



**THE COURT OF APPEAL**

**Neutral Citation Number [2020] IECA 151**

**Court of Appeal Record No. 2018/251**

**High Court Record No. 2017/2260S**

**Costello J.**

**BETWEEN/**

**PROMONTORIA (GEM) DAC**

**PLAINTIFF/RESPONDENT**

**- AND -**

**CIARAN REDMOND, MICHAEL O'NEILL, CLODY NORTON AND PETER CREAN T/A "THE NORC PARTNERSHIP"**

**DEFENDANT/APPELLANT**

**JUDGMENT of Ms. Justice Costello delivered on the 9th day of June 2020**

1. On 2 May 2018, the High Court granted the plaintiff ("Promontoria") judgment against the defendants in the sum of €3,896,000 and remitted the balance of the claim, €676,662.91, to plenary hearing ([2018] IEHC 231). The first and second named defendants did not defend the proceedings. The third and fourth named defendants have appealed the decision of the High Court. Pending that appeal, the third and fourth named defendants ("Mrs. Norton" and "Mr. Crean" respectively) have applied to the court for leave, pursuant to O.86A, r.4 of the Rules of the Superior Courts, to adduce new evidence comprising of two letters: (i) a letter of demand issued by Anglo Irish Bank Corporation Limited dated 14 December 2009 ("the December 2009 demand"), and (ii) a letter of demand issued by Anglo Irish Bank Corporation Limited dated 1 February 2010 ("the February 2010 demand"). This is my decision on the joint application.

**Background**

2. Promontoria commenced these proceedings by way of a summary summons issued on 11 October 2017. The defendants are sued as a partnership practising under the style and title of the NORC Partnership. In the special endorsement of claim, it is pleaded:-

"7. *The liabilities of the Defendants the subject of the within proceedings concern loan facilities provided to the Defendants by Irish Bank Resolution Corporation Limited (in liquidation) when acting under its former name Anglo Irish Bank Corporation plc (the Bank) pursuant to a Facility Letter dated 20 December 2004 and accepted in writing by the Defendants by the (sic) signature on 5 January 2005 (the Facility Letter).*"

3. It is pleaded that the Bank made loan facilities available to the defendants, and that under the provision of the National Asset Management Agency Act 2009, National Asset

Loan Management Limited ("NALM") became legally and beneficially entitled to the facilities and other rights connected with the facilities. At para. 9, Promontoria pleads:-

*"... By way of a Deed of Transfer (otherwise global assignment deed) dated 27 January 2017 and made between NALM and the Plaintiff, NALM transferred all remaining rights, title, interest and benefit held by NALM in or pursuant to the Facility to the Plaintiff."*

4. It is pleaded that the Bank agreed to advance a loan facility in the amount of €3,896,000 to the defendants. The facility was repayable on demand. The liabilities of the borrowers were joint and several. At paras. 15 and 16, it is pleaded:-

*"15. The Defendants failed to pay the principal and interest when due and owing in accordance with the Facility Letter and, accordingly, the Plaintiff exercised its right to call for immediate repayment of the sums due thereunder."*

*16. By letter of demand to the Defendants dated 15 June 2017, the Plaintiff demanded the sum of €4,545,502.53 then due and owing under the Facility Letter."*

5. It will be noted that the demand relied upon is one issued by Promontoria and not any of its predecessors in title. It is pleaded that on 24 July 2017, it appointed Mr. Ken Fennell as a receiver over certain assets of the defendants pursuant to a mortgage dated 14 September 2005 made between the defendants and the Bank over property which had been provided as security "for all sums due by the Defendants to the Bank." Promontoria pleaded that all rights, title, interest and benefit in the facility and the mortgage was now held by it and that, as of close of business on 25 September 2017, the property had not been sold nor any surplus income derived from the property.
6. Promontoria brought an application to have the proceedings admitted into the Commercial List of the High Court and for summary judgment against the defendants grounded upon an affidavit of Ms. Lisa Burns, sworn on 9 November 2017. Ms. Burns averred that she was an associate director employed by Link ASI Limited, formerly known as Capita Asset Services (Ireland) Limited, ("the Servicer"). She averred that the Servicer provides loan administration and asset management services in respect of the loans of the defendants that are owned by Promontoria, and that she was authorised to make the affidavit for and on behalf of Promontoria. At para. 2 she avers:-

*"I make this Affidavit from facts within my own knowledge save where otherwise appears and whereso otherwise appears I believe the same to be true and accurate in every respect."*

7. She gives no indication of the books or records which were provided to her in relation to the transaction, the subject of the proceedings. Neither does she aver that she had sight of the books and records of Promontoria, whatever they may comprise. As the appeal is pending before the court, I confine myself to saying that Ms. Burns exhibits five documents in her affidavit; the facility letter of 20 December 2004, a redacted copy of the

global assignment deed of 27 January 2017, the letter of demand of 15 June 2017, the deed of appointment of the receiver, dated 24 July 2017, and statements of account of Promontoria commencing in February 2017, in respect of two accounts. While a deed of appointment of the receiver is exhibited, the mortgage is not.

8. Mrs. Norton's then solicitor, Mr. Patrick Flynn, swore an affidavit on her behalf opposing the application for summary judgment. He stated at para. 3 that he had been asked to assist her in the matter "since April 2011", that is, more than a year after the letters at issue in this application were sent. At that time, she was aged seventy-four years and "not in great health." Over the last number of years, her health and hearing have "deteriorated a great deal further." He describes having discussions with the National Assets Management Agency ("NAMA") and said that "[t]hese discussions were most difficult as NAMA were less than efficient in the provision of the necessary and relevant paperwork." He said that, at the time during these discussions, there was an acceptance that the debt was due and owing and Mrs. Norton agreed that she would not challenge the acquisition of the facilities from Anglo Irish Bank/IBRC. Mr. Flynn accepted that the debt was acknowledged and he opposed the application to admit the proceedings into the Commercial List of the High Court on the basis that engagements with NAMA had been ongoing since 2011 over a period of five years and the debt was acknowledged and, "[g]iven the age profile and health concerns together with the history of engagement and background to the matter" he felt it was not a matter which should be admitted into the Commercial List of the High Court.
9. Ms. Burns replied to the affidavit of Mr. Flynn on 12 January 2018 and Mr. David Curran, a solicitor in the firm then acting for Mrs. Norton, replied to that affidavit on 25 January 2018.
10. Mr. Crean swore a replying affidavit on 20 March 2018. His first ground of defence was to state that Promontoria's claim, in whole or in part, was barred by virtue of the provisions of s.11 of the Statute of Limitations 1957. The argument was not based upon an earlier demand made more than six years prior to the institution of the proceedings, rather he said that the last payment on the loan was over six years ago (he believed it was in or about November 2009) and therefore, the proceedings had been commenced more than six years after the cause of action had accrued. In the alternative, he argued that the fact that Promontoria's claim included a claim for default interest indicated that there must have been a prior demand and, in view of the amount so claimed, such prior demand must have been a considerable period prior to the demand of June 2017. He argued that the security for the loan, the mortgage, which was referred to in the facility letter exhibited by Ms. Burns in her grounding affidavit, was sold separately to the facility letter, as evidenced by the deed of appointment of the receiver, and therefore the suit was not brought to recover monies due on foot of a secured loan.
11. The principal basis upon which Mr. Crean opposed the application for judgment was his assertion that there was a binding prior agreement between himself and Promontoria to compromise the claim against him. At para. 24 of his affidavit he averred:-

*"As a result of all of the ongoing negotiations and assurances received from the Plaintiff, I did not contest at any stage to (sic) proceedings. I consented to the matter being transferred to the Commercial Court. I say now that difficulties arise in that the figures being claimed have not been investigated fully by me, as detailed below."*

12. He complained that there was no evidence as to the manner in which the calculation of interest claimed had been provided and it was impossible for him to ascertain if the figure claimed was accurate, and whether he owed the sum claimed or not. Other grounds of defence were raised which are not germane to the issue before this court.

13. Further affidavits were exchanged between the parties. Ms. Lisa Burns swore an affidavit in reply to Mr. Crean's affidavit. At para. 2 she stated:-

*"I make this Affidavit on behalf of the Plaintiff and with the authority of the Plaintiff from facts within my own knowledge, or from facts I have gleaned from an examination of the books and records of the Plaintiff, save where otherwise appears and whereso otherwise appears I believe same to be true and accurate."*

14. She gives no further details as to the books or records of Promontoria she examined. Mr. Jonathan McWhinney also swore an affidavit on behalf of Promontoria. He said he was an asset manager employed by the Servicer and he gave his means of knowledge in identical terms to that of Ms. Burns. He also failed to explain precisely what books and records he examined.

15. Finally, it is worth noting that Mrs. Norton entered a memorandum of appearance on 31 October 2017. The motion seeking to enter the proceedings into the Commercial List of the High Court and to enter summary judgment against the defendants was issued on 10 November 2017, and Ms. Burns' affidavit was sworn on 9 November 2017. Mr. Crean entered a memorandum of appearance on 13 November 2017. At para. 30 of her affidavit of 9 November 2017, Ms. Burns averred:-

*"I am advised by the Plaintiff's legal advisors that the Defendants do not have a bona fide defence to the Plaintiff's claims. I am advised by the Plaintiff's legal advisers that for that reason any Appearance that may be entered to the within proceedings has been entered solely for the purposes of delay. Accordingly, I say and believe that there is no valid or just reason why the Plaintiff ought not be entitled to proceed to obtain an Order for summary judgment against the Defendants."*

Ms. Burns made this averment, it now appears, without knowledge of the full history of the engagement between Mrs. Norton and NAMA, and before Mr. Crean had even entered an appearance. In particular, neither the December 2009 demand, nor the February 2010 demand, both of which were written by the Bank, Promontoria's predecessor in title, were placed before the court by Promontoria, but instead the application for summary judgment was presented on the basis that the (only) demand was that of 15 June 2017.

Whatever the legal implications of the existence of these two letters, it is clear that the case of Promontoria proceeded on a misleading, if not false, basis.

### **Decision of the High Court**

16. The trial judge entered summary judgment against the defendants in the principal sum borrowed and remitted the balance of the claim to plenary hearing, apparently on the basis that the loan had not been repaid and that there was a dispute as to the correct calculation of the interest chargeable on the principal sum.

17. At para. 9 he held that:-

*"... this Court concludes that the cause of action in these proceedings arose when demand was made on the 15th June, 2017, and therefore there is no question of these proceedings being statute barred."*

18. The trial judge rejected Mr. Crean's argument that the proceedings had been compromised. However, he accepted that Mr. Crean genuinely believed that this was the case and that, accordingly, he did not believe that he would be called upon to defend the proceedings until relatively shortly before the proceedings came on for hearing. At para. 31 the trial judge found:-

*"31. However, while Mr. Crean has not raised any prima facie issues with the calculation of interest on the main account, it does seem to this Court that Mr. Crean genuinely believed (incorrectly, in this Court's view) that he had settled his proceedings with Promontoria, and he avers that for this reason, he did not contest the proceedings being admitted to the Commercial Court. This meant that in April, just weeks after his Alleged Settlement Agreement had been finalised in February, Mr. Crean had to defend a summary judgment in the Commercial Court. It is conceivable that if he had more time (which would have occurred if the proceedings had been heard in the Chancery List which might have been the case, if he had objected to them being heard in the Commercial Court), he might have been able to consider in more detail whether the correct interest had been charged on his loan..."*

19. The trial judge accepted that, in the circumstances, Mr. Crean did not have sufficient time properly to prepare his defence in full, due to his genuine belief that the proceedings had been settled and the time fairly required to investigate the issue he raised regarding the calculation of the interest claimed.

### **The basis for the application**

20. Mrs. Norton's application is grounded on an affidavit sworn by her new solicitor, Mr. Cunningham, who came on record for her in February 2020. He avers that it was difficult to obtain full instructions due to the fact that his client is eighty-two and is following government advice during the Covid-19 pandemic and is cocooning. Previous affidavits establish that she is suffering from deteriorating health and loss of hearing. He says that she made a data access request to Irish Bank Resolution Corporation (in special liquidation) ("IBRC") on 14 August 2019 and received a reply on 23 September 2019 which included the December 2009 demand from Anglo Irish Bank Corporation Ltd.

21. Mr. Cunningham says that Mrs. Norton acted on legal advice which was based upon the "incorrect" letter of demand provided by Promontoria to Mrs. Norton. She is not at fault as it was the duty of Promontoria to produce the evidence of the demand when suing for judgment in respect of a liquidated demand. She was unaware of either the December 2009 or February 2010 demands, prior to the decision of the High Court. Both letters were sent to the address of the first named defendant and not to her address, despite the fact that she is an addressee of each letter. She discovered the December 2009 demand through a data access request of a predecessor in title of Promontoria, and she only became aware of the February 2010 demand when Mr. Crean swore his affidavit to ground this application.
22. Mr. Crean also swore an affidavit to ground his application to admit new evidence. He said he discovered the February 2010 demand when he reviewed his files on this loan. It was in his possession all along. He searched his files in response to Mrs. Norton's discovery of the December 2009 demand. He explains his failure to search his files prior to the trial in the High Court on the grounds that, up until late February 2018, he bona fide believed that the claim against him had been compromised. He was "caught off-guard" by the proceedings which came on in a very short time frame, with the result that he did not have adequate time to perform a thorough review of all his documents in relation to the matter. Due to the age of the file, some of the documents were in storage and were not readily accessible. The trial judge accepted this explanation and the fact that he was, through no egregious fault of his own, not fully prepared to defend the claim and remitted the claim to €676,662.91 to plenary hearing.
23. In reply, Mr. Alastair Gracey, of Link ASI Limited, swore an affidavit on behalf of Promontoria opposing the application. He explained at paras. 9 and 14:-
- "9. *I say that in my role as Senior Asset Manager with the Servicer, I have access to a central folder which contains all downloaded documentation originally provided by NALM in its online dataroom as part of the Respondent's acquisition of the Facility. I say and believe that since the issuance of the within motions I have again reviewed the contents of the central folder with regards to the Facility and the December Demand Letter is not included in the documentation made available by NALM to the Respondent....*
14. *I say that I have checked the central folder containing all documentation made available to the Respondent by NALM as part of the Respondent's acquisition of the Facility and the February Demand Letter is not contained therein. Accordingly, I see no evidence from the central folder that suggests that a demand had previously been made by NALM or IBRC."*
24. His evidence is thus based upon the documents made available to him by Promontoria, which in turn are the documents furnished by NALM in a "central folder". He does not, and cannot, aver that he has access to the entire file relating to the facility. He avers that neither of these letters of demand are in the central folder, but that is as far as he can go. There is no evidence of what is comprised or, possibly more importantly, what is not

comprised in the central folder. In the circumstances, it is pure speculation on his part to say that there is no evidence that the December 2009 demand ever issued, and it is difficult to understand why he says there is no evidence of a demand having previously been made by NALM or IBRC based upon the contents of the central folder, when there exists a signed demand issued by Anglo Irish Bank Corporation Limited.

**The law in relation to the admission of new evidence on appeal**

25. These applications have been brought pursuant to O.86A, r. 4 of the Rules of the Superior Courts. Rule 4 provides as follows:-

- "(a) the Court of Appeal has on appeal full discretionary power to receive further evidence on questions of fact, and may receive such evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner,*
- (b) further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought,*
- (c) on any appeal from a final judgment or order, further evidence (save as to matters subsequent as mentioned in paragraph (b)) may be admitted on special grounds only, and only with the special leave of the Court of Appeal (obtained by application by motion on notice setting out the special grounds)...".*

26. The Court of Appeal is expressly conferred full discretionary power to receive further evidence on questions of fact. It may do so by oral examination in court, by affidavit or by deposition. On an appeal from an interlocutory judgment or order, the parties may adduce further evidence without special leave of the court. Similarly, in any case where matters have occurred after the date of the decision under appeal, further evidence may be given without special leave of the court. On the other hand, on an appeal from a final judgment or order, further evidence may only be admitted on special grounds and with the special leave of the Court of Appeal. This must be sought by motion to the court, and the applicant must set out the special grounds asserted in an affidavit.

27. Order 86A, r.4 reflects the provisions of former O.58, r.8 RSC which previously governed the admission of new evidence by the Supreme Court. The classic authority on the principles applicable to the exercise of the court of its discretion under O.58, r.8 is *Murphy v. Minister for Defence* [1991] 2 I.R. 161. Finlay C.J. said that the principles applicable are:-

- "1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;*
- 2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;*

3. *The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible.*"
28. In *Student Transport Scheme Limited v. The Minister for Education and Skills* [2015] IECA 303, Hogan J., speaking for the Court, held that the three criteria in *Murphy* apply to appeals before the Court of Appeal and that they are cumulative, so any prospective party wishing to adduce additional evidence on appeal to the Court of Appeal, which evidence was in existence at the time of the trial of the action, must satisfy all three criteria. The principles applied to all types of appeals and he observed that the principles have been applied in a flexible manner. He referred to the Supreme Court decision in *Fitzgerald v. Kenny* [1994] 2 I.R. 383, where it held that fresh evidence will be admitted if the underlying premise of the High Court has "been falsified by subsequent events" or where to do otherwise would "affront a sense of justice". He noted that, generally, appeals from decisions of the High Court are based upon evidence already given and arguments heard in the High Court, but both the law and existing practice permitted departures from this general rule, both in terms of the admission of new arguments and of new evidence. At paras. 16 and 17 of the judgment he held:-
- "16. *as the Supreme Court made clear in Lough Swilly that there is no inflexible rule which prevents an appellate Court - whether it be this Court or the Supreme Court-entertaining arguments which were not canvassed in the High Court, it is implicit in the reasoning of O'Donnell J. in that case that the jurisdiction to permit additional new arguments is confined to those cases where such is mandated in the interests of justice...*
17. *Similar principles underpin the provisions of Ord. 86A, r. 4(c) which regulate the admission of new evidence on an appeal to this Court. Inasmuch as this sub-rule insists that the party seeking to admit new evidence which pre-dated the hearing in the High Court must demonstrate the existence of 'special grounds' (i.e., in effect, satisfying the Murphy criteria), a balance is thereby struck between the need to protect the orderly administration of appellate justice in the interests of finality and certainty on the one hand and the need to accommodate exceptional or unusual cases in the interests of fairness on the other.*"
29. In the Supreme Court, both Clarke and O'Donnell JJ. have advocated flexibility in applying the principles laid down in *Murphy v. Minister for Justice*. In *Inland Fisheries Ireland v. O'Baoill* [2015] IESC 45, at para. 4.5, Clarke J. (as he then was) considered "that there may be unusual cases where somewhat different criteria may require to be applied to avoid injustice." In *Emerald Meats Limited v. Minister for Agriculture* [2012] IESC 48, at para. 37, O'Donnell J. said:-

*"In my view, the test that the relevant evidence could not with reasonable diligence have been available for trial is a reasonably flexible test. I would not wish to rule out the possibility that where a trial takes an unexpected turn, the mere fact that some information was available and could have been obtained for the trial, should not mean that it should be excluded on an appeal, particularly when the issue may*



*be decisive, the evidence cogent, and its potential relevance could not have been known in advance of the trial. However, in this case, it is important to have regard to the precise circumstances in which the challenged evidence came to be given and the issue in respect of which it was relied upon by the trial judge.”*

### **Discussion**

30. If the new evidence of the two letters – the December 2009 and February 2010 demands – are to be admitted, this court must grant the applicants special leave to do so. The court has a discretion whether or not to do so, and the discretion should be exercised in accordance with the established jurisprudence. The starting point is the criteria in *Murphy*. I propose taking the three criteria set out in *Murphy* in reverse order.
31. The two documents sought to be introduced into evidence came from the lender, Anglo Irish Bank Corporation Limited. The letter of 1 February 2010 is on headed note paper and is signed by the author and is in the possession of the addressee of the letter. Whatever the legal significance of this document in this case (about which I make no observation), the authenticity and, therefore, the creditability of the letter cannot reasonably be an issue. The letter of 14 December 2009 was produced to Mrs. Norton in response to a data access request from IBRC and, likewise, has all the hallmarks of authenticity. This is not to say that they may not be subsequently challenged by Promontoria, but I am satisfied that they meet the third criterion in *Murphy*.
32. The second criterion is that the evidence must be such that, if given, would probably have an important influence on the result of the case, though it need not be decisive. Mrs. Norton and Mr. Crean argue that the claim in the proceedings is a claim to recover a debt to which s.11 of the Statute of Limitations 1957, (“the Act of 1957”) applies. This means that the limitation period is six years from the date of the accrual of the cause of action. They submit that the loan is repayable on demand and that the cause of action accordingly accrued on the date that Anglo Irish Bank Corporation Limited demanded repayment of the loan. They said the two letters demanded repayment of the loan in December 2009 and February 2010, respectively and therefore, the cause of action accrued in December 2009 or, at the latest, in February 2010.
33. They further submit that the appeal is against a decision granting summary judgment and the refusal to remit the entire claim to plenary hearing. As such, all they will be required to demonstrate at the appeal is that they have an arguable defence to Promontoria’s claim so that the matter should be remitted to plenary hearing and Promontoria’s summary judgment vacated. They say the principles established in *Aer Rianta CPT v. Ryanair Ltd* [2001] 4 I.R. 607 and *Harrisrange Limited v Duncan* [2003] 4 I.R. 1 are well established. The Court of Appeal will have to be satisfied that it is “very clear” that they have no defence to Promontoria’s claim if it is to refuse the appeal. They emphasise that this is a low threshold. Given that this is the test which will be applied at the appeal, it follows that this is the test which must be applied when considering whether the evidence, if given, would probably have an important influence on the appeal, i.e. the second criterion in *Murphy*.

34. They submit that the two demands do so, as they clearly establish an arguable case that the cause of action was statute barred on the basis of the provisions of s.11 of the Act of 1957 and, for the purposes of this application in respect of an appeal against a summary judgment, this is all they need to show to satisfy this element of the test.

35. Promontoria argues to the contrary and says that the evidence fails to satisfy this test. First, it points to the fact that Mrs. Norton acknowledged in her own affidavit, and in the affidavits sworn on her behalf, that the debt was due. Secondly, it argues that the loan was secured by way of a mortgage. Accordingly, the provisions of s.36, and not s.11, of the Act of 1957 applies. Section 36 provides:-

*"36. (1)(a) No action shall be brought to recover any principal sum of money secured by a mortgage or charge on land...after the expiration of twelve years from the date when the right to receive the money accrued."*

Promontoria contends that, as the loan was secured by way of a mortgage, s.36 applies and, as the proceedings were commenced in October 2017, even if these two demands are admitted into evidence, the proceedings were still commenced within the twelve-year limitation period provided by s.36.

36. Promontoria cites two decisions of the High Court where the issue whether the limitation period applicable to a claim for summary judgment in respect of a secured debt was twelve or six years was raised, and where the High Court determined that the defendants had not raised an arguable defence. The first was *Allied Irish Banks plc v. Norton* [2018] IEHC 628 and the second was *Allied Irish Banks plc v. Sloan* [2019] IEHC 270. In each of those cases, Faherty and Noonan JJ. rejected applications by the defendants to remit the proceedings to plenary hearing on the basis that they had an arguable case that s.11 and not s.36 governed the limitation period where the loans sued upon were secured by mortgages. On this basis, Promontoria submits that the demands, if admitted, will not afford the defendants a defence and, accordingly, do not meet the second test in *Murphy*.

37. On the other hand, Mrs. Norton and Mr. Crean point to the decision of Barniville J. in *Promontoria (Arrow) Limited v. Burke & Ors.* [2018] IEHC 773. At para. 85 Barniville J. stated as follows:-

*"85. Bearing in mind the relatively low threshold which a defendant must satisfy in order to demonstrate an arguable defence and having regard to the fact that the authorities make it plain that the essential question which I have to determine is, is it 'very clear' that the defendants do not have a defence on a particular issue, I am satisfied that the defendants have demonstrated an arguable defence in relation to their contention that Promontoria's claim is statute barred. While Promontoria accepted solely for the purpose of this application for summary judgment in this case that the cause of action accrued following the expiry of the loan on 17th February, 2011 and that, for the purposes of this application only, time began to run at that point, it seems to me that that was, in any event, a reasonable and appropriate concession to make. I would, in any event, have decided that the*

*defendants had raised an arguable case that time began to run on 18th February, 2011 so that prima facie the proceedings commenced on 10th May, 2017 would be statute barred. ... I stress that in doing so I am not reaching any conclusions on those answers but I am merely considering whether the defendants have raised an arguable case in relation to them which would entitle the defendants to a further hearing on the Statute issue."*

38. While the decision of Faherty J. in *Norton* was delivered prior to the decision in *Burke*, it would appear that this was after Barniville J. had heard the application before him and had reserved his decision. Thus, each judge reached opposite conclusions on the same issue, but in respect of different facts. The decision of Noonan J. post-dated the decision in *Burke* and it would appear that it was not cited to him, while the decision in *Norton* was. Thus, there are conflicting decisions of the High Court as to whether, on an application for summary judgment, the High Court can determine whether the relevant section governing the running of time where summary judgment is sought in respect of a secured debt is s.36 or s.11 of the Act of 1957, or whether, instead, a defendant who raises an argument that s.11 is the applicable section has thereby raised an arguable defence which entitles the defendant to have the application for summary judgment remitted to plenary hearing.
39. In addition, it is worth noting that the High Court in this case did not decide this particular issue one way or the other. On the contrary, as neither of the two demands were in evidence before the trial judge, he proceeded upon the basis that the letter of demand issued on 15 June 2017, and on that factual basis concluded that the proceedings were not statute barred, having issued some four months later.
40. It seems to me, therefore, that the fact that two High Court judges have accepted that s.36 applies in circumstances where the loan sued upon was secured by way of a mortgage, is not sufficient in and of itself to say that the demands failed to satisfy the second criterion in *Murphy*. As there is a conflict in the authorities, it is open to the Court of Appeal to decide that Mrs. Norton and Mr. Crean have raised an arguable case within the meaning of the jurisprudence, and to refer the entire claim to plenary hearing. For this reason, I do not accept the arguments of Promontoria that the letters could not have any important influence on the outcome of the appeal.
41. Separately, Promontoria contended that Mrs. Norton had acknowledged the debt and that, accordingly, it is no longer open to her to submit that the claim against her is statute barred. In that regard, it is worth noting the reasoning of Finlay C.J. in *Murphy*, at p.166, where he said:-

*"Secondly, I am satisfied that if the existence of these two documents [medical circulars] had been known to the appellant's advisers at the time of the trial that the course of the trial, particularly relating to the cross-examination of the officers concerned in the decision, would have been substantially different to an extent which, again, would probably have an important effect on the result of the trial."*

42. The Chief Justice was prepared to envisage the counterfactual of different advice being offered to, and acted upon by, the litigant which "would probably have had an important effect on the result of the trial." It is no great stretch to extend this reasoning to advices given in respect of the claim before the commencement of litigation, and the manner in which the defence to the claim was approached. I am quite satisfied that if Mrs. Norton's solicitors had been aware of the existence of either of these two documents, that they would have been alive to the significance of the demands for her position and advised her accordingly. For these reasons, on this application, I will not hold that her acknowledgements of the debt precludes the court from concluding that she has satisfied the second limb in the *Murphy* test.
43. I will now turn to consider the first limb in *Murphy*: whether the documents were in existence at the time of the trial and whether they could have been obtained with reasonable diligence for use at the trial. Quite clearly the documents were in existence at the time of the trial as they were written in 2009 and 2010. The real issue for determination is whether Mrs. Norton and/or Mr. Crean could not have obtained the documents with reasonable diligence for use at the trial.
44. When the proceedings were heard in the High Court, it was not open to any of the parties to obtain discovery as discovery is not available in summary proceedings, unless they are remitted to plenary hearing. Therefore, the issue of whether the documents could have been obtained by requesting discovery from Promontoria, or any third party, does not arise. I, therefore, reject the argument of Promontoria that the failure of both applicants to seek discovery from Promontoria, or third party discovery, means that they each fail this test.
45. Mrs. Norton obtained the letter of December 2009 on foot of a data access request which she made subsequent to the decision of the High Court to IBRC. It is a relatively simple process and the process yielded the document. Promontoria argues that it was open to her to make that application prior to the trial in the High Court and, accordingly, she has not satisfied this first limb in the *Murphy* test. In relation to Mr. Crean, they argue that the document was actually retrieved from his own possession, where it had been kept in storage, and he, therefore, fails to satisfy the test.
46. The reasonable diligence test does not, in my opinion, require a defendant to make a data access request of a predecessor in title of an assignee of a debt in order to obtain copies of letters of demand issued by the predecessor in title where the assignee seeks summary judgment against the defendant. The documents of the predecessor in title are within the procurement, if not the possession, of the assignee. The assignee takes the loan subject to any defences validly open to the debtor. These include defences that the claim is, or may become, statute barred. Where an assignee sues to recover a debt which is payable on demand, the demand is critical to the claim. Therefore, there is an obligation on a plaintiff who seeks summary judgment in respect of a sum payable on demand to place before the court all demands calling for repayment of the loan, and not merely the latest or the one issued by the assignee. To hold otherwise would be to undermine the policy of

the Statute of Limitations and, at the very least, to place a premium on a lack of candour or diligence on the part of plaintiffs. The Act could be circumvented by inadvertently or, indeed, unscrupulously, issuing a fresh demand in respect of a claim on which time was running, or had actually expired.

47. In *Murphy*, Finlay C.J. said that:-

*"I am satisfied that there was not any want of due diligence in failing to obtain an order for discovery. In the absence of actual knowledge of this particular circular or a circular with these provisions in it, which I am satisfied did not exist in either the appellant or his advisers, I am not satisfied that there was any want of due diligence in failing to ask for this circular informally..."*

48. In this case, neither Mrs. Norton nor Mr. Crean were aware of the existence of the two demands, as indeed appears to have been the case for Promontoria also. By analogy with the reasoning of the Chief Justice, there could be no want of due diligence in failing to make a data access request of IBRC prior to the trial of the motion for summary judgment in the circumstances. As O'Flaherty J. said in the same case, "[f]ailure of a procedural requirement must not be used to bring about or acquiesce in a possible injustice. As judges we are required always to keep firmly in perspective what the justice of the particular case requires." As was submitted by counsel for Mrs. Norton, a data access request is not even a procedure provided under the rules of court.

49. In addition, Mrs. