adjoins the Jointly Owned Properties.
- 4.3 The Co-Owners wish to apply for planning permission to develop The Jointly Owned Properties and KD wishes to apply for planning permission to develop the Greenhills Road Property.
- 4.4 The Co-Owners recognise that there would be a significant commercial advantage to them if KD were to agree to include the Greenhills Road Property in a single application for planning permission in respect of the

Jointly Owned Properties and the Greenhills Road Property for an integrated residential development in respect of the development site.

4.5 KD has agreed with the other co-owners to make the Greenhills Road Property available for such a planning application in the terms hereafter appearing”

54. Clause 5 of the JVA then sets out the essential terms of the agreement, and (to the extent relevant to issues on this appeal) they are hereinafter reproduced:

“5.1 The Co-Owners do hereby agree to come together to form a Joint Venture in connection with the Development Site as hereafter described.

5.2 The Co-Owners do hereby agree to make an immediate application for planning permission for a residential development on the Development Site as soon as possible subsequent to the execution of these presents (“the Planning Application”) the contents and detail whereof has already been agreed between the Co-Owners.

5.3 (Not relevant)

5.4 As an inducement to KD to agree to the inclusion of the Greenhills Road Property in the Development Site for the purpose of the application for Planning Permission, it is agreed that KD shall be given a loan in the amount of the KD Loan the said KD Loan to be paid to KD upon the execution of this Agreement.

5.5 The KD Loan shall be funded by the Joint Venture out of Bank Facilities.

5.6 (Not relevant)

5.7 It is anticipated that a final grant of Planning Permission shall issue within 18 months of the date of this Agreement. Upon the issue of such Planning Permission it is agreed that the Development Site shall be sold as soon as reasonably practicable thereafter. In the event that the Planning Permission does not issue for whatever reason within the said 18-month period or within such later period as may be agreed between the Co-Owners then the Development Site shall be sold in any event.

5.8 (Not relevant)

5.9 (Not relevant)

5.10 It is agreed that in consideration of the premises KD shall be entitled in priority to the first €4.65m out of the Net Sale Proceeds, the first €2m whereof shall be deemed to have been paid to him upon the repayment of all sums due to the Bank whereupon the KD Loan shall be deemed to have been repaid by him.

5.11 The sale proceeds of the Development Site shall be distributed in accordance with the provisions of clause 9.1.”

55. Clause 6 sets out “The Objects of the Joint Venture”. Clause 7 contains provisions relating to “Accounts and Funding”. Clause 8 deals with “Sale of Property and Termination of Co-ownership Investment”. Clause 9, entitled “Distribution of Net Sale Proceeds”, sets out the order of priority in which the sale proceeds of the development site shall be distributed. Clause 10 deals with “Control and Management of the Co-ownership Investment”. Clause 11 deals with “Duties of Co-Owners”, while Clause 12 deals with miscellaneous under the heading “General”.

56. Is appropriate to set out the terms of subclauses 11.1 and 11.2 respectively having regard to references thereto in the High Court judgement and in the submissions of the parties respectively:

“11.1 Duties of Co-Owners regarding Bank Facilities

Each of the Co-Owners undertakes with the others to comply with its individual obligations under the Bank Facility Agreement and the Bank’s Security.

11.2 Personal Obligation and Indemnity

11.2.1 The Co-Owners shall have no personal obligation

- (i) to the Bank, save as provided for by the Bank Facility Agreement and the Bank’s Security;

- (ii) for any other debts and liabilities of the Joint Venture except as provided for in this Agreement.

11.2.2 In the event of a liability arising which is properly attributable to the Joint Venture then each Co-Owner will indemnify and hold harmless all of the other Co-Owners to the extent of his interest.

11.2.3 The Co-Owners agree that their liabilities in connection with the Joint Venture are several rather than joint and will be limited to their respective Property Owner Percentage. If any claim or demand is made against a Co-Owner arising out of this Agreement then each of the Co-Owners agrees to indemnify and keep indemnified the other or others of the Co-Owners against such claim or demand and all proceedings, costs, claims and expenses relating thereto.”

*Is the DRA a release or accord for the purposes of
s.17 of the Civil Liability Act 1961?*

57. This question requires to be answered to address Ground of Appeal No. 4.

58. S.17 of the Act of 1961 provides (to the extent relevant):

“(1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.

(2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or

accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest."

59. The High Court judge addressed the appellant's contention that the DRA represented a release or accord for the purposes of s.17 of the Act of 1961 as follows:

"13. The question is then whether the "Debt Resolution Agreement" is a release or accord for the purposes of section 17. This Court concludes that the terms of clause 10.1, titled "Reservation of Rights", of the "Debt Resolution Agreement" answers this question. Clause 10.1(a) provides:-

*'For the avoidance of doubt, each Borrower acknowledges and accepts that:-
(a) this Agreement shall not in any way impair or prejudice, or be construed as constituting a waiver or release or satisfaction of, any of the Bank's rights or remedies or in connection with the Finance Documents whether arising under their terms, at law or equity or otherwise...'*

14. 'Finance Documents' are defined in the said agreement as including the facility letter pursuant to which the plaintiff made available the loan facility to the defendant and the borrowers. Further, clause 9, entitled 'Absolute Bar', provides that:-

'This Agreement may be pleaded and tendered by the Bank as an absolute bar to any defence offered by any defaulting Borrower in any proceedings brought by the Bank in relation to this Agreement or the Finance Documents ...'

15. It is clear to me, based on the wording of the 'Debt Resolution Agreement', that it could not constitute a release or accord for the purposes of s. 17 of the Act of 1961. The defendant sought to rely on ACC Bank plc. v. Malocco [2000] 3 I.R. 191. In the course of her judgment, Laffoy J. stated, at p. 201:-

'I have no doubt that the submission made by counsel for the plaintiff that the effect of the settlement between the defendant's wife and the plaintiff on the liability of the defendant on foot of the loan agreement falls to be determined by application of s. 17 of the Act of 1961 is correct. What s. 17 means in the context of a wrong which is a breach of contract in the form of non-payment of a debt for which two debtors are concurrently liable and of a settlement agreement with one of the debtors is that, if the settlement agreement indicates an intention that the other is to be discharged, the settlement agreement effectuates his discharge, but, if it does not, he gets the benefit of the settlement agreement and his liability is reduced accordingly. ... As to whether an accord or settlement agreement "indicates", within the meaning of that word in s. 17, that a co-debtor is to be discharged, it seems to me that it does so indicate if such outcome is agreed expressly or by necessary implication.'

In my view, this authority is of no benefit to the defendant given what I consider to be the clear and expressed terms of the 'Debt Resolution Agreement'."

60. In written submissions to the Court of Appeal, and in oral submissions at the hearing of the appeal, it was urged upon us by the appellant that the High Court judge had been incorrect both in his interpretation of the implications or effect of Clauses 9 and 10.1, respectively, of the DRA, and in his rejection of *ACC Bank plc. v. Malocco* as being an authority that could provide support for the appellant's contention that s.17 can apply in the case of an action for non-payment of a debt.

61. In regard to the former point, the appellant argued that the High Court judge had fallen into error in only having regard to sub-clause 10.1(a), rather than considering the combined effect of sub-clauses 10.1(a) and (b). It was submitted that, when Clause 10.1 is

read, sub-clauses 10.1(a) and (b) must be interpreted as reservations of rights pending the full implementation of the DRA and that it is absolutely clear from clauses 8.3, 8.4 and 8.5, that once the various conditions are met, the Bank will release the Other Borrowers as of the Debt Resolution Date. The respondent's position in response to this is that it is impossible to reconcile the contention, maintained by the appellant, that clauses 8.3, 8.4 and 8.5 gave effect to an agreement whereby the plaintiff agreed not to pursue the Other Borrowers for monies owing under, *inter alia*, the loan once various conditions were met, with the wording of the DRA which provides expressly that "*it shall not in any way impair or prejudice, or be construed as constituting a waiver or release or satisfaction of, any of the Bank's rights or remedies under or in connection with*" the facility.

