

THE HIGH COURT

[2017 No. 42 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

PADDY MCKEOWN AND ADELAIDE MCCARTHY

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 1st day of April, 2020

Introduction

1. This is my judgment on an application made by Everyday Finance Designated Activity Company ("Everyday") by a notice of motion issued in the Court of Appeal on 9th October, 2019, for an order substituting Everyday as plaintiff/respondent in the proceedings in place of the existing plaintiff/respondent or, in the alternative, for an order adding Everyday as a co-plaintiff/co-respondent. Everyday's application was remitted by the Court of Appeal to be determined by the High Court, in the circumstances explained below.
2. Everyday's application was opposed by the defendants, who are litigants in person, on a number of grounds.
3. While Everyday's application, as issued, sought to substitute Everyday as the plaintiff/respondent in place of the existing plaintiff/respondent or, in the alternative, to add Everyday as a co-plaintiff/co-respondent, it was indicated during the course of the hearing of the application that, in light of developments which had occurred in the context of the defendants' appeal to the Court of Appeal and their subsequent application for leave to appeal to the Supreme Court, Everyday was seeking the second of the alternative orders sought, namely, an order that it be joined as a co-plaintiff/co-respondent. Following that clarification, at the outset of the second day of the hearing of the application (and following the delivery of the judgment of the Court of Appeal dismissing the defendants' substantive appeal), the defendants maintained their objection to Everyday's application.
4. Everyday's application was brought pursuant to O. 15, r. 14 of the Rules of the Superior Courts ("RSC") (erroneously referred to in the notice of motion as O. 15, r. 4) and O. 17, r. 4 (and pursuant to the relevant provisions of O. 86 and O. 86A, as the motion was first issued before the Court of Appeal) or, in the alternative, under the inherent jurisdiction of the court. As I indicate in the course of this judgment, the appropriate provision of the RSC under which to consider Everyday's application, is Order 17, rule 4.
5. For reasons which I explain in detail in this judgment, I have concluded that it is appropriate to make an order adding Everyday as an additional plaintiff to the proceedings. I have considered all of the objections raised by the defendants, insofar as I could understand them, and have concluded that the defendants have not raised any sustainable grounds of objection to Everyday's application. In those circumstances, I will make an order pursuant to O. 17, r. 4, adding Everyday as a plaintiff to the proceedings.

Factual and Procedural Background

6. The plaintiff, which I will describe for convenience, and where appropriate, throughout this judgment as "AIB", commenced summary proceedings against the defendants on 12th January, 2017. The defendants have sought to raise an issue as to the description of the plaintiff in the proceedings (Allied Irish Banks PLC), and have sought to argue that the plaintiff as so described is a different entity to Allied Irish Banks, p.l.c. I will address the defendants' arguments in that regard in the course of this judgment. For present purposes, I will adopt the neutral abbreviation of the plaintiff, namely, AIB. The proceedings were entered in the Commercial List and AIB sought summary judgment against the defendants. As against the first defendant, AIB sought judgment in the sum of €1,429,166.22. As against the first and second defendants, judgment was sought on a joint and several basis in the further separate sum of €40,548.60. Judgment was also sought against the second defendant in the sum of €1,387,003.82 and in the further sum of €40,000.00 on foot of guarantees given by her. Interest was also sought. AIB's application for summary judgment was heard by the High Court (Costello J.) on 27th April, 2017. The Court reserved judgment on the application and delivered a detailed reserved judgment on 12th May, 2017. Summary judgment was granted by the High Court as follows. Judgment was granted against the first defendant in the sum of €1,469,251.43. Judgment was granted against the second defendant in the sum of €1,467,102.96. Costs were awarded against the defendants. The High Court refused to grant a stay.
7. The defendants appealed to the Court of Appeal. Up to that point, the defendants were represented by solicitors and counsel. The defendants applied in person to the Court of Appeal for a stay. In an order made on 28th July, 2017, the President of the Court of Appeal granted a stay on the execution of the High Court order pending the determination of the appeal by the Court of Appeal.
8. On 2nd August, 2018, AIB (together with AIB Mortgage Bank and EBS Designated Activity Company ("EBS")) (as sellers) and Everyday (as buyer) executed an Irish law deed of transfer (excluding property (the "deed of transfer") assigning and transferring AIB's rights and interests in certain assets to Everyday. Among the assets which Everyday maintains were assigned and transferred to it under the deed of transfer were the rights and interests in the loans and security documents referable to the facilities provided by AIB to the defendants, on foot of which AIB had obtained judgment in the High Court. I stress that I am attempting to summarise very much in shorthand the effect of the deed of transfer and will consider it further later in this judgment. A further deed was executed by the same parties on 22nd October, 2018 (the "amendment deed"). Nothing turns on the amended deed for the purposes of Everyday's application.
9. On 8th August, 2018, AIB wrote a number of letters to the defendants informing them that it had agreed to sell their loans and the guarantees which the second defendant had provided to AIB to Everyday. These were the "goodbye letters". On 14th August, 2019, Everyday wrote to the defendants referring to the goodbye letters and informing the defendants as to what was to happen in relation to the relevant facilities following the

effective date of the transfer (2nd August, 2018). These were the "hello letters". The defendants have sought to raise certain issues in relation to the deed of transfer and the goodbye letters and the hello letters and I will address those issues later in this judgment.

10. A date was ultimately fixed for the hearing of the defendants' appeal in the Court of Appeal on 18th October, 2019. On 9th October, 2019, Everyday made an *ex parte* application to the Court of Appeal for leave to bring a motion seeking to be substituted as a plaintiff/respondent in place of AIB or, alternatively, to be added as a co-plaintiff/co-respondent. The Court of Appeal gave Everyday liberty to bring that motion, returnable before the directions list sitting of the Court of Appeal on 11th October, 2019. The order of the Court of Appeal of 9th October, 2019 is stated that the application was made by counsel on behalf of Everyday, "a Non-Party" to the proceedings. Fitzgerald Solicitors were referred to as "solicitors on behalf of the plaintiff" at the bottom of the order. The defendants were referred to as the "defendants in person". Byrne Wallace were referred to as "solicitors on behalf of Everyday Finance DAC". The motion issued on foot of that order is the motion which is now the subject of this judgment. It was issued on 9th October, 2019. However, in error, the motion stated that the application would be made on behalf of the "plaintiff/respondent" and not on behalf of Everyday. Further, the motion was signed by Byrne Wallace as "solicitors for the plaintiff/respondent" and not as solicitors for Everyday. The defendants have taken issue with the validity of the motion in circumstances where Byrne Wallace were described as solicitors for the plaintiff/respondent when that was not in fact the case and Fitzgerald Solicitors remained on record for the plaintiff/respondent, i.e. AIB, in the proceedings.
11. The motion was, in due course, adjourned to the hearing of the substantive appeal on 18th October, 2019. A number of affidavits were sworn on behalf of Everyday and on behalf of the defendants in advance of that date. As appears from the order of the Court of Appeal of 18th October, 2019, the Court was concerned as to its jurisdiction to hear the motion as there would be no automatic right of appeal to the defendants should the motion be granted. The Court, therefore, ordered that the motion be remitted to the High Court for hearing. However, the substantive appeal proceeded that day. The Court of Appeal reserved judgment. The Court of Appeal order of that date refers to the motion as having been brought by the plaintiff rather than Everyday and refers to Byrne Wallace as the "solicitors for the plaintiff". This may well have been due to the errors contained in the motion itself.
12. Having been remitted to the High Court, the motion was then listed before me as the Judge of the Commercial List and was ultimately listed for hearing on 28th November, 2019. As it happens, the Court of Appeal announced that judgment on the substantive appeal would be delivered at 2:00pm that day. In the circumstances, it was agreed that I would commence hearing Everyday's application but would not determine the application until the judgment of the Court of Appeal could be considered by the parties and by me. In the time allotted for the hearing of the application, counsel for Everyday had almost concluded his submissions. The application was then adjourned to enable the parties to

receive and consider the judgment of the Court of Appeal and the matter was listed for mention to enable a date to be fixed to resume the hearing of the application.

13. The Court of Appeal dismissed the defendants' appeal. In its conclusion, the Court held that the defendants had sought to argue certain grounds that were not argued in the High Court, or not included in the grounds of appeal. The Court noted that the defendants were legally represented in the High Court and that no reason had been advanced as to why these grounds were not so argued. The Court held that they were not properly before the court and were, therefore, rejected. In relation to the grounds of appeal which were properly before the Court, the court concluded that there was no error on fact or of law on the part of the trial judge and that she had correctly applied well-established jurisprudence. Accordingly, the defendants' appeal was dismissed. The order of the Court of Appeal dismissing the defendants' appeal was perfected on 16th December, 2019.
14. Everyday's application was listed to resume before me on 14th January, 2020. My attention was drawn on that date to the judgment of the Court of Appeal and to the fact that the defendants had made an application for leave to appeal to the Supreme Court from the judgment and order of the Court of Appeal. The defendants' application was apparently made on 6th January, 2020. As of the date of the resumed hearing before me, the respondent's notice had not been filed with the Supreme Court and the Supreme Court had not determined the defendants' application for leave to appeal. In light of the state of the proceedings, with a pending application for leave to appeal to the Supreme Court, counsel for Everyday confirmed that it was seeking an order joining Everyday as an additional plaintiff to the proceedings and not an order substituting it for AIB. The first defendant then responded to Everyday's application on his behalf and on behalf of the second defendant. The defendants opposed the application on several grounds. Having heard the first defendant's submissions and the submissions and reply on behalf of Everyday, I reserved judgment.
15. On 10th March, 2020, I was informed by counsel for Everyday, in the presence of the first defendant, that the Supreme Court had recently given its determination refusing to grant leave to appeal to the defendants. The first defendant was present on that occasion and reminded the court that Everyday had confirmed on the previous occasion that it was seeking an order that it be added as a plaintiff to the proceedings, rather than an order that it be substituted for the existing plaintiff, AIB.

Everyday's Application

16. I have explained earlier the circumstances in which Everyday came to issue its motion in the Court of Appeal to be substituted as plaintiff/respondent in place of AIB or, alternatively, to be added as a co-plaintiff/co-respondent with AIB and how that motion came to be remitted by the Court of Appeal to be determined by the High Court. I should now say something about the evidence provided to the court by Everyday in support of its application and by the first defendant, on his own behalf and on behalf of the second defendant, in response to that application.

The Judgment of Costello J.

17. Before doing so, I should draw attention to the findings of fact made by Costello J. in the judgment she delivered in the High Court on 12th May, 2017 on AIB's application for summary judgment. At the outset of her judgment (at para. 2), Costello J. described the plaintiff ("Allied Irish Banks PLC") as a *"body corporate... [which]... at all material times carries on the business of a bank within the State and has its registered office at Bank Centre, Ballsbridge, Dublin 4"*. She described the defendants and the business carried on by them. Costello J. then referred to the relevant facilities (at para. 3), commencing with the loan offer dated 20th May, 2013, by which the plaintiff offered to refinance three facilities which the first defendant had with the plaintiff. She noted that the letter referred to three facilities, namely, loan account numbers 934054-28910235 ("facility 1"), 934054-28910318 ("facility 2") and 934054-28910581 ("facility 3"). Costello J. noted that the plaintiff had offered those facilities subject to the terms and conditions set out in the letter and *"subject to the Bank's General Terms and Conditions Governing Business Lending"*. She noted that in each case, repayment was:-

"On demand at the pleasure of the Bank, subject to repayment/refinance on 31/12/2013. In the interim, interest is to be funded by way of a monthly standing order..."

Security for the facilities included two letters of guarantee from the second defendant in the amount of €1,650,000.00 and interest and €40,000.00 and interest. The first guarantee ("guarantee 1") was held by way of security in respect of facility 1 and facility 2 and the second guarantee ("guarantee 2") was in respect of security for facility 3 (see para. 3 of the judgment). Costello J. held that the funds were drawn down by way of refinancing, in the sense that they had previously been drawn down in respect of existing facilities. She noted that it was *"common case that the facilities were not repaid or refinanced and [that] each of the loan accounts remains outstanding"* (para. 4). That remains the case.

18. Costello J. then referred to a further letter of sanction, also dated 20th May, 2013, which was to refinance loan account number 934054-27044366 in the amount of €39,476.00 ("facility 4"), together with an overdraft facility of €10,000.00. She held that that facility was repayable on demand at the pleasure of the plaintiff and pending repayment/refinance on 31st December, 2013, with interest being funded by way of a monthly standing order. She further held that the defendants were jointly and severally liable for the liabilities incurred under facility 4 and that the funds had already been advanced on foot of an earlier facility. She held that the facilities were not repaid or refinanced and that the loan remained in arrears (para. 5).
19. Costello J. then referred to the two guarantees given by the second defendant to the plaintiff. The first was dated 2nd March, 2009 (i.e. "guarantee 1"), under which the second defendant agreed to guarantee the sums due to the plaintiff by the first defendant up to an amount not exceeding €1,650,000.00 together with interest. The Court found that the second defendant had agreed to guarantee 1 in writing on 2nd March, 2009. The Court then referred to a second guarantee in identical terms given by the second

defendant to the plaintiff on 1st December, 2009 (i.e. "guarantee 2"), under which the second defendant guaranteed the liabilities of the first defendant to the plaintiff up to a total amount not exceeding €40,000.00 together with interest (paras. 6 and 7).

20. At para. 8 of her judgment, Costello J. noted that:-
- (1) The defendants did not deny that they entered into the May, 2013 facilities;
 - (2) The defendants accepted that funds were drawn down, in the sense that the facilities were by way of a refinancing of existing facilities;
 - (3) The defendants accepted that the facilities were temporary and expired on 31st December, 2013; and
 - (4) The defendants accepted that the monies had not been repaid.
21. Costello J. then considered the various defences put forward on behalf of the defendants in response to the plaintiff's application for summary judgment. She found that the defendants did not have a real or *bona fide* defence to the application for summary judgment. As outlined earlier, Costello J. granted judgment on the terms which were set out in the order made on 12th May, 2017. The Court of Appeal dismissed the defendants' appeal from the judgment and order of Costello J., and the Supreme Court refused to grant the defendants leave to appeal from the judgment and order of the Court of Appeal. Accordingly, the findings made by Costello J. in the High Court are now unimpeachable by the defendants. Those findings are of importance when it comes to consider the evidence put before the court for the purposes of Everyday's application.
- The Affidavit Evidence before the Court**
22. Everyday's application was grounded on an affidavit sworn by Andrew McCudden on 8th October, 2019. Mr. McCudden is Head of Compliance in Everyday. Mr. McCudden swore further affidavits for the purposes of Everyday's application on 17th October, 2019 and 20th November, 2019. Affidavits were also sworn in support of Everyday's application on 10th October, 2018 and 17th October, 2019 by Robert Nash, a solicitor in Byrne Wallace, the solicitors acting for Everyday in its application. The first defendant, Paddy McKeown, swore three affidavits in response to Everyday's application, on 11th October, 2019, 11th November, 2019 and 22nd November, 2019.
23. I should make clear that in considering Everyday's application, and the defendants' opposition to that application, I have considered all of the affidavits and material put before the court. I have carefully considered all of the arguments advanced by Everyday in support of its application and all of the objections raised by the defendants in response to the application (so far as I could understand them). I have attempted to deal in this judgment with what appeared to me to be the principal grounds of opposition.
24. In his first affidavit, Mr. McCudden outlined the four facilities made available by AIB to the first defendant and to both defendants on foot of the letters of sanction dated 20th May, 2013. He exhibited partial copies of the letters of sanction to his supplemental affidavit of

17th October, 2019 (which I will refer to as his "second affidavit"). Complete copies of the letters of sanction were exhibited to his supplemental affidavit of 20th November, 2019 (which I will refer to as his "third affidavit"). He exhibited a copy of AIB's "*General Terms and Conditions Governing Business Lending*" (March, 2013) ("AIB's general terms") to his second affidavit. Mr. McCudden also exhibited to that affidavit, a copy of the guarantees given by the second defendant in favour of AIB dated 2nd March, 2009 and 1st December, 2009.

25. Mr. McCudden referred in his first affidavit to the judgment delivered by Costello J. on 12th May, 2017 and to the order made on foot of that judgment. He then referred to the deed of transfer and to the amendment deed under which AIB, AIB Mortgage Bank and EBS (inter alia) assigned and transferred to Everyday their rights and interests in (inter alia) the facilities provided to the defendants and the guarantees and other security documents provided in respect of those facilities. A redacted copy of the deed of transfer and of the amended deed was exhibited to that affidavit (Exhibit "AMcC1"). Mr. McCudden explained the reasons for the redactions to both deeds. The reasons advanced were threefold. The first reason given was commercial sensitivity (and an explanation was given for that). The second reason was bank/client confidentiality and restrictions under the Data Protection legislation. The third reason was on the basis of irrelevance.
26. Mr. McCudden exhibited the goodbye letters from AIB and the hello letters from Everyday (at Exhibits "AMcC2" and "AMcC3"). Having done so, he sought an order substituting Everyday as the plaintiff/respondent to the proceedings and the appeal then pending before the Court of Appeal. The motion issued on behalf of Everyday sought a substitution order or, in the alternative, an order adding Everyday as a co-plaintiff/co-respondent.
27. Mr. Nash of Byrne Wallace swore an affidavit on behalf of Everyday on 10th October, 2019 in relation to the circumstances in which the motion was issued in the Court of Appeal and notified to the defendants.
28. The first defendant, Mr. McKeown, swore his first replying affidavit on 11th October, 2019 (and I will refer to that as his "first affidavit"). He set out various grounds on which the defendants were objecting to Everyday's application. Among the grounds raised by Mr. McKeown were the following: First, there was no consent from AIB, the plaintiff/respondent, and no consent from the entity which entered into the deed of transfer, which Mr. McKeown contended was a separate entity to the plaintiff/respondent in the proceedings. Second, Mr. McKeown contended that it was not open to the plaintiff/respondent to assign the benefit of the judgment and order made by Costello J., in circumstances where the judgment and order provided for the payment of costs and that issue was (and remains) before the Taxing Master (or his successor under the Legal Services Regulation Act, 2015). Third, Mr. McKeown contended that the plaintiff/respondent had proceeded to register a judgment mortgage over two properties and, in doing so, made a claim to securities far in excess of their entitlements and that it was not open to Everyday to seek to benefit from that. Fourth, Mr. McKeown took issue with aspects of the deed of transfer and with the redactions made to that document. Fifth,

Mr. McKeown contended that the letter of sanction did not permit the transfer (or assignment) of the benefit of the facilities to Everyday. Nor, he contended, did the AIB general terms. Sixth, Mr. McKeown contested Everyday's entitlement to rely on securities held by the plaintiff and relied on the judgment of the High Court (Abbott J.) in *Re a Reference to Court under Section 19(2) of the Registration of Title Act, 1964 and in the Matter of an Application by Allied Irish Banks PLC and Allied Irish Mortgage Bank* [2006] IEHC 463 (the "Abbott judgment"). Seventh, Mr. McKeown contended that there was no "explicit notice of transfer" in respect of an alleged transfer between Allied Irish Banks, p.l.c. and Allied Irish Banks PLC contrary to s. 28(6) of the Supreme Court of Judicature (Ire) Act, 1877 (the "1877 Act") so as to effect a legal transfer as between those allegedly different entities, such that the plaintiff/respondent could have "no legal, lawful or contractual underlying cause of action". Finally, Mr. McKeown requested the court to refuse the motion and to protect the defendants' constitutional rights to private property and "private income".

29. Mr. McKeown exhibited various documents in support of the contentions advanced on behalf of the defendants in his first affidavit, including a copy of an appearance entered by "Fitzgerald Legal & Advisory" as solicitors for various defendants in plenary proceedings commenced against them by the defendants (Record No. 2019/6902 P); an extract from the special endorsement of claim to the summary summons issued by AIB against the defendants; and documents in respect of the registration by AIB of the judgment against the defendants as a judgment mortgage on folio CK19666L.
30. Mr. McCudden replied to that affidavit by way of his second affidavit. He took issue with a number of the contentions advanced on behalf of the defendants by Mr. McKeown in his first affidavit and exhibited the further documents referred to earlier.
31. A supplemental affidavit was sworn on behalf of Everyday by Mr. Nash on 14th November, 2019. In that affidavit, Mr. Nash exhibited a document dated 17th October, 2019 which purported to provide AIB's consent to Everyday's application.
32. Mr. McKeown swore a supplemental replying affidavit on 11th November, 2019 (which I will refer to as his "second affidavit"). As well as reiterating most of the grounds of objection set out in his first affidavit, Mr. McKeown advanced some additional grounds of objection in his second affidavit. So far as I can understand from his affidavit, the additional grounds of objection were as follows.
33. First, Mr. McKeown contended that the notice of motion issued by Byrne Wallace on behalf of Everyday was defective, as Byrne Wallace were not the solicitors on record for the plaintiff/respondent in the proceedings. Mr. McKeown contended that the motion should be struck out as it had been brought in breach of the provisions of O. 7 RSC. He disputed the assertion made in correspondence by Byrne Wallace that it had been acting as agents for the solicitors on record for the plaintiff/respondent, "Fitzgerald Solicitors".
34. Second, Mr. McKeown reiterated his contention that no consent had been provided by the plaintiff/respondent in the case or by the alleged separate entity, Allied Irish Banks, p.l.c.

Mr. McKeown then made a number of points in relation to the terms of the “goodbye letters” and the “hello letters” and in relation to the deed of transfer and AIB’s general terms. These points were made both in an attempt to demonstrate that different AIB entities existed and that no consent was evident from any of them, as well as to support the contention that there was no entitlement under the AIB general terms to assign or transfer any charges to Everyday, notwithstanding the terms of the deed of transfer.

35. Third, Mr. McKeown criticised the document put forward by Mr. Nash on behalf of Everyday as representing the consent of the plaintiff/respondent to Everyday’s application on various grounds.
36. Fourth, Mr. McKeown disputed the suggestion that the defendants had not made the case in the High Court in the summary summons proceedings as to the alleged difference between the entity referred to as the plaintiff in the title to the proceedings (Allied Irish Banks PLC) and the alleged separate entity (Allied Irish Banks, p.l.c.). He referred to para. 15 of the supplemental affidavit he had sworn in those proceedings on 21st April, 2017, which he claimed was opened by counsel for the plaintiff/respondent to Costello J.
37. Fifth, Mr. McKeown raised the possibility that a novation may have occurred in respect of the defendants’ facilities and that required the defendants’ consent. He referred to and exhibited a document obtained by the defendants from Deutsche Bank AG (London Branch) (“Deutsche Bank”) which referred to an agreement between “Allied Irish Banks Plc” and Deutsche Bank “*in relation to the securitisation of loans including yours*” and which provided certain personal data which Deutsche Bank had located on its systems in relation to the defendants. The document referred to both defendants and provided personal data in relation to them. It does not, however, refer to any particular loans or transactions. Mr. McKeown contended that this document amounted to proof of a novation which required the defendants’ consent, which had not been sought or provided. He contended that as a result “*the underlying contractual agreements*” were “*null and void*”.
38. Sixth, Mr. McKeown contended that by reason of its alleged status, Everyday could not purchase commercial loans under its licence from the Central Bank of Ireland.
39. Seventh, Mr. McKeown reiterated the defendants’ reliance upon s. 28(6) of the 1877 Act, which he contended was fatal to Everyday’s application.
40. Mr. McCudden replied by way of a supplemental affidavit sworn on 20th November, 2019 (which I will refer to as his “third affidavit”). In summary, among the points made by Mr. McCudden in his third affidavit were the following.
41. First, Mr. McCudden explained the circumstances in which the notice of motion issued on behalf of Everyday and stated that Byrne Wallace were the solicitors for the plaintiff/respondent. He stated that that was a typographical error and the motion should have referred to Byrne Wallace as “*solicitors for the intended plaintiff/respondent*”. He referred to correspondence sent by Byrne Wallace to the defendants prior to the bringing

of the application and to the order of the Court of Appeal dated 9th October, 2019 which, as noted earlier, referred to the application being made on behalf of Everyday, as a non-party to the proceedings.

42. Second, Mr. McCudden explained that Byrne Wallace were solicitors acting for Everyday in the motion now before the court and also attended the substantive appeal in the Court of Appeal as agents of "*Fitzgerald Solicitors (now titled "Fitzgerald General & Advisory")*", the solicitors on record for the plaintiff/respondent in the proceedings (para. 11). He stated that "Fitzgerald Legal & Advisory" gave express authority permitting Byrne Wallace to act as town agents for the Court of Appeal hearing and referred to correspondence to that effect (paras. 12-15 and Exhibits "AMcC13", "AMcC14" and "AMcC15").
43. Third, Mr. McCudden referred to the express written consent provided by AIB to Everyday's application dated 17th October, 2019 (exhibited at Exhibit "RN7" to Mr. Nash's second affidavit). He further sought to rely on the terms on which the loans were transferred to Everyday and the "goodbye letters" and the "hello letters" sent to the defendants on foot of the transfer, as demonstrating that, in any event, it was not necessary to obtain the express consent of AIB to the application.
44. Fourth, Mr. McCudden referred to the "goodbye letters" and the "hello letters" and contended that they fully complied with s. 28(6) of the 1877 Act.
45. Fifth, while accepting that Mr. McKeown did make reference to an issue in relation to the identity of the plaintiff in his affidavit of 12th April, 2017, it did not feature in the defendants' written submissions or oral submissions at the hearing before Costello J. and was not germane to the determination of Everyday's application.
46. Sixth, Mr. McCudden contended that the existence of a costs order was not determinative one way or the other of Everyday's application, nor did the stay on execution granted by the President of the Court of Appeal on 28th July, 2017 preclude the registration of judgment mortgages or the transfer of the facilities and guarantees to Everyday.
47. Seventh, Mr. McCudden addressed again the redactions made to the deed of transfer and averred that the redacted portions were not relevant to the application before the court and did not hide any novation agreement or unrevealed transfers or any other information relevant to the defendants. He further noted that, with regard to the document from Deutsche Bank exhibited by Mr. McKeown, the document did not identify the particular facilities or guarantees to Everyday and further averred that Deutsche Bank has not acquired those facilities or guarantees.
48. Finally, Mr. McCudden contended that some of the arguments advanced by Mr. McKeown, such as the argument concerning the term of the facilities, were the subject of submissions before Costello J. and were addressed by her in her judgment (which has now been upheld by the Court of Appeal).

49. The final affidavit sworn in connection with Everyday's application was the supplemental replying affidavit sworn by Mr. McKeown on 22nd November, 2019 (which I will refer to as his "third affidavit"). It is unnecessary to rehearse everything stated in that affidavit. Mr. McKeown reiterated and repeated many of the grounds of objection set out in his previous two affidavits. He continued to contend that Everyday's motion was improperly brought as Byrne Wallace were not the solicitors on record for the plaintiff/respondent and that the motion was, therefore, "*devoid of legal effect or force*" and could not be "*legally heard by the court*". Mr. McKeown disputed the consent provided by "Fitzgerald Legal & Advisory" and advanced the case that the firm of solicitors under that name was a different firm of solicitors to "Fitzgerald Solicitors". He objected to the confirmation provided by Philip O'Leary on behalf of "Fitzgerald legal & Advisory" on 15th October, 2019 (exhibited at "AMcC13" to Mr. McCudden's third affidavit) on the basis that it did not come from "Fitzgerald Solicitors" and also on the basis of the wording contained at the bottom of the relevant email. Mr. McKeown continued to assert that, in bringing the motion, Everyday and its solicitors had not complied with the provisions of O. 7 RSC.
50. Most of the other points made in Mr. McKeown's third affidavit were reiterations of and elaborations on arguments made in his earlier affidavits. He did, however, make some new points. One of those points was made in reliance on the decision of the Supreme Court in *SPV Osus Limited v. HSBC Institutional Trusts Services (Ireland) Limited & ors* [2018] IESC 44 ("SPV Osus"). Mr. McKeown submitted that discovery would be required in order to determine whether the purported transfer or assignment to Everyday amounted to "*commodification or maintenance and champerty*" which would render it unenforceable as a matter of public policy (para. 10(c)). Mr. McKeown also sought to rely on the alleged absence of notice given to the defendants in respect of the purported transfer to Everyday and relied on s. 28(6) of the 1877 Act and the judgment of Baker J. in the High Court in *AIB Mortgage Bank v. Thompson* [2018] 3 I.R. 172 ("*Thompson*") (para. 16).
51. This is necessarily an imperfect and incomplete summary of all of the points advanced in Mr. McKeown's third affidavit. I have, however, nonetheless considered all of the points made by him on behalf of the defendants in that affidavit and in his earlier affidavits.

Proper Approach to Consideration of Everyday's Application

52. In this section of the judgment I address three issues. First, I consider the relevant provision of the RSC under which Everyday's application must be considered. Second, I consider the nature of an application to substitute a party or to add an additional party and how the court should treat such an application. Third, I consider the appropriate standard of proof to be applied in such an application.

(1) Basis for application under RSC

53. As noted earlier, Everyday initially sought an order that it be substituted for AIB as the plaintiff/respondent in the proceedings or, alternatively, an order that it be joined as a co-plaintiff/co-respondent. It is not pursuing the substitution application, but is pursuing its application to be joined as an additional plaintiff. The basis upon which the application was made (leaving aside the provisions of the RSC applicable to appeals before the Court

of Appeal) was stated to be O. 15, r. 4 (this was intended to read O. 15, r. 14) and O. 17, r. 4 or, alternatively, the inherent jurisdiction of the court.

54. It is now well established that the appropriate provision of the RSC under which an application of the type made by Everyday to substitute or add a party in circumstances where an event occurs after the commencement of the proceedings which causes a change of interest, is O. 17, r. 4 and not O. 15, r. 14. This is clear from the judgment of Baker J. in the High Court in *Irish Bank Resolution Corporation Limited (In Special Liquidation) v. Lavelle* [2015] IESC 321 ("*Lavelle*"). Having considered the relevant authorities, Baker J. held that O. 17, r. 4 permits an application to be made to add or substitute a party who has taken a legal assignment of a loan book from the original plaintiff in proceedings. The Court of Appeal upheld that judgment on appeal in *Stapleford Finance Limited (As Substituted) v. Lavelle* [2016] IECA 104. The Court of Appeal held that Baker J. was correct in her conclusion that the assignment in question amounted to a change in interest within the meaning of O. 17, r. 4. The Court of Appeal concluded that Baker J. was correct in holding that she had the power to substitute the relevant party as the sole plaintiff in the proceedings under that provision and that she had not erred in law in making the order under it.

55. I am satisfied, therefore, that the relevant provisions of the RSC under which to consider Everyday's application to be added as an additional plaintiff with AIB, in circumstances where the relevant facilities and guarantees were transferred or assigned to Everyday under the deed of trust and amendment deed, is O.17, r.4.

(2) The nature of the application

56. The Court of Appeal has made clear that an application for an order under O. 17, r. 4 is intended to be a simple, straightforward and purely procedural application. It is not intended to be in the nature of a "*mini-trial*".

57. In *Irish Bank Resolution Corporation Limited v. Comer* [2014] IEHC 671 ("*Comer*"), Kelly J. described a similar application to substitute a party for an existing party in the proceedings (in the case of the sale of a loan book and facilities), albeit made under O. 15, r. 14 RSC, as a "*procedural motion*" which should not be turned into "*a sort of mini-trial of the action*". That was not what was envisaged by the RSC, in general, or under the provisions of O. 63A, in particular (see para. 44).

58. The Court of Appeal reached the same conclusion in relation to a substitution application made under O. 17, r. 4 in *Bank of Scotland PLC v. McDermott* [2019] IECA 142 ("*McDermott*"). I will come back to the judgment in this case in a moment, when considering the question of the standard of proof to be applied. However, the judgment is also relevant in describing the nature of an application under O. 17, r. 4. Having noted that an application under that provision could be made *ex parte*, but had been made on notice in that case, Peart J. in delivering the judgment of the Court of Appeal then stated:

"I would consider that the very fact that such an application may be made on an ex parte basis is at least an indication that it is not contemplated that such a simple,

straightforward, and perhaps formal application should give rise to the level of controversy that has attended upon the present application. Of course, it goes without saying, that the court must be satisfied by the affidavit evidence adduced by the applicant that it is entitled to be substituted. But it should not be seen as yet another opportunity for the other party to raise issues that relate more to the merit of the underlying proceedings, and to in that way open up an avenue for further litigation and consequent delay in the proceedings. In my view, the appellant has seized upon the respondent's application for substitution, having been put on notice of it, in order to further frustrate the efforts of the creditor bank, now Ennis, to take steps of enforcement against him on foot of the summary judgment obtained on the 29th July 2013, by raising grounds of objection that are devoid of merit.” (para. 31).

59. It seems to me that the same could be said for the present application and the defendants' attempts to raise issues by way of opposition to the application, which relate more to the merit of the underlying proceedings in which summary judgment was granted against them by the High Court and upheld by the Court of Appeal. The description of the nature of the application as being “*simple, straightforward, and perhaps formal*” is particularly apposite. That is how an application such as that made by Everyday should be seen. It should not be seen, or used, as an opportunity to ventilate issues relevant to the underlying and substantive dispute between the parties (particularly when the merits of the underlying dispute have already been determined by the High Court and by the Court of Appeal).

60. Having referred to what Kelly J. stated in *Comer*, the Court of Appeal in *McDermott* went on to state as follows:

“...such applications remain purely procedural in nature, and there can be no question of such an application becoming in the nature of a mini-trial.” (para. 37).

61. Everyday's application should, therefore, be dealt with as a simple, straightforward and formal application and should not be regarded as a mini-trial of contentious issues between the parties.

(3) The Standard of Proof

62. Counsel for Everyday raised the issue in the course of his submissions as to the standard of proof which the court should apply in determining Everyday's application. He contended that the correct standard to apply was that the court should be satisfied that Everyday had demonstrated a “*prima facie*” case to the effect that it was entitled to be substituted or, alternatively, added as a party to the proceedings on the basis of the material put before the court. That, counsel submitted, was the correct standard to be applied to Everyday's ultimate application to be joined as an additional plaintiff to the proceedings with AIB. However, counsel also made it clear that in the event that the court were to conclude that the standard of proof which it had to meet in order to succeed on its application was the ordinary civil standard of proof on the balance of probabilities, the evidence put before the court satisfied that higher standard also. I recognise that at the

time counsel advanced his submission as to the appropriate standard for the court to apply, the defendant's application for leave to appeal to the Supreme Court had been made but had not yet been determined. That application was subsequently determined against the defendants.

63. The defendants did not engage on this issue at the hearing. However, it seems to me that I should consider and rule on the issue so as to make clear the standard which I have decided to adopt in determining Everyday's application.
64. A resolution of the issue as to the appropriate standard of proof to be applied in an application such as this, requires a brief consideration of a trio of judgments of the Court of Appeal. The first in time is *Irish Bank Resolution Corporation Limited v. Halpin* [2014] IECA 3 ("*Halpin*"). That was a case in which the transferee and assignee of certain facilities from IBRC applied to be substituted for IBRC in an appeal before the Court of Appeal from two judgments obtained by it against the defendant in the High Court. It was indicated by the applicant that if the court was not prepared to make a substitution order, it was seeking to be added as a party to the appeal. The Court of Appeal refused to grant the substitution order but did add the applicant as a party to the appeal. The Court of Appeal refused a substitution order on the grounds that since it was being sought to uphold the judgments of the High Court in favour of IBRC (as plaintiff), then IBRC had to remain as a plaintiff in the proceedings. The judgments were granted to IBRC, as plaintiff, by reason of it having established by factual evidence to the satisfaction of the High Court its entitlement to such judgments. Otherwise, the effect of the substitution would be to permit the applicant to be considered as being entitled to have been granted judgment in the High Court in circumstances where it did not have any entitlement to judgment in its favour on the relevant dates. The Court of Appeal distinguished the case from other cases where the substitution was sought before judgment was obtained in the High Court.
65. The Court of Appeal went on to consider the alternative application to join the applicant as a co-plaintiff/co-respondent to the appeals. The court was satisfied that the applicant had put before the court evidence on a *prima facie* basis that, pursuant to a deed of transfer, it was entitled from the date of that deed to the benefit of the facilities underlying the claim against the defendant and also to the judgments obtained by IBRC against the defendant in the High Court. On that basis the Court of Appeal concluded that it was in the interests of justice that the applicant be added as a party and be permitted to participate in the hearing of the appeals, albeit that it was confined to making any argument advanced by IBRC in the High Court or which it might properly advance on the appeal, in reliance upon the evidence before the High Court (para. 28).
66. Finlay Geoghegan J., in giving the judgment of the Court of Appeal, stated:

"In making this order the Court is not determining the claimed entitlement of [the applicant] to the judgments obtained by IBRC. It is simply determining that it has put forward evidence on a prima facie basis that would entitle it to be joined as a co-plaintiff in the proceedings for the purpose of pursuing its claim either to the

facilities which it contends have been transferred or to the judgments which it contends have been transferred or assigned.” (para. 28).

67. The Court of Appeal then stated that if the appeals were dismissed, the existing High Court judgments in favour of IBRC would remain in place and the applicant, as a co-plaintiff in the proceedings, would then be entitled to pursue any application in the High Court for execution on foot of the judgments in favour of IBRC. The Court of Appeal made clear that on such an application, the alleged entitlement of the applicant to enforce the judgments, as an assignee or transferee of the judgments, could be determined as appropriate at first instance (see para. 30).
68. The Court of Appeal in *Halpin* was making clear, therefore, that it was determining the applicant’s application to be added as a plaintiff/respondent to the appeal on the basis that it had put forward *prima facie* evidence of its entitlement to the benefit of facilities transferred. Having made that order, the court would then proceed to determine the appeals. If the appeals were dismissed and the judgments of the High Court upheld, then it would be a matter for the applicant to establish in the High Court its entitlement to execute the judgments obtained by IBRC.
69. The second relevant judgment of the Court of Appeal is *Bank of Scotland plc v. O’Connor* [2017] IECA 54 (“*O’Connor*”). The issue in that case concerned the standing of Bank of Scotland to participate in an appeal by the defendant from a judgment obtained against him in the High Court by Bank of Scotland in circumstances where, a number of months after the judgment had been granted, Bank of Scotland agreed to sell the relevant facilities, guarantees and security rights to a purchaser. The defendant argued that, following that sale, Bank of Scotland had no further interest in the loans in respect of which judgment was granted in its favour by the High Court and no standing to defend the appeal against the judgment. Bank of Scotland submitted that, in part in reliance on the judgment of the Court of Appeal in *Halpin*, it was entitled to remain as a respondent and to defend the appeal. It also argued that it had the benefit of an order for costs in the High Court which it was entitled to defend. The Court of Appeal applied *Halpin* and held that Bank of Scotland had to, and was entitled to, remain as a respondent to the appeal, as what was sought to be upheld was the determination of the High Court that it was entitled to judgment against the defendant. Bank of Scotland had not agreed to sell the loans to the purchaser until after the date the judgment was granted. Further, Bank of Scotland had the benefit of a costs order in the High Court which it was entitled to seek to uphold on appeal. On that basis, the Court of Appeal concluded that Bank of Scotland did continue to have *locus standi* in the appeal. The Court of Appeal had decided to dismiss that appeal. However, in a separate judgment, having concluded that Bank of Scotland had standing, Finlay Geoghegan J. (delivering the judgment of the Court of Appeal) went on to state:

“It is important to stress that the question as to the person who is now entitled to seek to enforce the High Court judgment against the appellant is not determined by

this judgment. Any future application by reason of the sale of the loans of the appellant would be to the High Court and different issues may arise.” (para. 14.)

70. Although the question of the standard of proof to be applied did not directly apply in *O'Connor*, as it was the defendant/appellant who was contending that Bank of Scotland had no standing to participate in the appeal, there is no reason to believe that if the application to be joined had been made by the purchaser, the court would have applied a different test to that applied in *Halpin*, having expressly endorsed the judgment in *Halpin* (and the reasons for it).
71. The third relevant judgment of the Court of Appeal is *McDermott*. In that case, the High Court had made an order substituting the purchaser of a loan book for Bank of Scotland in summary proceedings where judgment had been granted more than four years previously. The High Court had also made an order that the purchaser be substituted for Bank of Scotland as the party entitled to enforce the judgment. One of the issues which arose on the appeal was whether the evidence before the High Court was sufficient to enable that court to be satisfied that it was appropriate to make the substitution order sought. The purpose of the application to substitute the purchaser of the loan book was to enable it to take steps on foot of the judgment to enforce the judgment and to obtain payment on foot of it. I have set out earlier the Court of Appeal's description of the nature of the application to substitute a party. On the appeal, the defendant/applicant sought to argue that the level of proof required on the application (being one made after judgment had been granted, as opposed to the normal situation where a substitution order was sought prior to final judgment) should be to a higher standard than the prima facie standard stated in *Comer*. The Court of Appeal noted that in *O'Driscoll* the substitution order was made after final judgment had been granted and in circumstances where there would be no opportunity at a subsequent trial to raise issues in relation to the validity of the assignment of the loans to the purchaser. The Court of Appeal concluded that, where the substitution application was made after judgment had been granted and where there would be no opportunity at trial to raise issues in relation to the proofs adduced in support of the application, the *prima facie* test referred to by Kelly J. in *Comer* was not the correct test to apply. The Court held that the correct test in such circumstances was that applicable in civil proceedings generally, namely, the balance of probabilities (para. 37). The Court went on to conclude that the trial judge had correctly applied that test by stating that he was “*absolutely satisfied that the transfer of the loan has been established*” and that there was ample evidence to justify that conclusion. The Court of Appeal held that the trial judge had been satisfied at least to the level of the balance of probabilities, if not beyond that standard, and that he was entitled to be so satisfied (para. 38). In applying the balance of probabilities standard, it seems to me that the Court of Appeal was recognising that, unlike in *Halpin* and in *O'Connor*, where it would be open to the defendant to raise issues in relation to the validity of the assignments in question when the purchaser sought to enforce the judgment, that option was not open to the defendant in *McDermott* as the High Court had already made an order that the purchaser be substituted for Bank of Scotland as the party entitled to enforce that

judgment. Therefore, the defendant would not have the opportunity to challenge the assignment at the later enforcement stage.

72. It seems to me that, based on that trio of Court of Appeal judgments, the normal position is that the court decides an application to substitute or add a party under O. 17, r. 4 RSC on the basis that a *prima facie* case must be established by the applicant for such an order. That is the standard to be applied where it would be open to the opposing party (normally the defendant to the proceedings) to raise issues in relation to the assignment or transfer of the facilities in question at the subsequent enforcement stage. However, where that opportunity does not exist, the court will adopt the higher standard of the balance of probabilities.
73. In the present case, the application is merely now to add Everyday as a co-plaintiff to the proceedings, on the basis of the transfer or assignment of the relevant facilities and the guarantees. If that order was to be made, the defendants would nonetheless be entitled to raise issues in relation to the transfer or assignment if and when Everyday comes to seek to enforce the judgment. An order joining Everyday as a co-plaintiff to the proceedings would, therefore, not determine those issues. The defendants could subsequently raise issues in relation to them at that later stage. On that basis, the position is more like that which pertained in *Halpin* and *O'Connor*, rather than the position in *McDermott*.
74. However, the defendants did seek to ventilate a range of issues in relation to the validity of the transfer or assignment of the facilities, guarantees and related security by AIB to Everyday. I have considered many of those issues in the course of this judgment. I have decided to do so on the basis of the balance of probabilities, rather than to a *prima facie* standard, in order to deal with the defendants' grounds of opposition at their highest at this point in time. I am satisfied that irrespective of whether the *prima facie* standard is applied or whether the approach to be taken is to consider the issues on the basis of the balance of probabilities, the defendants fail on each of the objections they have raised. However, what they have failed on is their objection to the application by Everyday to be added as a party to the proceedings. It may be that the defendants will be in a position to raise other grounds of objection if and when it comes to Everyday's attempt to execute on foot of the judgment. It may, however, be of relevance and assistance to whatever judge or court is dealing with the issue at that later stage to have regard to the conclusions I have reached in the course of this judgment. That will be a matter for that judge or court, as the case may be.
75. I will now turn to consider those grounds of objection raised by the defendants which are, or may be relevant to Everyday's application to be joined to the proceedings.

Defendants' Principal Grounds of Objection to Application

(1) Defective notice of motion: Alleged breach of O.7 RSC

76. One of the main or principal grounds of objection raised by the defendants concerns the circumstances in which Everyday's motion came to be issued by Byrne Wallace. The defendants contended that the motion is defective in that it was issued by Byrne Wallace,

purportedly as solicitors for the plaintiff/respondent, and purportedly sought relief on behalf of the plaintiff/respondent, in circumstances where Byrne Wallace were not the solicitors acting for AIB, the plaintiff/respondent, but rather were acting for Everyday. The defendants contended that that amounted to a breach of the provisions of O. 7 RSC. They contended that the motion was fatally defective and should, therefore, be refused by the court. Everyday accepted that the notice of motion contained an error, in that it referred to the motion being issued on behalf of the plaintiff/respondent and by Byrne Wallace as solicitors for the plaintiff/respondent where it should have referred to the motion being issued on behalf of the "*intended plaintiff/respondent*", with Byrne Wallace acting for that entity. The error was described as a "*typographical error*" at para. 10 of Mr. McCudden's third affidavit.

77. I accept that the notice of motion did contain an error. It should have been issued by Byrne Wallace as solicitors on behalf of Everyday and should have made clear at the outset that the application was being made by counsel on behalf of Everyday as the intended plaintiff/respondent. However, I do not accept that the error was a fatal one or that there was any breach of the provisions of O. 7 RSC. In the event that there was a breach of that provision, I am satisfied that it was inadvertent and did not cause any prejudice or unfairness to the defendants. If there was a failure by Everyday, through its solicitors, to comply with the provisions of O. 7 RSC in bringing the motion (and I do not believe that there was), I hold that any such failure did not render the proceedings void and would so direct under O. 124 RSC. My reasons for these conclusions are as follows.
78. First, the notice of motion itself made very clear what reliefs were being sought and on whose behalf they were being sought. Paragraphs 1 and 2 of the notice of motion made clear that the reliefs being sought were an order substituting Everyday in place of AIB, the existing plaintiff/respondent or, in the alternative, an order adding Everyday as a co-plaintiff/co-respondent with AIB. The motion was grounded on an affidavit sworn by Mr. McCudden on 8th October, 2019. That motion made it very clear that the application was being made by Everyday and not by AIB. Mr. McCudden explained at the outset of his affidavit that he was the Head of Compliance in Everyday and was making the affidavit for and on its behalf. I do not believe that the defendants could have been confused by the motion and affidavit as to the party seeking the relief and as to the basis on which that relief was being sought, despite the errors contained in the notice of motion. In fairness to the defendants, they did not contend that they were confused.
79. Second, the correspondence which preceded the *ex parte* application to the Court of Appeal by Everyday on 9th October, 2019, made very clear what the application was to be and on whose behalf it was being brought. That correspondence also made clear that Byrne Wallace were the solicitors acting for Everyday and not for AIB. The correspondence was exhibited by Mr. Nash to the first affidavit which he swore on 10th October, 2019.
80. Byrne Wallace wrote to the defendants' then solicitors, Gary Matthews Solicitors, on 2nd October, 2019 stating that they acted for Everyday. Everyday was identified in that letter

as the client of Byrne Wallace. The letter explained that by virtue of Everyday's acquisition of the facilities the subject of the proceedings and its consequential interest in the proceedings, Byrne Wallace would need to make a "*short procedural application*" to the Court of Appeal to substitute Everyday in place of AIB. That letter was copied to the first defendant at his email address.

81. Gary Matthews Solicitors responded by informing Byrne Wallace that they were no longer acting for the defendants. Byrne Wallace then emailed the first defendant on 3rd October, 2019 informing the defendants that the application referred to in the previous letter would be listed for hearing before the Court of Appeal on 11th October, 2019 and that they would be serving the relevant papers on the defendants by email and by registered post the following day.
82. The defendants responded on 7th October, 2019. From that response, it is clear that the defendants were well aware that the application to the Court of Appeal was one being made by Everyday and that Byrne Wallace were the solicitors acting for Everyday. Byrne Wallace wrote again to the defendants on 8th October, 2019. Again, their letter made clear at the outset that their client was Everyday. That letter enclosed a copy of the motion and of Mr. McCudden's first affidavit and exhibits. It again explained that the substitution application merely sought to have Everyday reflected as plaintiff/respondent in the proceedings in circumstances where the facilities, guarantees and security in question were sold by AIB to Everyday after the High Court proceedings had come to an end. I have no hesitation in concluding that on the basis of that correspondence the defendants were well aware that the motion referred to in the correspondence was one which was being brought by Everyday and that Byrne Wallace were the solicitors acting for Everyday in connection with that motion.
83. Third, the order of the Court of Appeal made on 9th October, 2019 made clear that the motion was one made on behalf of Everyday and not on behalf of AIB, and that Byrne Wallace were the solicitors acting for Everyday and not for AIB. The order was made following the *ex parte* application by counsel on behalf of Everyday which was described at the outset of the order as being "*a Non-Party to the within proceedings*". The order made clear that the application was made on behalf of Everyday for short service of the motion seeking the substitution order. The order further expressly stated that Everyday was to have liberty to issue the motion returnable for 11th October, 2019. Everyday was referred to as the applicant. Byrne Wallace were described at the bottom of the order as solicitors on behalf of Everyday. Fitzgerald Solicitors were described as the solicitors for the plaintiff. The defendants were referred to as defendants in person.
84. It was clear from the Court of Appeal order of 9th October, 2019 that there was no confusion on the part of the court at that stage, that the application was one being made by Everyday and that Byrne Wallace were acting in the motion as solicitors for Everyday. I note, however, that in the subsequent order made by the Court of Appeal on 18th October, 2019 in which the court refused to deal with Everyday's application and remitted it to the High Court, the order stated that the motion was made by counsel for the

plaintiff rather than by counsel for Everyday. The order made a number of references to counsel for the plaintiff. Byrne Wallace were described as solicitors for the plaintiff at the bottom of that order. However, it seems to me that those references are understandable in circumstances where, as we shall see shortly, Byrne Wallace were engaged to act as agents for Fitzgerald Solicitors/Fitzgerald Legal & Advisory, the solicitors acting for AIB in the proceedings, and appeared on their behalf at the hearing of the appeal on 18th October, 2019. The order made on 28th November, 2019, consequent upon the delivery of the judgment of the Court of Appeal that day, referred to "Fitzgerald" as solicitors for the plaintiff.

85. I do not believe that there was any breach of the provisions of O. 7, r. 2(1), (2) or (2A) RSC by reason of the circumstances in which the motion came to be issued. Order 7, rule 2 deals with the situation where a party has changed or discharged his or her solicitor. Where that is done, a notice to that effect must be filed in the Central Office and until that is done and a copy served on every other party to the proceedings, the change or discharge will not be deemed to have taken effect. Order 7, rule 2A contains an additional requirement in the case of such a change or discharge taking place in the case of an appeal pending before the Court of Appeal or the Supreme Court. However, there was no such change or discharge by any party of the solicitor acting on its behalf. AIB was not changing or discharging its solicitor. Its solicitor remained as Fitzgerald Solicitors/Fitzgerald Legal & Advisory (and I will come to the issue raised by the defendants in relation to that firm shortly). Byrne Wallace were acting as solicitors for Everyday which wished to become a party to the proceedings, but which was not at the time the motion was issued (and still is not) a party to the proceedings. There was, therefore, no question of a party seeking to change or discharge its solicitor on the facts as they presented themselves before the Court of Appeal or before this court. In my view, neither Byrne Wallace nor Everyday acted in breach of O. 7, r. 2(1), (2) or (2A) RSC in bringing the motion before the Court of Appeal in the manner in which it was brought. Furthermore, if I am wrong about that, I am satisfied that any breach was inadvertent and did not give rise to any confusion on the part of the defendants or any injustice or unfairness to them. Nor did any such alleged noncompliance with O. 7 render the motion brought void. That is the effect of O. 124, r. 1 RSC which provides as follows:-

"Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

86. It is clear from that provision that even if I were to take the view that there was a breach of or non-compliance with O. 7, and I do not, such non-compliance or breach would not render the proceedings void unless the court were to so direct. For the reasons set out earlier, I would not be prepared to so direct. Nor would I be prepared to set aside the motion, either in whole or in part, as being irregular. On the contrary, I would be and am prepared to deal with the motion on the basis that it was validly brought and is validly before the court.

87. The defendants have also sought to raise an issue concerning the circumstances in which Byrne Wallace came to act as agents for Fitzgerald Solicitors/Fitzgerald Legal & Advisory, the solicitors acting for AIB, the plaintiff/respondent in the appeal. However, it does not seem to me that that is an issue which properly arises on Everyday's application. Nor is there any merit whatsoever to the allegations made by the defendants in that regard. I do not have to decide whether Fitzgerald Solicitors changed their name to Fitzgerald Legal & Advisory (as Mr. McCudden stated at para. 11 of his third affidavit) or whether Fitzgerald Solicitors and Fitzgerald Legal & Advisory are separate firms (as Mr. McKeown asserted at para. 5 of his third affidavit). None of that is, in my view, remotely relevant to Everyday's application to be joined as a party to the proceedings. In my view, it is totally irrelevant. However, lest there be any lingering doubt in the mind of the defendants that there was something untoward about the circumstances in which Byrne Wallace came to act as agents for Fitzgerald Solicitors/Fitzgerald Legal & Advisory at the substantive appeal before the Court of Appeal, I should make clear that I do not accept that there was anything improper or irregular about what occurred, on the basis of the evidence which I have seen. The evidence discloses that in response to a letter from the defendants of 6th November, 2019, Byrne Wallace wrote to the defendants by email on 8th November, 2019 and informed them that Byrne Wallace would be acting as agent for Fitzgerald Solicitors before the Court of Appeal under an express authority given to that firm in advance of the Court of Appeal hearing. When the defendants requested a copy of the "express permission" from Fitzgerald Solicitors, Byrne Wallace responded by pointing out that Fitzgerald Solicitors had been copied with the email of 8th November, 2019 which attached the Byrne Wallace letter and "can confirm the position is as outlined in our letter". When pressed further by the defendants, Mr. McCudden addressed this issue at paras. 11 and 12 of his third affidavit. He explained that Byrne Wallace were solicitors for Everyday (in the substitution application) and attended the substantive appeal as agents of Fitzgerald Solicitors who were by then called "Fitzgerald Legal & Advisory", the solicitors on record for the plaintiff in the appeal. He further stated that Fitzgerald Legal & Advisory had given express authority permitting Byrne Wallace to act as town agents for the Court of Appeal hearing and that that authority was confirmed in email correspondence with Byrne Wallace dated 15th October, 2019. Mr. McCudden exhibited a redacted copy of the email correspondence sent on 15th October, 2019 at Exhibit "AMcC13" to that affidavit. The exhibit discloses that at 17:03 on 15th October, 2019, Gemma Freeman of Byrne Wallace wrote to Philip O'Leary, making reference to a call earlier that day. Following a redacted portion of the email, she stated:-

"As such the CA [Court of Appeal] may expect or enquire about an appearance from Fitzgeralds on the basis that you are on record for AIB and AIB is not yet removed from the proceedings. In this event, in order to avoid incurring costs, Byrne Wallace is happy to act as your town agents and appear on your behalf, once you confirm that you are happy for us to do so.

I would be grateful if you would confirm."

88. The response to that email came at 17:29 on the same date from Philip O'Leary (with the email address philipoleary@fitzsols.com). Mr. O'Leary was described in that email as "*Managing Partner*" of "Fitzgerald Legal & Advisory". He stated:-

"Gemma, happy to confirm on the basis as outlined."

89. Whether Mr. O'Leary was providing that confirmation as managing partner of Fitzgerald Legal & Advisory or whether he was doing so, as appears from his email address, on behalf of Fitzgerald Solicitors, is not material to the determination of Everyday's application. The required confirmation was provided. The order ultimately made by the Court of Appeal on 28th November, 2019 recorded "Fitzgerald" as acting for the plaintiff (i.e. AIB). Whether that was intended to be a reference to Fitzgerald Solicitors or to Fitzgerald Legal & Advisory, if they are indeed separate firms or merely the same firm with a change of name, is, in my view, irrelevant for the purpose of Everyday's application.
90. The defendants also contended that Mr. O'Leary's email could not be relied upon as evidence of the confirmation from his firm that Byrne Wallace could act as its agents for the appeal before the Court of Appeal, in light of the wording contained at the bottom of Mr. O'Leary's email. In particular, they relied on the fact that the wording at the bottom of the email stated that the communication was "*without prejudice and subject to contract and shall not be construed as a memorandum within the meaning of the Statute of Frauds*". The defendants suggested that in some way that precluded the document being relied upon as evidence of the confirmation of Mr. O'Leary's agreement. I reject that submission. It has no merit whatsoever. That or similar wording at the bottom of the email is a variation of the wording contained at the bottom of emails sent by many solicitors' firms to deal with various issues including solicitor/client privilege and confidentiality. Wording is also often used so as to make clear that the document does not bind a client in the context of a commercial or property transaction. That was obviously not the purpose of Mr. O'Leary's email. The use of the words "*without prejudice*" would only be relevant where the email amounted to a communication in the context of an attempt to negotiate a settlement of proceedings. Otherwise, the "*without prejudice*" designation is meaningless and ineffective. Mr. O'Leary's email was not sent in the course of any attempted negotiation of the settlement of proceedings. Therefore, those words have no effect. There is nothing in the words used at the bottom of Mr. O'Leary's email which would preclude the court from considering that email as evidencing the confirmation from Mr. O'Leary that his firm was happy for Byrne Wallace to act as its agents in the substantive appeal before the Court of Appeal.
91. I am satisfied that there is no basis whatsoever for the defendants' objection to Everyday's application on the basis of alleged non-compliance with the provisions of O. 7 RSC. There was no change of solicitors for AIB. Byrne Wallace were at all times acting for Everyday on its application. Byrne Wallace also acted as agents for Fitzgerald Solicitors/Fitzgerald Legal & Advisory at the substantive hearing of the defendants' appeal in the Court of Appeal. While Everyday's notice of motion did contain a number of errors

as mentioned earlier, in my view, they were insignificant and did not give rise to any confusion on the part of the defendants or any injustice or unfairness to them.

Furthermore, even if there were any non-compliance with the provisions of O. 7 RSC (and there was not), that non-compliance did not render the motion void and it was and is in order for the court to deal with the motion in all the circumstances outlined above.

(2) Description of AIB in proceedings and in other documents

92. As part of their objection to Everyday's application, the defendants sought to raise inconsistencies between the description of AIB in the title to the proceedings and the description of AIB in other documents put in evidence before the court, including the relevant facility letters and guarantees, the deed of transfer, the "goodbye letters" and the "hello letters" and the letter of consent by AIB to Everyday's application. So far as I could understand the defendants' contentions in that regard, I address them below.

(a) The identity of the plaintiff

93. The defendants sought to advance the argument that the AIB entity described in the title to the proceedings is different to the AIB entity referred to in the relevant facility letters and guarantees, the deed of transfer and in the "goodbye letters" and the "hello letters". In my view, this is completely irrelevant to Everyday's application.

94. It appears that the defendants, at one stage, did seek to make the point in the High Court that the AIB entity described as plaintiff in the proceedings was a different entity to that referred to in the relevant facility letters and guarantees (according to Mr. McKeown, it was referred to at para. 15 of the supplemental affidavit he swore on 21st April, 2017). However, I have read the written submissions prepared on behalf of the defendants by counsel and solicitors for the purpose of the summary judgment application before Costello J. and the transcript of the hearing before Costello J. on 27th April, 2017. The point was not pursued on behalf of the defendants in their written submissions or in the oral submissions at the hearing. Nor was the point made in the grounds of appeal advanced by the defendants in their notice of expedited appeal to the Court of Appeal. As noted by Donnelly J. in her judgment on behalf of the Court of Appeal on the defendants' appeal, the defendants sought leave to admit new grounds of appeal directed to the issue of the identity and locus standi of the plaintiff. However, the defendants' application was refused by Irvine J. on behalf of the Court of Appeal on 20th October, 2017. Nonetheless, it appears that the defendants sought to advance in the appeal an argument that the plaintiff entity had no *locus standi* in the proceedings as it was not the entity that had provided the facilities the subject of the facility letters. The Court of Appeal refused to permit the defendants to advance that argument. At para. 22 of her judgment on behalf of the Court of Appeal, Donnelly J. noted that the Court of Appeal was being asked to act as a court of first instance in respect of that issue and that there had been no explanation for the defendants' failure to pursue the point in the High Court where the defendants were legally represented. The Court of Appeal refused to permit the defendants to advance the argument on the appeal and rejected it.

95. The defendants have now sought to make the point again in response to Everyday's application. In my view, it is entirely irrelevant to Everyday's application. Furthermore,

there is no merit whatsoever to the point. While great care should undoubtedly be taken to ensure that an entity is correctly named in the title to the proceedings, it is very clear in the present case which AIB entity is and is intended to be the plaintiff. This is clear, for example, from the summary summons which (at para. 1 of the special endorsement of claim) described the plaintiff as a "*body corporate engaged in the provision of financial services and... authorised to carry on business within the State by the Central Bank of Ireland*" and that it had its registered office at Bankcentre, Ballsbridge, Dublin 4. Paragraphs 4 to 17 of the special endorsement of claim then referred to the loan facilities provided by the plaintiff to the first defendant and to both defendants and to the guarantees given by the second defendant in respect of certain of those facilities. Specific reference was made to the facility letters of 20th May, 2013 and to the guarantees accepted and signed by the second defendant on 2nd March, 2009 and 1st December, 2009. Those facility letters and guarantees all made clear that the relevant AIB entity which provided the loans and which was the recipient of the guarantees provided by the second defendant was Allied Irish Banks, p.l.c., which had its registered office at Bankcentre, Ballsbridge, Dublin 4 and was registered in Ireland under no. 24173. There could have been no doubt or confusion on the part of the defendants that the entity named as plaintiff in the summary summons and which sought judgment on foot of the facility letters and guarantees was the entity named in the facility letters and guarantees.

96. I am satisfied that that is also the case in relation to the deed of transfer in which one of the sellers was named on the first page as Allied Irish Banks, P.L.C. (along with AIB Mortgage Bank and EBS). That entity was then referred to as the first party named on p. 2 of the deed as "*ALLIED IRISH BANKS, PUBLIC LIMITED COMPANY, a company incorporated in Ireland, with registered no. 24173, having its registered office at Bankcentre, Ballsbridge, Dublin 4 (AIB)*". That entity was referred to as one of the sellers of the various loans and securities which were transferred or assigned to Everyday. It is quite clear that the AIB entity referred to in that deed is Allied Irish Banks, p.l.c. and is the same entity named as the plaintiff in the proceedings.
97. The same as the case in relation to the "goodbye letters" sent by AIB to the defendants on 8th August, 2018. Each of those letters was sent by James F. Hurley, senior manager, on AIB notepaper from the "AIB Transition Services Team". It is, however, clear from the bottom of the letters, that the letters were coming from Allied Irish Banks, p.l.c. with its registered office at Bankcentre, Ballsbridge, Dublin 4 and that the company was registered in Ireland under no. 24173. All of the "goodbye letters" were sent on the same AIB letterhead and contained the same references to the relevant AIB entity. While the "hello letters" from Everyday dated 14th August, 2019 referred to "*AIB plc*" and/or AIB Mortgage Bank, they made express reference to the "goodbye letters" of 8th August, 2018 which contained the description of the relevant AIB entity. In my view, there was and is no doubt whatsoever as to the AIB entity which is and was the plaintiff in the proceedings and the respondent to the appeal in the Court of Appeal and that entity is and was the same entity that provided the loan facilities to the defendants and was the recipient of the guarantees provided by the second defendant. There is no basis whatsoever for any ground of objection advanced by the defendants based on an alleged

difference between the entity named as plaintiff in the proceedings and the entity which provided the loan facilities and received the benefit of the guarantees.

98. Arguments based on an alleged misdescription of AIB, by reason of the absence of a comma or other similarly insignificant feature, have unsurprisingly not fared well before the Irish Courts. See, for example: *Ben Gilroy and Jerry Beades v. The Governor of Mountjoy Prison* [2019] IEHC 71 (Barrett J.) and *Allied Irish Banks, plc v. Seamus McQuaid & ors* [2018] IEHC 516 (Haughton J.). As in those cases, the argument made in the present case by the defendants based on an alleged misdescription of the plaintiff or an alleged inconsistency between the description of the plaintiff and the description of AIB in the relevant documents, in my view, is equally devoid of any merit.
99. I should note that just as I was about to sign this judgment I came across a judgment of the Court of Appeal delivered on 26th March, 2020 in another case in which the defendants were parties – *Ned Murphy v. Paddy McKeown and Adelaide McCarthy* [2020] IECA 75 (“*Murphy*”). The judgment of the Court of Appeal was delivered by Murray J. in an appeal by the defendants against an order restraining them from interfering with a receiver in the exercise of his functions over certain properties owned by them. The defendants raised an issue concerning the description of AIB in the instruments appointing the receiver and claimed that the AIB entity described in those instruments without a comma was not the entity with which they dealt. Since that judgment was decided after I reserved judgment in this case and since the parties have not had the opportunity of making any submissions to me in relation to it, I have not placed any reliance on the judgment of the Court of Appeal in *Murphy*, save to record that I became aware of it and that, in my view, there is nothing in the judgment which would cause me to alter the conclusions I have reached on the argument advanced by the defendants in response to Everyday’s application concerning the identity of the plaintiff.
100. Insofar as the defendants sought to rely on an affidavit sworn by Tony Cooper, an AIB case manager, on 11th October, 2017, in the context of an application by the defendants to admit new evidence as part of their appeal to the Court of Appeal, that reliance is equally misplaced. The defendants sought to rely in oral submissions on para. 33 of that affidavit. In his affidavit, Mr. Cooper was addressing the argument sought to be advanced by the defendants that there was some confusion between the identity of the plaintiff and a UK AIB entity. Mr. Cooper was explaining how the plaintiff was described in the Credit Institutions Register, where it was referred to without the comma. Mr. Cooper did not accept that the presence or omission of a comma was significant. He made the point that if the plaintiff did not commence the proceedings using the name of the plaintiff as it was listed on the Credit Institutions Register, objections would be raised by the defendants for including a superfluous comma. Whatever about that later point, I agree with Mr. Cooper that the presence or omission of the comma is and was not significant, in the particular context of this case in any event. It is again clear that the entity referred to in the register was the AIB entity with registration no. 24173. In my view, this has no relevance to Everyday’s application. The AIB entity named as plaintiff to the proceedings is and has

at all material times been the same entity as was referred to in the facility letters, guarantees, deed of transfer, "goodbye letters" and "hello letters".

(b) Consent by plaintiff to Everyday's application

101. The defendants contended that there was no valid consent by the plaintiff to Everyday's application having regard to the terms of the consent provided on its behalf. In my view, this ground of opposition has no merit whatsoever.
102. It is arguably the case that it was unnecessary for Everyday to obtain the plaintiff's consent to its application to be substituted for or added as an additional party to the existing plaintiff in the proceedings, in light of the terms of the deed of transfer and amendment deed. Whether or not that was so, the consent of the plaintiff was sought and provided. The consent was exhibited at Exhibit "RN7" to Mr. Nash's second affidavit. He exhibited a document on AIB notepaper which came from "AIB Financial Solutions Group" with an address in Cork. The plaintiff's name, correctly spelt as Allied Irish Banks, p.l.c. with the registration no. 24173 and the registered office at Bankcentre, Ballsbridge, Dublin 4 was contained at the bottom of the AIB notepaper, clearly indicating that the document emanated from that entity. The document bore the title of the proceedings, together with the High Court record number and the Court of Appeal record number. It then stated:-

"Allied Irish Bank's plc hereby consent to Everyday Finance DAC being substituted as the Plaintiff/Respondent or to be joined as Co-Plaintiff/Respondent with the current Plaintiff/Respondent in the above proceedings."

103. The defendants complained that the AIB entity referred to in the passage quoted, namely, "Allied Irish Bank's plc", was not the same as the entity named as the plaintiff in the proceedings or the entity referred to at the bottom of the letter. The first defendant (at para. 15 of his second affidavit) suggested that there was "now yet another AIB floating around". While the description of the AIB entity referred to in the passage quoted above was careless and greater care most certainly ought to have been exercised in the preparation of the consent, there could, in my view, be no doubt as to the AIB entity actually providing its consent to Everyday's application. It was clearly the same entity as was and is the plaintiff in the proceedings, being the entity referred to at the bottom of the consent document and the same entity as provided the loan facilities to the defendants and was the recipient of the guarantees from the second defendant. While careless and sloppy, the misdescription of the AIB entity in the letter of consent was in no way fatal to the consent provided. It was and is clear from a reading of the document as a whole, that the relevant AIB entity was providing its consent to Everyday's application.
104. The defendants also criticised the terms of the consent on the additional grounds that the person signing the document was not identifiable and that it was not clear from the signature that the person signing was a person with the appropriate authority to do so on behalf of AIB. I agree that it would have been preferable if the person signing the document and his or her title had been clearly identified. However, I do not agree that the absence of identification or confirmation that the person concerned had authority to sign

the document on behalf of AIB is in any way fatal to the consent evidenced by the document. The document was provided in order to evidence and confirm the consent of the plaintiff/respondent to Everyday's application. It is not a deed or contract or other formal document in respect of which any particular formality was required. It simply evidenced the consent of the plaintiff/respondent to the application. In my view, notwithstanding the errors in the document, it nonetheless evidenced the consent of the plaintiff/respondent to Everyday's application. The absence of any objection by the plaintiff to the application and the agreement of its solicitors, Fitzgerald Solicitors/Fitzgerald Legal & Advisory, for Byrne Wallace to act as their agents for the substantive appeal before the Court of Appeal, are all entirely consistent with that consent to the application.

(3) Validity of transfer/assignment

105. The defendants sought as part of their opposition to Everyday's application, to challenge the validity of the transfer or assignment of the relevant loan facilities, guarantees and securities to Everyday. In circumstances where Everyday's application is now to be joined as a co-plaintiff to the proceedings with the existing plaintiff, it is very difficult to see how these grounds of objection have any relevance to Everyday's application. In the event that Everyday is joined as a co-plaintiff to the proceedings, and if it seeks to take further steps to execute on foot of the judgment granted against the defendants, it would in the ordinary way be open to the defendants to seek to raise these issues at that stage. However, as the defendants have raised them on this application, I should set out, in brief, my views on the objections raised, in the event that they are relevant or of assistance to whatever judge or court may have to consider those issues at a later stage.
106. I am satisfied that there is no merit whatsoever to the grounds of objection raised on this point by the defendants. I will deal with each of the arguments raised by the defendants in turn.
107. First, the defendants contended that the plaintiff in the proceedings was a different entity to the AIB entity which was a party to the deed of transfer and amendment deed with Everyday. However, for reasons already mentioned, I do not accept that that is the case. It is clear that the plaintiff is the same AIB entity which granted the loan facilities to the defendants and took the benefit of the guarantees and other security from them, for reasons already mentioned. I am also satisfied, for reasons previously outlined, that the first named party to the deed of transfer and amendment deed is one and the same as the plaintiff. The correct AIB entity (with AIB Mortgage Bank and EBS) entered into the deed of transfer and amendment deed with Everyday.
108. Second, the defendants' objections to the redactions made to the deed of transfer are misplaced and are also without merit. Mr. McCudden explained the basis for the redactions made at para. 13 of his first affidavit and at para. 21 of his third affidavit. The redactions were made in accordance with GDPR requirements, including the redaction of third party personal data, for commercial sensitivity and for banker/client confidentiality reasons. They were further made on the grounds of relevance. The case law in relation to the redaction of documents such as these, was considered by McDonald J. in the High

Court in *Everyday Finance Designated Activity Company v. Woods* [2019] IEHC 605 (“*Woods*”). McDonald J. considered the judgments of Noonan J. in the High Court in *Launceston Property Finance v. Walls* [2018] IEHC 610, my judgment in *Promontoria (Arrow) v. Burke* [2018] IEHC 773 and the judgment of Haughton J. in the High Court in *Courtney v. OCM Emru Debtco* [2019] IEHC 160. As noted by McDonald J. at para. 11 of his judgment in *Woods*, what is necessary for the court to consider are the “*relevant parts of the deeds which contain the assignment of the loans in issue*” and that:-

“If a Defendant wishes to see more of the deed, the burden is on the Defendant to show why more is necessary..., if the Defendant does discharge that burden, then the burden shifts to the Plaintiff to justify the extent of the redaction made.”

109. I am satisfied that in the present case, Mr. McCudden on behalf of Everyday has provided an adequate explanation for the redactions. The burden then shifted to the defendants to show why it was necessary for them to see more than was provided in the redacted deeds. In my view, the defendants have failed to discharge that burden. It is clear from the redacted portions of the deed of transfer that the relevant facilities, guarantees and security referable to the defendants, were being transferred or assigned to Everyday. Therefore, I reject any objection raised by the defendants based on the failure by Everyday to produce an unredacted version of the deed of transfer.
110. Third, the defendants contended that the deed of transfer was in breach of the provisions of the applicable AIB general terms. I do not accept that submission. As noted earlier, the relevant version of the AIB general terms were those applicable in March, 2013. Clause 7.18 of those AIB general terms dealt with “*Assignment by the Bank*”. It is necessary to quote clause 7.18 in full, as the first defendant relied on only a partial extract from that provision (see para. 14(b) of the first defendant’s second affidavit). Clause 7.18 provided as follows:-

“The Bank reserves the right to assign, charge, transfer (by way of novation, securitisation or otherwise) or sub-participate all or part of any facilities and any security held as collateral in respect of the facilities to any member of the Allied Irish Banks Group or to any third party, either within the State or elsewhere, without notice to or the prior consent of the Borrower. The Borrower irrevocably consents and agrees that the Bank will be entitled to give any proposed assignee, chargee, transferee or sub-participant such information as the Bank deems necessary relating to the Borrower, the facility and the security. The Borrower agrees to execute, at the cost of the Bank, any documentation (including without prejudice to the generality of the foregoing, any deed of novation) which the Bank requests it to execute in connection with any such assignment, transfer, sub-participation or securitisation and in consideration of the facilities and as security therefore, the Borrower irrevocably appoints the Bank to be its attorney for the purpose of the execution of any such documentation.”

111. The relevant facility letters of May, 2013 expressly incorporated those AIB general terms, including clause 7.18. Clause 7.18 clearly entitled the plaintiff to transfer or assign the

loan facilities and any security held as collateral for those facilities to any third party, without notice to or the prior consent of the defendants. It was, therefore, open to the plaintiff to transfer or assign the facilities, guarantees and other security provided. Further, separately the guarantees provided by the second defendant envisaged the possibility that the plaintiff could assign the benefit of the guarantees, as the plaintiff was defined in both of the guarantees as including “*its successors and assigns*”. There is no basis, therefore, for the defendants’ contention that the deed of transfer was in breach of the relevant AIB general terms.

112. Fourth, the defendants contended that the AIB entity which was party to the deed of transfer was different to the AIB entity which granted the facilities and obtained the benefit of the guarantees and other security and that there was no assignment or transfer of them as between the two AIB entities and no notice of any such transfer or assignment to the defendants. However, that contention was based on the fundamentally mistaken contention that the AIB entity which advanced the facilities and obtained the benefit of the guarantees and other security was a different AIB entity to that which was a party to the deed of transfer. It was not. They were and are the same entities for the reasons explained earlier. There was, therefore, no such assignment or transfer as between two AIB entities and no requirement to provide notice of any such alleged assignment to the defendants.
113. Fifth, the defendants contended that the transfer or assignment to Everyday under the deed of transfer was unlawful or was ineffective, as no “*explicit written notice*” was provided to the defendants as required by s. 28(6) of the 1877 Act (para. 16 of Mr. McKeown’s third affidavit). The defendants placed reliance on the judgment of Baker J. in the High Court in *Thompson*. In my view, there is no merit to this ground of objection either. The plaintiff had a contractual right to transfer or assign the facilities, guarantees and other security held under the terms of the relevant AIB general terms and under the terms of the guarantees themselves. It exercised that contractual right by means of the deed of transfer. Furthermore, express written notice was provided to the defendants in the form of the “goodbye letters” in themselves or read together with the “hello letters”. I agree with the conclusions reached by McDonald J. in the High Court in *McCarthy v. Moroney* [2018] IEHC 379 (“Moroney”) where he held that the Bank of Scotland Ireland (“BOSI”) had a contractual right under the contracts in place between it and the borrowers to assign the relevant loans and related security to the purchaser, Ennis Property Finance DAC (“Ennis Property”). McDonald J. looked at the relevant contractual documents and concluded that they clearly conferred a contractual right to transfer or assign the relevant interests to Ennis Property. Having reached that conclusion, McDonald J. stated that it was unnecessary to consider in any detail whether in addition to that contractual right, BOSI had a right as a matter of law to assign its rights under the relevant deed subject to compliance with the provisions of s. 28(6) of the 1877 Act. However, he went on to consider whether those requirements were complied with and held that they were (see, for example, paras. 76 and 80 of the judgment of McDonald J. in *Woods*).

114. In the same way, I have concluded that the plaintiff had a contractual right to assign or transfer the relevant facilities, guarantees and security to Everyday and did so by means of the deed of transfer and the amendment deed. Insofar as it may also be necessary to demonstrate compliance with the general law in relation to assignments and with the statutory formalities contained in s. 28(6) of the 1877 Act (and I am not so deciding), I am in any event satisfied that the requirements of s. 28(6) were met on the facts of this case.
115. In her judgment in *Thompson*, Baker J. in the high Court explained clearly the purpose of s. 28(6) of the 1877 Act, which was to ensure that the debtor would know to whom the debt was due and from what date the debtor could, with certainty, pay the debt to an assignee of that debt. Baker J. pointed out that s. 28(6) set out the means by which the legal right to sue on a chose in action or debt could be assigned and that in order for the assignment to take effect at law, the court had to be satisfied that the requirements of s. 28(6) were complied with. Without such compliance, the assignment would remain in equity only.
116. Baker J. also addressed the form of notice required under s. 28(6) of the 1877 Act. She agreed with Costello J. in *LSREF III Stone Investments Limited v. Morrissey* [2015] IEHC 603 ("*Stone*") that no particular form of notice is required. Both Baker J. and Costello J. agreed with the legal position as stated by Widgery L.J. in *Van Lynn Developments Ltd v. Pelias Construction Co. Ltd* [1969] 1 Q.B. 607 at p. 615 where he said:-

"...the only formality required by the section is that express notice in writing be given to the debtor. The section does not speak of 'a notice': it speaks of 'notice'. Accordingly, it is wrong to suppose that a separate document purposely prepared as a notice, and described as such, is necessary in order to satisfy the statute. The statute only requires that information relative to the assignment shall be conveyed to the debtor, and that it should be conveyed in writing."

117. Baker J. held that the court had to look at the "*substance and not the form of a notice*" (para. 48, p. 183). She continued:-

"I consider that in order to be a valid notice under s. 28(6) the debtor must be given express notice in writing of an assignment of his debt to another, that other must be identified, and the notice must contain sufficient information to enable the debtor to know with reasonable certainty that the assignment did assign the debt so that he may without acting at his peril pay the debt to the identified assignee. The absence of a date is relevant, and this must be so because s. 28(6) expressly provides in its terms that the date of the notice to the debtor is the effective date of the assignment for the purposes of the assignment at law." (para. 49, p. 183)

118. Baker J. further observed that the 1877 Act does not make provision for who is to give the required notice in writing of the assignment (para. 50, p. 183). Later, she stated:-

"While a notice does not have to be sent with the intention of constituting a statutory notice, a notice must be sufficiently clear as the legislation requires that the notice be express... I do not consider that s. 28(6) leaves open an argument that a notice which impliedly identifies an assignment can be sufficient, or that a prior general consent performs the statutory function of a notice. A notice must be given, it need not be formal, it need not refer to the statute, but it must be an express notice of an assignment and not merely a claim to the debt by another party. The existence of a prior assignment ought not to be implied. There is nothing in the statute to my mind which suggests that the notice must be contained in one document and for that reason the joinder of documents maybe sufficient to constitute a notice of assignment. Costello J. described the process of the sending of 'goodbye' and 'hello' letters by assignor and assignee to a debtor or obligor which taken together amount to an assignment and she had no doubt that the debtor had as a matter of fact sufficient notice for the purposes of her judgment in LSREF III Stone Investments Limited v. Morrissey [2015] IEHC 603..." (para. 53, pp. 184-185)

119. I am satisfied that the "goodbye letters" sent to the defendants on 8th August, 2018 satisfied all the notice requirements of s. 28(6) of the 1877 Act. Those letters made express reference to the sale and transfer of the relevant loans and related security, guarantees and other rights to Everyday with effect from 2nd August, 2018. The notice given by those letters was, in my view, sufficiently clear. It went on to explain how the loans would be dealt with in the future and with whom the defendants were required to deal in that regard. The assignee or transferee was clearly identified. A date was provided and a transitional period identified. It was explained to the defendants what was to happen following the expiry of the transitional period. In my view, in themselves, the "goodbye letters" constituted sufficient notice for the purpose of section 28(6). If I am wrong about that, those letters read together with the "hello letters" sent by Everyday to the defendants on 14th August, 2018, together amounted to valid notice for the purposes of section 28(6). Those letters identified Everyday as the purchaser of the relevant facilities, guarantees and security, the transfer date and the transitional period and explained what was to happen during those relevant periods in respect of the accounts identified in the letters. It is clear from the cases that a number of documents together can constitute a notice of assignment for the purpose of s. 28(6): see, for example, *Thompson and Stone*. There is, in my view, therefore, no merit whatsoever to the contention that "explicit written notice" of the sale by the plaintiff to Everyday and of the relevant transfer or assignments contained therein was not provided to the defendants.
120. While perhaps not directly relevant to Everyday's application, as these issues were raised, I have decided them and have concluded that there is no basis for the defendants' challenge to the validity of the transfer or assignment of their facilities, guarantees and security by the plaintiff to Everyday.

(4) Existence of costs order made by the High Court

121. The defendants contended that the fact that the order made by Costello J. on 12th May, 2017 which gave effect to her judgment of that date contained an order that the defendants pay the plaintiff's costs of the proceedings when taxed and ascertained and that the plaintiff had sought to have those costs taxed by the Taxing Master (as he was then known), precluded the plaintiff from assigning or transferring the facilities to Everyday. I do not accept that that is so. The plaintiff obtained the costs order and was and is entitled to enforce that costs order against the defendants (and is now unconstrained in doing so having regard to the fact that the stay on execution on foot of the order granted by the President of the Court of Appeal on 28th July, 2017 pending the determination of the appeal has now expired in light of the dismissal of the appeal by that court). The costs order was made in favour of the plaintiff and not in favour of Everyday. Like Bank of Scotland in *O'Connor*, the plaintiff had and has the benefit of the costs order made by Costello J. on 12th May, 2017. The fact that the Taxing Master may have adjourned the taxation of the costs hearing brought by the plaintiff generally (as alleged by Mr. McKeown at para. 18 of his second affidavit) is irrelevant to the issue as to whether Everyday should be joined as a party to the proceedings. The defendants' objection based on the costs order and adjourned taxation hearing was not a well-founded objection to the order sought by Everyday.
122. Similarly, and for completeness, I should also make clear that I am satisfied that the fact that the plaintiff registered the judgment it obtained against the defendants in the High Court as a judgment mortgage on the defendants' folio, did not preclude the plaintiff from selling the relevant facilities, guarantees and security to Everyday and does not preclude the court from acceding to Everyday's application to be joined a party to the proceedings.

(5) Defendants' reliance on the Abbott judgment

123. As noted earlier, the defendants sought to rely, in the course of the replying affidavits sworn by Mr. McKeown, on the Abbott judgment, namely, the judgment delivered by Abbott J. in the High Court in *In Re Allied Irish Banks plc and Allied Irish Mortgage Bank* [2006] IEHC 463. Having read and reread what Mr. McKeown stated in his affidavits in reliance on the Abbott judgment, I confess that I have found it extremely difficult to understand the basis on which the defendants have sought to rely on that judgment by way of objection to Everyday's application. Insofar as the defendants sought to rely on the Abbott judgment as precluding AIB from transferring or assigning the relevant facilities, guarantees and security to Everyday by means of the deed of transfer and the amendment deed, they are mistaken. There is nothing in the Abbott judgment which bears upon that issue. Nor is there anything in that judgment which precludes the court from granting the order sought by Everyday that it be joined as a party to the proceedings.
124. The Abbott judgment dealt with something completely different. It arose on foot of a reference made by the Registrar of Titles to the High Court pursuant to s. 19(2) of the Registration of Title Act, 1964. The reference was made in circumstances where applications were made to the Registrar for registration of charges created in favour of the plaintiff and AIB Mortgage since February, 2006 which were created by a new

standard form mortgage introduced by the AIB Group, under which borrowers simultaneously created a mortgage in favour of both the plaintiff and AIB Mortgage Bank. The purpose of doing so was, as appears from the Abbott judgment, to enable the AIB Group and its customers to take advantage of the Asset Covered Securities Act, 2001. A single mortgage was created to be executed by the mortgageor in favour of the plaintiff and AIB Mortgage Bank. Various issues arose in relation to that type of newly created mortgage, which caused the Registrar to make the reference to the High Court. Abbott J. answered the questions raised in the reference. However, none of those issues appears to me to be remotely relevant to, or to cast any doubt upon, the terms of the deed of transfer between the plaintiff, AIB Mortgage Bank and EBS, on the one hand, and Everyday on the other, or to Everyday's application to be joined as a party to the proceedings. There is, in my view, nothing in the Abbott judgment which precludes me from granting the order sought by Everyday.

(6) Alleged novation in favour of Deutsche Bank

125. The defendants contended, on the basis of material obtained by them from Deutsche Bank, that some form of arrangement was entered into between the plaintiff and Deutsche Bank concerning the facilities granted to the defendants and the securities provided by them in respect of those facilities for which the plaintiff failed to obtain the defendants' consent. Mr. McKeown asserted that the arrangement between the plaintiff and Deutsche Bank was in the nature of a novation, for which the defendants never provided their consent and for which notice had not been provided to the defendants' contrary to s. 28(6) of the 1877 Act. The defendants further speculated that, if there was a novation arrangement with Deutsche Bank, it was "*secret and unrevealed*" and that it was not possible for the defendants to ascertain what occurred by reason of the redactions made to the deed of transfer.
126. It is difficult to see how any of this is relevant to Everyday's application to be joined as a party to the proceedings. I do not believe that it is. However, as the point was raised by the defendants, I will address it briefly.
127. Mr. McCudden, on behalf of Everyday, unequivocally confirmed on affidavit that the redacted portions of the deed of transfer "*certainly do not hide a novation agreement or any unrevealed transfers*" or any other information relevant to the allegations made by Mr. McKeown at paras. 20, 21, 24 and 25 of his second affidavit (see para. 21 of Mr. McCudden's third affidavit). Mr. McCudden was not cross-examined on that averment and there is nothing in the material before the court to cast doubt on its veracity.
128. Furthermore, there is unequivocal evidence before the court as to the facilities, guarantees and security transferred or assigned to Everyday under the deed of transfer. They include the facilities and guarantees on foot of which the plaintiff obtained summary judgment against the defendants. The evidence provided by the defendants from Deutsche Bank merely indicates that the plaintiff may have entered into an arrangement with Deutsche Bank in relation to the securitisation of loans, including loans made to the defendants (see the email from Ms. Natasha Mavrommati of Deutsche Bank to the first defendant sent on 18th December, 2018). The email provided certain personal data in

relation to each of the defendants, but did not contain any information in relation to the loans which were the subject of the securitisation agreement between the plaintiff and Deutsche Bank. The information exhibited by Mr. McKeown does not contradict the clear and unequivocal evidence which Everyday put before the court concerning the facilities, guarantees and security transferred or assigned to Everyday. It is not for me to speculate, but it may be that the defendants had other loans which were the subject of a securitisation arrangement between the plaintiff and Deutsche Bank. However, Everyday has established to my satisfaction, and at the very least to the standard of the balance of probabilities, that the relevant facilities and guarantees on which judgment was granted against the defendants were transferred to Everyday. There is no evidence before the court that those particular facilities and guarantees had previously been transferred or assigned or otherwise dealt with in favour of Deutsche Bank.

129. While none of the defendants' arguments based on an arrangement between the plaintiff and Deutsche Bank is relevant to Everyday's application to be joined as a party to the proceedings, I am nonetheless satisfied that the evidence clearly discloses that the defendants' loan facilities, guarantees and security were transferred or assigned by the plaintiff together with AIB Mortgage Bank and EBS to Everyday.

(7) Defendants' reliance upon SPV Osus

130. In his third and final affidavit, and in the course of his oral submissions to the court, the first defendant sought to impugn the transfer or assignment in favour of Everyday on the basis of the judgment of the Supreme Court in *SPV Osus*. The defendants raised the argument that the assignment could be unenforceable as a matter of public policy, as amounting to "*commodification or maintenance and champerty*" (para. 10(c) of Mr. McKeown's third affidavit). The defendants submitted that if the application by Everyday to be substituted as a plaintiff in place of the existing plaintiff were granted, it would remove the existing plaintiff from the proceedings and deny the defendants the opportunity of obtaining discovery in relation to that issue.
131. That point was advanced before Everyday clarified that it was not pursuing its application to be substituted in place of the plaintiff, but was seeking to be joined as an additional party. I am satisfied that the judgment of the Supreme Court in *SPV Osus* provides no impediment to the court making an order joining Everyday as an additional party to the proceedings.
132. Nor, in my view, is there anything in that judgment which casts doubt upon the validity of the assignment contained in the deed of transfer in favour of Everyday. It was not a "*bare right to litigate*", to use the terms referred to by O'Donnell J. in *SPV Osus* (at para. 51, p. 27). The arrangement, the subject of the Supreme Court's decision in *SPV Osus*, was fundamentally different to the arrangement the subject of the deed of transfer in favour of Everyday. That arrangement was more akin to the arrangement considered by the Court of Appeal in *Morrissey v. Irish Bank Resolution Corporation Limited (In Special Liquidation) & ors* [2017] IECA 162 ("*Morrissey*"). There, the Court of Appeal considered whether certain loan sales made by IBRC were champertous. Having referred to the

relevant authorities, Hogan J., in delivering judgment of the Court of Appeal, concluded on the basis of a redacted version of the loan sale agreement that:-

"...there is nothing to suggest that the loan sale agreement involved anything other than a bare loan sale agreement, comprising the assignment of the loans from IBRC to Stone, along with the associated right to sue in respect of the recovery of the loans..." (para. 57)

133. The Court of Appeal in *Morrissey* concluded that, in those circumstances, the objection to the loan sale agreement on the grounds that it was champertous or savoured of champerty, or that it amounted to maintenance failed. In my view, the same conclusion should be reached in relation to the arrangement the subject of the deed of trust in the present case. However, it is not necessary to go so far as to reach a concluded view on that issue for the purposes of dealing with Everyday's application to be joined as a party. It is sufficient to conclude the decision of the Supreme Court in *SPV Osus* does not preclude the court from making that order.

(8) Status of Everyday

134. The defendants also sought to object to Everyday's application on the basis of the regulatory status of Everyday (para. 24 of Mr. McKeown's second affidavit and para. 26 of his third affidavit). In my view, the regulatory status of Everyday is not relevant to its application to be joined as a party to the proceedings. The fact that Everyday is not a bank or may not be entitled to act as a lender to the defendants, is irrelevant for the purpose of Everyday's application. I do not consider it necessary, therefore, to address further this ground of objection.

Conclusions

135. While Everyday originally sought an order substituting it as the plaintiff/respondent in the appeal before the Court of Appeal or, alternatively, adding it as a co-plaintiff/co-respondent after the Court of Appeal remitted Everyday's application to be determined by the High Court, and during the course of the hearing of Everyday's application, Everyday confirmed that the order it was seeking was an order that it be joined as an additional plaintiff to the proceedings. I have considered Everyday's application on that basis. Although it is certainly arguable that Everyday was only required to establish its entitlement to be joined as a party on a *prima facie* basis, I have considered Everyday's application on the basis that it was required to establish its entitlement to be joined as a party, insofar as evidential and other issues are concerned, on the basis of the balance of probabilities. I have considered all of the grounds of objection raised by the defendants to Everyday's application. I have attempted to deal with each of those objections in this judgment. It may be that I have not specifically addressed each and every point raised by the defendants. However, I have addressed most, if not all, of the objections raised. In the event that I have not specifically referred to and individually addressed any further objection made by the defendants, it is because I consider that those grounds of objection were completely devoid of any merit. I have concluded that none of the grounds of objection raised by the defendants have any merit. While I completely acknowledge that the first defendant advanced the defendants' opposition to Everyday's application in a

courteous and measured manner, I am afraid that I have concluded that there is no basis for any of the objections raised.

136. I have decided that Everyday is entitled to an order pursuant to O. 17, r. 4 RSC adding it as an additional plaintiff in the proceedings.
137. While I have concluded that many of the issues sought to be raised by the defendants in opposition to Everyday's application did not properly arise on an application to add a party to proceedings, I nonetheless proceeded to consider many of those objections and to offer my views and conclusions on them. Those conclusions may be of relevance and assistance to whatever judge or court is required to deal with any further steps which may be taken by Everyday in the proceedings.