62. As regards the latter point, i.e., that the High Court judge was wrong in maintaining that *ACC Bank plc. v. Malocco* could not assist the appellant, it is more fundamental in its implications. If the appellant is wrong, and s.17 of the Act of 1961 does not apply to debt claims, then the pre-existing common law rules as to release, satisfaction and accord apply. Importantly, it has at all stages been the respondent's case that s.17 of the Act of 1961 does not apply to debt claims.

63. The common law position is admirably set out at paragraphs 19-017 to 19-020 inclusive of *Chitty on Contracts*, 34th edition (2021: Sweet & Maxwell), volume 1, as follows:

"19-017 The discharge of one joint debtor by a release in a deed or by accord and satisfaction discharges all, in accordance with the general principle that joint liability creates only one obligation; and the same is true, illogical though it may seem, if one joint and several debtor is so discharged. On the other hand, a covenant not to sue one joint or joint and several debtor does not discharge the others, though it

may leave the covenantee liable to pay contribution to the other debtors, and thus deprive the covenant of some of its apparent effect.

19-018 The courts generally construe a release as a covenant not to sue if it contains an indication of intention that the other debtors are not to be discharged. Moreover, even an accord and satisfaction with one joint or joint and several debtor will not discharge the others if the agreement, expressly or impliedly, provides that the creditor's rights against them shall be preserved.

19-019 The distinction between a release and a covenant not to sue rests on the intention of the parties. A release involves total destruction of the debt or claim; a covenant not to sue implies that the creditor undertakes not to take proceedings against the debtor in question (the covenantee) while not necessarily abandoning their rights against any other party liable. In this context the term 'covenant' does not bear its traditional meaning of a promise in a deed, but extends to any promise.

19-020 In practice the difficulty normally arises from the fact that, in making the agreement, the parties have overlooked the position of co-debtors, and it is not clear whether the creditor intends to reserve their rights against them or not. If the agreement appears from its words to be a release and there are no words reserving rights against the other debtors nor anything in the circumstances to rebut the prima facie meaning of words used, the agreement will release all the debtors; but it would seem that the courts lean in favour of other debtors not being discharged by construing the agreement as a covenant not to sue for as a release but subject to an implied reservation of rights against other debtors."

64. Statements to the same effect are also to be found in Clark and Lindsell on Torts, 23rd edition, (2022: Sweet & Maxwell) at paragraph 30-37.

65. The effect of s.17 of the Act of 1961, in circumstances in which it applies, on the pre-existing common law position as just stated, is set out by Anthony Kerr, S.C., in his well-respected commentary on *The Civil Liability Acts*, 5th edition, (2017: Round Hall) at pp 23-24. He states:

“Subsection (1) is in large part declaratory, except that it extends to several concurrent tortfeasors possibly would not have been discharged by a release or accord with one of their number even though such release or record expressly so provided.

Subsection (2) sweeps away the subtle distinctions between a release and a covenant not to sue and clarifies the law relating to accord and satisfaction. Prior to the Act the release of one of several joint tortfeasors release all the others (see *Duck v Mayeu* [1892] 2 Q.B. 511 at 513), even though this was not in the contemplation of the parties, but an agreement on the part of the plaintiff not to sue one of the defendants did not prejudice his or her right to proceed against the others. This was because the release was seen as extinguishing the cause of action: *Cutler v. McPhail* [1962] Q.B. 292 at 296. According to Glanville Williams, *JTCN* [the acronym stands for Joint Torts and Contributory Negligence (1954)], p. 504, the subsection is based on the desirability of facilitating out-of-court settlements and the principle that partial satisfaction by one concurrent wrongdoer operates in favour of all. To prevent collusion between the injured person and one wrongdoer whereby the injured person obtained in aggregate more than the amount of the damages to which he or she was justly entitled, Glanville Williams, *ibid.*, recommended the use of the words ‘in the amount of the consideration paid for the release or accord’. This has the consequence that the claim against the other wrongdoers is reduced even though the release record stipulates that the money paid shall be regarded as consideration for the release or accord and not as satisfaction of the liability. Although the word ‘accord’ (unlike the

word ‘satisfaction’) is not defined by the act it means ‘an agreement that is a release in all respects except that it is not under seal’: per Egan J in *Murphy v. J Donohoe Ltd* [1992] I.L.R.M. 378 at 396. These provisions were extensively considered by Laffoy J. in *ACC Bank plc v. Malocco* [2000] 3 I.R.191.” ...

“As to whether an accord or settlement agreement indicated that a co-debtor was to be discharged, it seemed to Laffoy J. that it did so indicate if such outcome was agreed expressly or by necessary implication. In a case where the defendant raises by way of defence that he or she has been discharged by virtue of an accord or settlement agreement with a codebtor indicating an intention that he be so discharged, the onus was on the defendant to establish such intention. For the position in England, see *Morris v. Wentworth-Stanley* [1999] Q.B. 1004.”

[Explanation in square brackets by the Court]

66. While, as we shall see, *ACC Bank plc v. Malocco* has been held to have been wrongly decided insofar as it held that s.17 of the Act of 1961 could apply to an action for recovery of a debt, other statements by Laffoy J. in that case concerning the background to the enactment of s.17 and concerning the law on accord and satisfaction generally were uncontroversial.

67. In fairness to all concerned it must be stated that at the time of the hearing of this appeal the legal position in regard to whether s.17 could apply to an action for recovery of a debt was uncertain. There was one line of authority comprising cases such as *Jervis v. Harris* [1996] Ch 195 and *Histon v. Shannon Foynes Port Company* [2006] IEHC 190 supporting the view that a claim for payment of a debt was not a “wrong” within the meaning of the Act of 1961. However, there were also High Court judgments in cases such as *ACC Bank plc. v. Malocco*; *Allied Irish Banks v. O’Reilly* [2019] IEHC 151 and *Ulster Bank Ireland DAC v.*

McDonagh [2020] IEHC 185 that represented authority for the proposition that s.17 of the Act of 1961 does apply to debt claims.

68. Since judgment was reserved in the present case the legal position has been clarified in a decision of the Court of Appeal in *Ulster Bank Ireland Limited v. McDonagh* [2022] IECA 87. The facts of the case were that the bank in question was suing to recover a substantial sum of money (c. €22M) advanced to the defendant borrowers as a loan facility for building development purposes. It had been a condition precedent of the loan facility letter that the bank would receive an independent valuation addressed to the bank confirming that lands which were to be mortgaged and charged as security for the loan at a valuation of a minimum of €56M. A firm of valuers (CBRE) provided a valuation report valuing the lands in question at €57M, which valuation report was relied upon by the bank. Subsequent to the drawing down of the loan the property market collapsed, and the defendants failed to repay the loan. The bank issued proceedings to recover the debt plus interest which was continuing to accrue. These proceedings were in fact compromised by agreement, but the Compromise Agreement broke down. In parallel with the proceedings initiated by the bank against the borrowers, the bank also sued the valuers, alleging negligence in the preparation of the valuation of the lands in question. Subsequently the bank settled its action against the valuers for a sum of €5M which was credited to the defendant borrowers' loan account. When the bank's action against the defendant borrowers came on for hearing in the High Court it was argued, *inter alia*, by the defendants that the bank was, by reason of what the defendant borrowers characterised as a compromise with a concurrent wrongdoer (i.e. the valuers), and having regard to the terms of s.17(2) of the Act of 1961, precluded from claiming from the defendants some or all of the same debt. The High Court determined the issue against the defendants and granted judgment to the bank for a sum just short of €23M proven in respect

of the debt and interest against the defendants jointly and severally. The defendants subsequently appealed to the Court of Appeal.

69. In an impressive joint judgment of Murray J. and Collins J. (Pilkington J. concurring), the Court of Appeal considered, *inter alia*, the conflicting case law on the issue of whether s.17 of the Act of 1961 (the Act of 1961 is referred to in the judgment in abbreviated form as “CLA”) can apply to a claim for a debt. They held that *ACC Bank plc. v. Malocco* and *Allied Irish Banks v. O’Reilly* had been wrongly decided, and determined that:

“228. The provisions in the CLA governing concurrent wrongdoers are concerned exclusively with the allocation of responsibility between wrongdoers facing legal action for the recovery of damages.

229. A claim for recovery of a debt is not an action for the recovery of damages, but an order in the nature of specific performance of a contractual obligation. The law governing contribution as between or claims as against concurrent wrongdoers has never applied to an action for the recovery of a debt and nothing in the CLA changes that.

230. Even if the CLA could be interpreted in such a way that an action for the recovery of a debt and an action for damages for breach of contract are to be equated so that debt recovery proceedings come within Part III CLA, a claim against a debtor on foot of a loan instrument and a claim against a valuer whose negligence is alleged to have resulted in the granting of the loan are not actions to recover the same ‘damage’. The debtor’s liability is for the whole of the debt while the valuer’s liability is (at most) only for the amount of the loan that the lender is unable to recover from the debtor. The liability of the debtor and the debtor are not therefore concurrent.

231. *We agree with the contention of the Bank that if the defendants wished to make a case that CBRE was a wrongdoer it was incumbent on them to adduce some expert evidence that that firm had acted negligently as alleged by the defendants.*

232. *It is only if CBRE would have had a contribution liability in excess of €5 million that any reduction to the Bank's claim against the Defendants would arise. In our view, there is absolutely no basis on which it could be suggested that CBRE could have any such liability to the Defendants. Indeed, we find it impossible to see a basis on which CBRE could be required to make any contribution to the Defendants, given that the effect of such contribution would be to relieve the Defendants of a contractual obligation freely undertaken by them and confer a windfall benefit on them insofar as they would be relieved, at least in part, from the obligation to repay monies of which they had had the benefit."*

70. The implications of the judgment in *Ulster Bank Ireland Limited v. McDonagh* for the appellant in the present case is that his claim that the DRA constituted a release or accord to which s.17 of the Act of 1961 applied is misconceived and must inevitably fail. It is now clear that the provision at issue does not apply in the case of proceedings for the recovery of a debt.

71. As to the practical consequences for the appellant, we should draw attention to the following further observations of Murray J. and Collins J. in *Ulster Bank Ireland Limited v. McDonagh*, at paragraph 104 of their joint judgment:

"104. This case is not concerned with the manner in which liability as between joint debtors or debtors and guarantors should be determined. However, having regard to our finding that an action to recover a debt is not within the contemplation of those provisions of CLA addressing the relationship between concurrent wrongdoers and, as a result, our conclusion that both Malocco and O'Reilly were wrongly decided, we

should make clear that this does not in any sense have the consequence that in either of these situations a creditor is entitled to effect double recovery nor does it mean that a compromise with one debtor in these circumstances has no implications for another party liable on the debt. Instead, the relevant common law rules and applicable equitable principles continue to operate. In the case of joint debtors this means that the release of one co-debtor in an agreement which did not expressly or impliedly reserve the creditors' rights against the others will wholly extinguish the creditor's rights."

72. The only remaining question then is whether the DRA expressly or impliedly reserved the Bank's rights to proceed against the appellant.

73. The High Court judge's view was that the effect of Clauses 9 and 10(1)(a) of the DRA was that the Bank had reserved its rights against the appellant as a co-debtor. We think that he was correct having regard to the wording of those clauses, the wider terms of the DRA, and the overall context and that any other view is untenable.

74. We therefore reject Ground of appeal No. 4.

Did entry into the DRA amount to a breach of the JVA;

and, if so, was such breach induced by the respondent?

75. These questions require to be answered to address Grounds of Appeal Nos. 2 and 3.

76. There is no real dispute between both sides in this litigation as to the law on inducement of breach of contract. Pointing to a number of English cases (*Lumley v. Gye* (1853) 2 E & B 216, 118 ER 749 and *Emerald Construction Co Ltd v. Lowthian* [1966] 1 WLR 691), and passages from an unidentified edition of Clerk & Lindsell on Torts, and from McMahon & Binchy on the Law of Torts, 4th ed, the appellant contends that in order for him to be successful he needs to show that it is arguable that (1) the Other Borrowers had a legal obligation to him; (2) that the bank knew of this obligation; (3) that the bank induced the

Other Borrowers to breach that obligation, and (4) that that breach caused him to suffer damage.

77. The respondent in their written submissions, at paragraph 43, point to the Irish High Court judgment of O’Neill J. in *Iarnród Éireann/Irish Rail v. Holbrooke (and ten others), and the Irish Locomotive Drivers Association* [2000] 11 ELR 109. By way of brief explanation of the background to the case it should be stated that the first eleven defendants to the proceedings were all locomotive drivers in the employment of the plaintiffs. They were also members of the national executive committee of the twelfth named defendant, the Irish Locomotive Drivers Association. The plaintiffs sought damages from all of the defendants for the losses they claimed to have suffered arising out of two stoppages which occurred in the rail service, stoppages they claimed were brought about by the actions of the defendants and in respect of which the plaintiffs claimed that all of the defendants were liable for damages for procuring breaches of the plaintiffs’ commercial contracts.

78. In his judgment in that case, O’Neill J. adopted as a correct statement of the law the essential ingredients of the tort of inducement of breach of contract identified by Hamilton J. in *Armstrong Motors Ltd v. Coras Iompair Éireann* (unreported, High Court, 2nd of December 1975). These were expressed to be:

- “1. That the defendants did know of the existence of the Contracts and intended to procure their breach.
2. That the defendants did definitely and unequivocally persuade, induce or procure the employees concerned to break their Contracts of Employment with the intention of procuring the breach of the contracts.
3. That the employees so persuaded, induced or procured did in fact break their contracts of employment.

4. That the breach of the Contract forming the subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their Contracts of Employment.”

79. Proceeding on the basis that the four ingredients identified by the appellant are correct having regard to *Iarnród Éireann/Irish Rail v. Holbrooke and Ors*, it is noted that the respondent bank in the present case accepts that it was aware of the JVA.

80. The relevant provision of the JVA relied upon by the appellant is Clause 11.1 thereof which relates to the “Duties Of Co-Owners Regarding Bank Facilities” and states that “[e]ach of the Co-Owners undertakes with the others to comply with its individual obligations under the Bank Facility Agreement and the Bank’s Security.”

81. The case being made by the appellant is encapsulated in paragraphs 50 to 55 of his written submissions, which bear reproduction:

“50. ... this must include constructive knowledge of the obligation of the Other Borrowers to pay back the loan.

51. Where the defendant failed in the High Court is that the High Court found that it was not arguable that by entering the DRA the Other Borrowers breached the JVA. It is respectfully submitted that this finding is incorrect.

52. Under the JVA, the Other Borrowers had an obligation to pay back the loan in full. This obligation was for the benefit of all parties to the JVA, including the defendant, so as to avoid the very situation in which the defendant now finds himself, i.e. being pursued solely for all sums outstanding under the loan.

53. As a result of the above, an implied term of the JVA was that Other Borrowers would not dispose of assets in a manner which resulted in them being unable to repay the loan.

54. From the point of view of the Other Borrowers, the very purpose of the DRA, was that they would pay back less than the full amount of the loan. This is what has happened since the DRA was signed. It is also what the defendant avers he was told by SO, was the result of the DRA.

55. The manner in which the DRA operated, by selling assets and paying off debts other than the loan, appears to have the effect of reducing the ability of the Other Borrowers to pay back the loan in full, while minimising the amount by which the loan is reduced. The full effect of this operation is a matter which cannot be resolved in a summary judgement application.”

82. In counter submissions the respondent says that compliance with the provisions of the DRA by the Other Borrowers did not amount to a breach of the JVA. The respondent says that there are a number of difficulties with the appellant’s submissions.

83. First, insofar as it was alleged in paragraph 52 of the appellant’s submissions that the appellant was “being pursued solely for all sums outstanding under the loan” (which we understand to mean that the appellant was the only one of the borrowers being pursued), the respondent says that that is simply not correct. The respondent points to paragraph 15 of the affidavit of Mr Diggin (sworn on the 14th of October 2020) in which he states that the (other) borrowers made payments in a cumulative total of €270,000 after the DRA was concluded being:

- €40,000 on the 13th of March 2017;
- €10,000 on the 15th of March 2017;
- €200,000 on the 17th of May 2017;
- €10,000 on the 8th of August 2017; and
- €10,000 on the 31st of August 2017

Further, Mr Diggin goes on to state at paragraphs 16 and 17 of his said affidavit that since judgment was granted by the High Court on the 18th of July 2018, yet further payments have been made by the Other Borrowers, being:

- €250,000 on the 28th of November 2019; and
- €218, 065 on the 5th of December 2019 (being the net proceeds of the sale of the property known as the Greenhills Site).

84. The respondent says that while it is true that the appellant is the only one of the borrowers against whom court proceedings have been issued by the Bank, that is not the same as him being the only person pursued by the Bank. The point is made that the extensive range of conditions with which the Other Borrowers must comply in order to benefit from the Bank's forbearance under the DRA indicate that they too have been pursued by the Bank for the debts they owe.

85. Secondly, the respondent says that the implied term contended for by the appellant cannot be read into the JVA, namely that the Other Borrowers would not dispose of assets in a manner which would result in their being unable to repay the loan, may be permissibly implied into the JVA.

86. We were referred to a number of cases by the respondent in support of their contention in that respect, i.e. *Sweeney v. Duggan* [1997] 2 IR 531, and *Meridian Communication v. Eircell Ltd* [2002] 1 IR 17. In the latter case at p.41 of the report , O'Higgins C.J., having reviewed a large body of both Irish and English case-law concluded:

"The following principles emerge:-

- *before a term will be implied in a contract it must be necessary to do so, and not merely reasonable;*
- *the term must be necessary to give business efficacy to the agreement;*

- *it must be a term which both parties must have intended, that is, a term based on the presumed common intention of the parties;*
- *the court will approach the implication of terms into a contract with caution;*
- *there is a presumption against importing terms into a contract in writing and the more detailed the terms agreed in writing the stronger is the presumption against the implication of terms;*
- *if the term sought to be implied cannot be stated with reasonable precision, it will not be implied.*

The decision of the Court in all matters where contractual terms are alleged to be implied is based on those principles.”

87. The respondent say there is no wording in the JVA to the effect that the Other Borrowers would refrain, or forbear, from dealing with their assets generally, so as to ensure that there would always be resources available, in the event of the Other Borrowers experiencing financial difficulties, to discharge their indebtedness under the facility, in preference to any other financial obligation which they might have.

88. It was further submitted that the officious bystander would not assume that a joint-venture agreement, which involves a number of persons working together on a discrete project, imports an obligation on all the parties thereto to refrain from dealing with all of their assets, with a view to ensuring that the creditors of the joint venture could always have recourse against those assets, as and when such recourse became necessary.

89. It was further submitted that the suggested term may not be implied under the “*business efficacy*” test either. The respondent maintains that applying the criteria identified in the *Meridian Communication* case it is clear that the asserted term is not necessary to render the JVA efficacious and that it is not a term which can plausibly be said to be based on

the joint intention of the parties. Moreover, given that the Facility is a highly detailed commercial contract, the court should exercise particular caution when invited to imply any terms, especially when the term sought to be implied is as vague and potentially far reaching as that postulated by the appellant in this case.

90. The respondent says that in circumstances where a term such as that which the appellant seeks to have implied into the JVA does not satisfy the criteria identified in the case law for the implication of terms into commercial contracts, it is untenable for the appellant to maintain that it was in fact a term of the contract. Accordingly, there is no basis for apprehending that the JVA was inconsistent with the terms of the DRA.

91. Finally, relying on *Edwin Hill & Partners v. First National Finance Corp plc* [1989] 1 WLR 225, the respondent says in the alternative that even if the asserted inconsistency between the JVA and the DRA were held to exist, the Bank's inducement of the Other Borrowers to breach the JVA was in any event capable of being justified on the basis that in doing so the Bank was merely securing its own right to be repaid monies owed to it by the Other Borrowers.

92. The High Court judge dealt with this issue at paragraphs 16 and 17 of his judgment. Before outlining what he said in that regard it is important to take account of his remarks at an earlier stage of his judgment at paragraphs 5 and 6 respectively, where he stated:

"5. In a case such as this where the defendant is relying upon an interpretation of a statutory provision and/or the construction of a contract(s), it seems to me that the judgment in McGrath v. O'Driscoll [2007] 1 ILRM is of particular relevance, where Clarke J. (as he then was) stated, at p. 210:-

'So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do

so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.'

6. I am satisfied that the issues raised by the defendant herein are 'relatively straightforward' and that 'there is no real risk of an injustice being done by determining those' arguments put forward by the defendant on a motion to enter final judgment. Further, it should be noted that at the hearing of the motion I had the benefit of detailed legal submissions together with books of the relevant authorities from Mr. Andrew Fitzpatrick S.C., on behalf of the plaintiff, and Mr. Donnchadh Woulfe B.L., on behalf of the defendant. I will now consider the defences put forward on behalf of the defendant."

93. On the specific issues of whether entry into the DRA amounted to a breach of the JVA and, if so, whether such breach was induced by the respondent, the High Court judge held:

"16. The second ground of defence was that by entering into the 'Debt Resolution Agreement' the borrowers were in breach of the 'Joint Venture Agreement', such breach being induced by the plaintiff. Although it would seem that the plaintiff was aware of the 'Joint Venture Agreement', there was no breach of it by virtue of the 'Debt Resolution Agreement'. I refer to clause 11.1, titled 'Duties of Co-Owners regarding Bank Facilities', which states:-

'Each of the Co-Owners undertakes with the others to comply with its individual obligations under the Bank Facility Agreement and the Bank's Security.'

Further, at 11.2 titled 'Personal Obligation and Indemnity':-

'11.2.3. The Co-Owners agree that their liabilities in connection with the Joint Venture are several rather than joint and will be limited to their respective Property Owner Percentage. If any claim or demand is made against a Co-Owner arising out of this Agreement then each of the Co-Owners agrees to indemnify and keep indemnified the other or others of the Co-Owners against such claim or demand and all proceedings, costs, claims and expenses relating thereto.'

17. Given the terms of these clauses, I do not accept that by entering into the 'Debt Resolution Agreement' the borrowers have thereby breached the 'Joint Venture Agreement'. It is clear that the borrowers have to indemnify the defendant, as per the provisions I have referred to."

94. I agree with the High Court judge that the two terms that he has highlighted provide strong support for the respondent's case that the JVA was not breached by the co-owners entering into the DRA with the Bank. However, I would go further. I agree with the respondent that for the appellant to succeed in his contention he must be in a position to establish that it was an implied term of the JVA that the Other Borrowers would not dispose of assets in a manner that would result in their being unable to repay the loan. In proceedings such as the present the appellant does not need to be in a position to show that he would succeed in such an argument, but he does have to show that the point is at least arguable from his perspective. I have given careful consideration to the question of arguability and am not persuaded that the appellant has even an arguable case in that regard. The starting point must be the principles set out by O'Higgins C.J. in *Meridian Communication v. Eircell Ltd*. In my judgment there has been no engagement by the appellant with those requirements and how he might meet them. He has put nothing before us to demonstrate that the implication of such a term would be necessary to give business efficacy to the agreement. Moreover, there is

nothing in the background to this agreement or in the terms of the agreement itself to suggest that the term which the appellant now suggests must be implied into the agreement was the presumed common intention of the parties. Bearing in mind the admonition of the former Chief Justice about the need to approach the implication of terms into a contract with caution, the presumption that exists against the importing of terms into a contract in writing, and the failure of the appellant to point to how the implication of the term he contends for into the JVA was necessary to give business efficacy to it, leads me to the conclusion that the contention lacks any reality or cogency, and fails to meet the low threshold of being arguable.

95. In the circumstances I would also dismiss Grounds of Appeal Nos. 2 and 3.

The refusal to allow cross-examination of the plaintiff's deponents

96. In this section of the judgment I propose to address Ground of Appeal No. 1.

97. The background to this aspect of the matter is as follows. The motion seeking summary judgment was listed for hearing before the High Court on the 15th of February 2018. It was to be grounded upon affidavits of (1) Paul Diggin, sworn on the 31st of January 2017 and the 15th of February 2018; (2) Alan Redmond sworn on the 25th of July 2017; and (3) Stephen Opperman sworn on the 25th of July 2017. Responding to these, affidavits which had been sworn by the appellant personally on the 30th of March 2017, the 4th of May 2017, the 16th of June 2017 and the 12th of October 2017, were also placed before the court. By an email dated the 12th of February 2018 from the appellant's solicitors to the respondent's solicitors, the latter were sent a Notice Of Cross-Examination of Deponents at Trial requiring the plaintiff to produce the aforementioned Paul Diggin, Alan Redmond and Stephen Opperman for cross examination before the court.

98. This email was responded to by an email dated the 13th of February 2018 from the plaintiff's solicitors expressing surprise, pointing out that the 14-day notice period specified in Order 40 Rule 31 of the Rules of the Superior Courts had not been complied with, and

pointing out that late service of such a notice was contrary to case management directions given by Noonan J. on the 4th of October 2017. In the circumstances it was contended that the notice to cross-examine was invalid. Without prejudice to that, however, it was further contended that even if the purported notice to cross-examine had been properly filed and served on time, the affidavits which had been filed on behalf of the plaintiff would nonetheless be admissible in evidence, irrespective of the attendance of the deponents, as there was no relevant factual contradiction in an affidavit which would require the cross examination of those deponents. In a further email to the plaintiff's solicitors dated the 14th of February 2018 it was asserted that:

“It was confirmed in Bula Ltd v. Crowley [2003] 2 IR 430 that Order 40, Rule 31 deals only with trials to be heard on affidavit and not to motions heard on affidavit. The matter before the court tomorrow the 15th of February is your client's motion for final judgement against our client. We shall be relying on order 37 rule two in respect of the Notice of Cross-Examination of Deponents. The Central Office has confirmed in writing that it is not necessary to file a notice of cross-examination in the High Court. There are factual contradiction contained in the affidavits and we require to cross-examine the parties. We therefore reject the contention is contained in your letter. Yours etc.”

99. Seemingly, although it is not alluded to either in the judgment of Meenan J. or in the High Court's Order of the 10th of July 2018, perfected on the 20th of July 2018, the issue of whether the defendant could cross examine the plaintiff's deponents pursuant to the Notice to Cross-Examine that had been served, was ventilated before the High Court judge in the course of the hearing of the motion seeking summary judgment. There is no transcript of the

hearing and the only accounts with respect to what occurred in regard to this aspect of the matter is that contained in a further affidavit of the appellant sworn for the purposes of this appeal on the 25th of October 2018, and a further affidavit of Paul Diggin, sworn in reply thereto on the 31st of October 2018.

100. In his affidavit sworn on the 25th of October 2018 the appellant states:

“5) The first ground of appeal is that I say that the learned High Court Judge erred in law and in fact in refusing to allow the cross examination of the deponents of the affidavits filed on behalf of the plaintiff, pursuant to Order 37 of the Rules of the Superior Courts, in particular, but not limited to those deponents present in court on the day of the hearing in the High Court.

- a) I am advised that pursuant to Order 37 Rule 2 of the Rules of the Superior Courts, where a notice to cross-examine an opponent is served on a party in summary judgment proceedings, unless such deponent is produced accordingly their affidavit shall not be used as evidence unless by the special leave of the Court. I am further advised that the term ‘special leave’ has been found to mean that the application for leave must be on notice to the other party.
- b) No application on notice was for leave to use the affidavits of the plaintiff’s deponents.
- c) During the proceedings, the High Court determined that it “must” have discretion to refuse to allow the cross examination of deponents. I am advised that in the absence of a motion on notice, no such discretion exists.
- d) In the respondent’s notice, it is pleaded that this is not a good ground of appeal, because of a failure to meet certain requirements under Order 40

Rule 31 of the Rules of the Superior Courts. However, I am advised that these requirements have no bearing on the provisions of Order 37 Rule 2.”

101. In his responding affidavit sworn on the 31st of October 2018 Mr Diggin, after exhibiting the correspondence between the solicitors concerning the notice to cross-examine, states:

“11. The hearing of the Bank’s application for summary judgement against Mr Doyle proceeded on 19 February 2018. Of the three deponents, in respect of whom the Notice of Cross-Examination had been delivered, both myself and Mr Redmond were present in court. The third deponent, Mr Opperman, was not available because he was out of the country by the time the said Notice had been attempted to be served.

12. As an aside but given that he has sworn an affidavit regarding the hearing of the matter, I should note that Mr Doyle was not himself present in court on the day of the hearing.

13. During the course of the hearing, counsel for Mr Doyle sought to cross-examine myself and Mr Redmond. Counsel for the Bank objected on the basis of the matters which had already been set out by the bank’s solicitors and correspondence.

14. As to the late service of the Notice of Cross-Examination, counsel for Mr Doyle apologised to the court for this and indicated that this was due to an oversight on the part of Mr Doyle’s solicitors.

15. As to the suggestion of a factual contradiction on affidavit, the learned High Court judge enquired of counsel for Mr Doyle what the specifics of this contradiction were. Counsel for Mr Doyle drew the Court’s attention to a line in the affidavit of Mr Redmond, sworn on 25 July 2017, which reads as follows:

‘As will be seen from the terms of this agreement, the speculative averments made by the defendant are unfounded.’

16. The agreement referenced by Mr Redmond was a debt resolution agreement entered into between the bank and Mr Doyle's co-borrowers. At the time Mr Redmond swore his affidavit, Mr Doyle had not yet had sight of that agreement but, in his preceding affidavits, he had made various speculative averments regarding its terms. Mr Redmond had exhibited a copy of the agreement to his affidavit and was stating simply that same demonstrated that Mr Doyle's averments in this regard were unfounded.

17 Notwithstanding the plain meaning of Mr Redmond's averment, counsel for Mr Doyle seem to argue that this averment should be read as meaning that everything averred to by Mr Doyle in his previous affidavits was denied by the Bank and, therefore, there was a factual contradiction. In addition to being utterly misguided, this was not accepted by the learned High Court judge.

18. Furthermore, in so far as Mr Doyle suggests that an application on notice for '*special leave*' should have been made on behalf of the Bank, it seems to me important to note that Mr Doyle asserts in his affidavit that '*special leave*' is required '*unless such deponent is produced.*' That being so, I struggle to understand his argument in this regard, at least in so far as myself and Mr Redmond are concerned, seeing as we were both present in court."

102. It is appropriate to set out the terms of both Order 37, Rule 2, and also of Order 40, Rule 31 (in the form in which it was at the time of the hearing before the High Court, i.e., prior to its substitution in full by SI 127 of 2021 – The Rules of the Superior Courts (Affidavits) 2021).

103. Order 37, Rule 2, provides:

"2. Save in so far as the Court shall otherwise order, a motion for liberty to enter judgment under this Order shall be heard on affidavit: provided that any party desiring

to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Master or the Court, as the case may be. In cases in which the Master has jurisdiction, he shall have the same power as the Court to hear oral evidence.”

104. Order 40, Rule 31 on the other hand, appears in the sub-part of Order 40 entitled “Trial on Affidavit”, and provides:

“When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production. The notice shall be in the Form No 21 in Appendix C.”

105. The appellant would appear to be right in his contention that the applicable rule in this instance is that contained in Order 37, Rule 2. He relies in that regard upon the decision of the Supreme Court in *Bula Ltd v. Crowley* [2003] 2 IR 430. The *Bula* case was not concerned with Order 37, Rule 2, but rather with, *inter alia*, an application to the High Court by a receiver appointed by a bank to which Bula Ltd was indebted, pursuant to s. 316 of the

Companies Act 1963, for an order approving the sale of certain of that company's assets. The High Court (Murphy J.) had made the order approving the sale under s. 316 of the Act of 1963 and held that the receiver had exercised all reasonable care necessary to obtain the best price and that there had been no breach by the receiver of his duty under s. 316A of the Act of 1963, as amended. The appellants appealed unsuccessfully to the Supreme Court.

106. Part of the appellant's case had been that the s. 316 application had grave consequences for the appellants and that consequently, they had the right to cross-examine deponents to test their evidence. Counsel submitted that the refusal of the trial judge to allow cross-examination on behalf of the appellants was in breach of fundamental fair procedures.

107. In giving judgment for the Supreme Court, Denham J. considered both the procedural background to the issue, and its merits. I consider that it may be helpful to reproduce in full her judgment on this issue. She stated:

"This ground of appeal requires analysis from several angles. First, the parties, by consent, sought and obtained directions for the s. 316 hearing from the President of the High Court on the 20th March, 2002. On that date orders were made as to the exchange of affidavits and as to the date of hearing. It was at that time that issues such as the cross-examination of the witnesses should have been addressed. The affidavit of the receiver and Mr Wells had been sworn on the 4th March, 2002.

Secondly, the application for cross-examination was filed on the 22nd April, 2002, in circumstances where the date for trial (23rd April, 2002) had been set on the 20th March, 2002 and the affidavits in issue sworn on the 4th March, 2002 and filed on the 20th March, 2002. In a case where there has been a history of litigation and delays, the timing of this application was an appropriate factor for the High Court Judge to consider.

Thirdly, the application to cross-examine has to be considered in the context of the s. 316 application. In this case, the receiver had chosen to go to court to seek directions as to the sale. It is understandable, in light of the long history of litigation, that the receiver chose to avail of this facility and make the application to court. Counsel for the receiver submitted that in any application under s. 316, a competent receiver must come before the court in the knowledge that the court might not approve the sale. Thus it was essential that while the receiver placed before the court material sufficient for directions, he must not disclose material that could prejudice a subsequent sale if the court did not approve the sale. He instanced, if the receiver came to court and said that the nineteen parties who signed the confidentiality agreement all told the receiver that the mine was hopeless, and if that was disclosed and the court did not approve the application for the sale, how would that leave the receiver if he wished to sell? Counsel submitted that careful judgment was necessary by the receiver to determine if there was sufficient material for the court to exercise its function. However, on the other hand, the receiver should not disclose commercially sensitive information in case a subsequent sale was necessary. The test for the court was to consider if it had sufficient information upon which to make a decision. The court could either require further information or refuse (because of lack of sufficient information or otherwise) to direct the sale. I am satisfied that this is the correct analysis of the nature of the application and the functions of the receiver and the court and I apply them to this case. If the court required further material it could have requested it, it could have requested commercially sensitive material in a sealed envelope or it could have refused to order the sale. However, the court did not take any of these approaches.

In this case, the court had to be satisfied that the receiver had exercised all reasonable care necessary to obtain the best price, the price reasonably obtainable for the property at the time of sale. The facts which the trial judge had before him included those set out in the affidavits of the receiver and Mr Wells. These facts have been set out in this judgment, as has the process taken by the receiver toward the sale. There was no significant challenge as to the expertise of Mr Wells. There was no significant challenge as to the expert opinion of Mr Wells. There was evidence of valuation put forward by Mr Wymes and Mr Evans. However, no expert gave evidence such as to challenge the expertise of IMC. But the appellants wished to cross-examine the receiver's deponents.

On the 22nd April, 2002, the solicitor for the appellants sent by fax a notice to cross-examine the receiver and Mr Wells. Counsel for the receiver submitted that the notice for cross-examination was misconceived, that it was in the form of cross-examination pursuant to O 40, r 31 of the Rules of the Superior Courts 1986. It stated:-

'Notice of Cross-Examination

Take notice that the [appellants], Bula Ltd (in receivership), Bula Holdings, Michael Wymes and Richard Wood intend at the trial of this application to cross-examine the several deponents named and described in the schedule hereto on their affidavits therein specified. And also take notice that you are required to produce the said deponents for such cross-examination before the court aforesaid.'

Counsel submitted that this referred to trials on affidavit. He submitted that an entirely different provision deals with the discretion of the court, in applications such as these under s. 316. He referred to O. 40, r 1. That rule provides:-

‘Upon any petition, motion, or other application, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.’

On the other hand, following heading III, Trial on Affidavit, O. 40, rr. 28, 29 and 30 provide:-

‘28. Within fourteen days after a consent for taking evidence by affidavit as between the parties has been given, or after an order has been made for such purpose, or within such time as the parties may agree upon, or the Court may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

29. The defendant, within fourteen days after delivery of such list, or within such time as the parties may agree upon, or the Court may allow, shall file his affidavits, and deliver to the plaintiff or his solicitor a list thereof.

30. Within seven days after the expiration of the last-mentioned fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.’

Following the above rules, r. 31 provides:-

“When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in

writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production. The notice shall be in the Form No 21 in Appendix C.”

It is clear that this latter rule relates to a trial which, as an exception to the oral tradition, is being heard on affidavit. In such a trial, the right to cross-examination of such evidence exists.

However, a s. 316 application is an entirely different matter to a trial on affidavit. There are opposing parties in an adversarial trial. In contrast, this is a motion. The receiver has applied to court to obtain the court's consent, if appropriate, for a sale. Parties are put on notice and may present evidence but it is not an adversarial trial by affidavit. Instead, the court, in exercising its judicial discretion on the application, may also exercise a judicial discretion as to whether there may be cross-examination. In the exercise of that judicial discretion, it was quite appropriate for the court to have regard to the fact that there had been, by consent, a hearing before the President of the High Court on the 20th March, 2002, for directions as to the application and there had been no application there for cross-examination. Further, it was appropriate to have regard to the fact that although the appellants had the affidavits of the receiver and Mr Wells by that date, yet it was the 22nd April, 2002, before they

filed a notice to cross-examine. This delay was a factor the High Court was entitled to take into consideration. Further, the High Court was entitled to have regard to the fact that the application on the 23rd April, 2002, before the High Court was for time to prepare for cross-examination.

I am satisfied that the issue of cross-examination in an application under s 316 is a matter for the judicial discretion of the court in an application or motion. It is not a right as is expressed for trials on affidavit. Consequently, the court was correct to consider that it had a discretion and then to exercise judicial discretion. In such exercise of discretion the court did not err in considering the matters which it did. In refusing the adjournment on the 24th April, 2002, the court acted within its discretion. It is clear from case law that appellate courts are slow to intervene and overturn an order such as a refusal of an adjournment. The burden on the appellants is heavy.

I am satisfied that the appellants have failed to meet any such burden of proof. I would not intervene in the High Court's decision not to adjourn the case. Further, I am satisfied that the appellants' submissions are grounded on a false understanding as to the alleged right to cross-examination, as an application under s. 316 is not a trial on affidavit. Consequently, I am satisfied that the appellants' appeal on this ground fails also."

108. While the *Bula* case was not concerned with Order 37, Rule 2, I consider that the appellant is correct in contending that reasoning by analogy, Order 40, Rule 31 does not apply to motions seeking liberty to enter final judgment in proceedings commenced by Summary Summons.

109. There are two principal differences between the two procedures for the cross-examination of deponents as to their affidavits.

110. The first is that the Order 37, Rule 2 procedure does not specify a time limit within which the notice in writing requiring the production of a deponent for cross-examination must be served, whereas in the case of the Order 40 Rule 36 procedure it must be served within 14 days after the end of the time allowed for the filing of affidavits in reply, or within such time as in any case the court may specially appoint.

111. The second is that under the Order 37 Rule 2 procedure, *“unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of ... the Court”* In contrast, under the Order 40 Rule 31 procedure no *“special leave”* is required. All that is required is *“the leave of the court”*. The appellant says that the term *“special leave”* is a term of art which has the meaning attributed to it by Irvine J. in *Halston Street Credit Union Ltd v. Costello and Anor* [2015] IECA 91.

112. The *Halston Street Credit Union Ltd* case was concerned with an appeal against an order of the High Court made on the 23rd of January 2015, whereby it refused the application of Emberton Finance Limited, (“Emberton”) made under Order 55, Rule 36, of the Rules of the Superior Courts to extend the time fixed by the Examiner to admit its claim to have a judgment mortgage, which it had registered against the property of the defendant (Costello), discharged out of the proceeds of the intended sale of that property.

113. Order 55, Rule 36 provides:

“No claim shall be received after the time fixed by the advertisement except by special leave of the Court. Application for such leave shall be made by motion on notice and it may be granted upon such terms and conditions as the Court shall direct.”

114. In adjudicating on the issues in the *Halston Street Credit Union Ltd*, Irvine J. (with whom Peart and Hogan JJ. agreed) found it necessary to consider the meaning of the phrase “special leave”. She stated:

“38. ... *I am satisfied that breach of an administrative deadline such as that which requires to be rectified by an application under Ord.55, r.36 should not, in the absence of some legal reason, such as a specific abandonment of the right to claim, as was mentioned in Browne [the allusion is to Browne v Browne [1919] 1 I.R. 25], or proof of significant prejudice, be refused. In this regard, Emberton’s delay has not been shown to have adversely affected the interests of any other creditor. It has not been responsible for any delay in the sale of the property or any delay that has affected the value of the assets available for distribution. The property remains unsold for reasons unconnected with Emberton. It follows that there are no proceeds of sale as yet available for distribution and the Examiner’s Certificate of Incumbrances has not, therefore, been finalised.*

39. *In these circumstances I must reject the argument made on Halston’s behalf that the use of the words "special leave" in Ord. 55 r.36 elevates the threshold at which the court should grant the relief sought. The term “special leave” is one which appears elsewhere in the Rules of the Superior Courts, not least in the context of the admission of new evidence on appeal: see, e.g., Ord. 58, r. 30(c)(formerly Ord. 58, r. 8). It is nevertheless implicit from the case-law dealing with the admission of new evidence on appeal from Lynagh v. Mackin [1970] I.R. 180, onwards that the reference to “special leave” was simply a convenient term to describe a procedure where the applicant was required to proceed by motion on notice to all relevant parties so that the court might have before it all relevant material which might govern the exercise of the discretionary power it was called upon to apply. It is in this sense*

that the reference to the “special” nature of the leave should be understood. It simply means that the leave ought not to be granted save where the applicant has complied with the appropriate formalities and procedures involved in an application brought by way of notice of motion. As I have just indicated, the term does not, however, imply or suggest that such leave should only be granted in exceptional or unusual circumstances or by reference to some otherwise elevated standard.”

115. I am satisfied that Order 37, Rule 2, was the applicable rule. While that rule did not set a time limit within which a notice to cross-examine was required to be served there was nonetheless an implied obligation on a party seeking to cross-examine a deponent to give reasonable notice to the other side, and certainly sufficient notice to allow them in turn to apply to the court for special leave to rely on the affidavits of the deponent(s) concerned in the event of them being either unable or unwilling to produce the deponent concerned. Approaching the matter in the same way as Irvine J. did in the *Halston Street Credit Union Ltd* case, a party desiring to seek special clearance would, absent special circumstances justifying discretionary dispensation with the requirement by the court, consent to an abridgment of time, or the granting of an abridgment of time by the court upon application to it in that regard, require a minimum of eight days’ notice, because the Rules of the Superior Courts require that motions be served with seven clear days’ notice unless otherwise stated. Fair procedures would demand this, otherwise a party seeking to cross-examine could wait until the last minute, thereby in effect “ambushing” their opponent by setting up a situation in which there was insufficient time for their opponent to formally apply by Notice of Motion for special clearance.

116. The situation in the present case is complicated because the plaintiff did not apparently appreciate that, if the notice to cross-examine served late in the day were to be treated as valid, it would need to apply for special leave to proceed on affidavits alone if they

were either unable or unwilling to produce their deponents. This was in circumstances where the plaintiff's side believed, incorrectly, that the applicable rule was Order 37, Rule 2, rather than Order 40, Rule 31.

117. It is difficult to know for certain, absent any transcript or agreed note of the evidence on this issue, but given the e-mail correspondence exchanged in the lead up to the hearing it seems likely that the trial judge may have been at least apprised as to the disagreement between the parties with regard to the correct procedure. However, there is nothing in the affidavits before this court to suggest that the trial judge made any ruling as to which of the two rules in controversy was the applicable rule. Moreover, if there was a contention before him that the plaintiff required special leave to proceed on affidavit, the evidence is silent as to whether the *Halston Street Credit Union Ltd* case upon which the appellant now relies was brought to his attention; as to whether the plaintiff wished, of necessity and in circumstances that were not of its making, to make a late application for special leave; whether there was any discussion or indication in court as to whether consent to an abridgment of time would be forthcoming; as to whether in the absence of consent the plaintiff formally sought an abridgment of time; or as to whether in circumstances where the defendant had served his notice to cross-examine very late in the day, the court was prepared to dispense with the notice requirement for the seeking of special leave so as to avoid the possibility of an otherwise unnecessary adjournment, and to ensure that the court could expeditiously proceed to adjudicate upon and determine the real issues between the parties.

118. On the contrary, what appears to have happened is that the plaintiff objected that the defendant's notice to cross examine was invalid, and represented an unfairness to them, in circumstances where it was served very late in the day. It further argued that the proposed cross-examination was in any case unnecessary, and would serve no purpose, as they maintained there was no conflict in the affidavits as to any material issue of fact. The

defendant's side then appears to have conceded that the notice was served very late, and in effect the defendant was asking the court to allow it to proceed with the proposed cross-examination notwithstanding the lateness of his notice. In doing so, the defendant seemingly made clear that he took issue with the plaintiff's contention that there was no conflict in the affidavits as to any material issue of fact. The parties' respective positions on whether there was a conflict of fact to be resolved were, as we understand it, as set out by Mr Diggin in his affidavit of the 31st of October 2018 and quoted above at paragraph 101.

119. It seems clear that whatever were the parameters of the arguments, the plaintiff was opposing the suggestion that the defendant should cross-examine the plaintiff's deponents. However, the mere articulation of that position was not *per se* a failure to produce those deponents for cross-examination. The plaintiff, as respondent to this appeal, has contended that two of his three deponents were present in court, and in respect of the third, that person was abroad and had not been effectively served, as the defendant had failed to serve his notice to cross-examine upon that party before he had gone abroad. If, the trial judge had permitted cross-examination, there is, it seems to me, every likelihood that the plaintiff, would in fact have made both Mr Diggin and Mr Redmond, who were present in court, available to be cross-examined, although perhaps under protest or at the very least having registered unhappiness about it. The need to seek special leave would only have arisen if there was a failure to produce the deponents the subject matter of the notice. However, it never got to that stage because the trial judge exercised what he believed was a discretion on his part to refuse to allow cross-examination. While we do not have his *ipsissima verba*, this Court has been given to understand that his reasons for refusing to allow cross-examination were two-fold, namely the lateness of service of the notice to cross-examine, and his assessment that there was in any event no material conflict as to a matter of fact which required to be resolved by cross-examination.

120. Before ruling, it is necessary to make a couple of observations. First, the appellant is the moving party in this appeal. It was incumbent upon him to put a transcript or agreed note of the proceedings before us in relation to how this issue as to the refusal to allow cross-examination was dealt with in the court below. In so far as this Court now finds itself in the unsatisfactory situation of having to deal with the matter on partial information only, I consider that the fault lies at the appellant's door. Secondly, it is by no means clear that the issue of special leave possibly being required, and of the requirement for a formal notice of motion to be served by a party seeking such leave, was the subject of any argument or ruling in the court below. The general rule is that an appellant may not agitate a point on appeal that was not relied upon in the court below. That having been said, the respondent has not sought to contend that a new point is now being made. Rather, the respondent's case is simply that the trial judge had a discretion not to allow cross-examination, and that in the circumstances of the case that discretion was properly exercised. Be that as it may, I regard the overall situation concerning this aspect of the appeal and how it has been presented by the appellant as being far from satisfactory.

121. The appellant criticises the assertion said to have been made by the trial judge that he "*must have a discretion*" to refuse to allow cross-examination. While it is true to say that Order 37, Rule 2 is not couched in terms of the existence of a discretion to allow or disallow cross-examination, neither does it imply the absence of such a discretion. It merely imposes a requirement on the party desiring to cross-examine to serve a notice in writing, requiring the production of the deponent concerned for cross-examination, and specifies that "*unless such deponent is produced*" there shall be certain procedural consequences. A judge of the High Court is the ultimate arbiter of both matters of substantive and procedural fairness in his/her court. As previously stated, while Order 37, Rule 2 imposes a notice requirement, it does not fix a notice period. As a matter of fairness, however, the notice provided must be reasonable

and if reasonable notice is not given then I consider that the judge does, as a matter of inherent jurisdiction, have a discretion to refuse to allow cross-examination, because the spirit, if not the letter, of the rule requiring the giving of notice in writing has been disrespected. Moreover, in considering how to exercise his/her discretion a High Court judge must be entitled to enquire into the extent to which the proposed cross-examination is in fact necessary to resolve material conflicts of fact relevant to matters at issue in the motion before the court.

122. In my judgment the High Court judge was correct in taking the view that he had a discretion to refuse to permit cross-examination in the circumstances of this case and was correct to do so in the circumstances as found by him. I would therefore reject Ground of Appeal No. 1.

Grounds of Appeal 5, 6 and 7

123. Finally, it is necessary to address substantive Grounds of Appeal Nos. 5, 6 and 7. I also reject, save to the limited extent indicated below, those grounds of appeal which in substance complain about the findings of the trial judge that (i) the entirety of the proceeds of sales under the DRA were credited to the amount due under the loan the subject matter of these proceedings, in circumstances where the plaintiff redacted evidence of where the proceeds of sales under the DRA were applied and (ii) that payments under the DRA were to the benefit of the defendant.

124. The findings of fact in dispute were purportedly based upon the affidavit evidence that was before the High Court judge at the date of the hearing. However, it is true to say that judgment was granted for a sum that failed to take into account the payments of €270,000 made by the co-borrowers under the DRA between the 13th of March 2017, and the 31st of August 2017 (which are referenced in paragraph 19 of the amended Summary Summons). However, although that should not have occurred, and the defendant was entitled to have

received credit for that sum against his liability, the failure of the trial judge to take account of it was ostensibly due to oversight, rather than any failure on the part of the plaintiff to put in evidence the accurate position as to the defendant's liabilities as of the date of the hearing. Although it is somewhat speculative, the oversight might possibly be explained by the fact that Mr Diggin's updating affidavit setting out the co-borrowers 2017 repayments was filed very late in the day. The plaintiff might be criticised for only filing Mr Diggin's updating affidavit on the morning of the scheduled hearing date, but there is no evidence before us that the defendant complained that he was prejudiced by the lateness of the filing, or that he sought an adjournment on the basis that he was unable to deal with the information then being provided.

125. Be that as it may, the respondent (i.e. the plaintiff) has not sought in the context of this appeal to dispute at any stage that the appellant is entitled to credit for the €270,000 in question. It is common case that judgment was granted for an incorrect figure and so the appeal must be allowed at least in that respect, and a correct figure substituted which also takes account of the evidence received by this court concerning yet further payments made by the co-borrowers since the date of judgment, and for which the appellant is also entitled to receive credit.

126. However, though the figures for which judgment was granted may require to be adjusted for the reasons stated, that does not mean that this Court must go further and remit the entire case for plenary hearing on that basis. The appellant contends that that should happen and his primary case as to why that should happen is that the High Court only had before it a redacted copy of the DRA. The appellant says it was impossible, because of the extent of redactions, for the appellant or the court to know how much of the proceeds of the sales of the various properties were applied in reduction of the borrower's joint and several

liabilities for indebtedness based upon the loan facility granted to the joint venture, and/or whether that was done to the maximum possible extent.

127. However, it seems to me that there is nothing on the face of the documentation exhibited to say that the appellant's co-borrowers, who had other liabilities to the respondent in addition to those arising from their participation in the joint venture, owed the appellant a duty to only dispose of the properties with which the DRA was concerned in a manner which would benefit the appellant to the maximum extent. Neither were they obliged to waive their entitlement to banker/client confidentiality with respect to their dealings with their bank in respect of their other liabilities. In my judgment the Bank was accordingly entitled to redact the DRA in the manner in which it did, and the extent of the redactions was not such as to prevent either the appellant or the court from knowing what was agreed with respect to repayments by the co-borrowers in respect of the joint venture liabilities for which the appellant was entitled to receive credit. The affidavit evidence, as updated by Mr Diggin's affidavit of the 15th of February 2018, which was before the High Court was sufficiently certain as to the level of the appellant's indebtedness to allow judgment to be granted for a figure representing the amount of the appellant's indebtedness less all just credits and allowances. As stated, there was regrettably a miscalculation as to what in fact were those just credits and allowances, but that error is (a) capable of being now corrected, and (b) does not suggest that the appellant otherwise has an arguable defence. The mere existence of redactions complained of did not justify the assertion that the appellant had an arguable defence to the claim such as would require the Court to remit the matter to a plenary hearing.

128. I would therefore allow the appeal to the limited extent of substituting the sum of €7,005,283.47 (being the sum stated in the amended Summary Summons) for the judgment sum of €7,743,348.47 provided for in the High Court's Order. In all other respects Grounds of Appeal Nos. 5, 6 and 7 are rejected, and particularly in so far as they form the basis for the

contention that the High Court judge was in error in not remitting the matter for plenary hearing.

Ground of Appeal 8

129. Considering all of the above I would further dismiss Ground of Appeal No. 8 which seeks a variation of the award of costs in the High Court to exclude such costs as were incurred before the 25th of July 2017. While the existence of the DRA was not disclosed until that date, there is no evidence that there was active concealment of its existence by the respondent. The DRA was known about more than six months before the hearing of the motion, a redacted copy of it having been exhibited in Mr Redmond's affidavit of the 25th of July 2017. Moreover, as paragraph 5 of Mr Redmond's said affidavit makes clear, a copy of the unredacted DRA was available in court on the date of the hearing so that it might be inspected by the High Court judge if that had been required.

130. The position with respect to the costs of the appeal will be a matter for determination following receipt of submissions. In that regard, if any party or parties, wishes to apply for their costs of the appeal, or to resist the other party's application in that regard, they are invited to make short written submissions (maximum 1500 words) to the Court, to be filed with the Court of Appeal office within 14 days of delivery of this judgment, following which the Court will, if necessary, deliver a separate costs ruling.

Whelan J.: I agree.

Ní Raifeartaigh J.: I also agree.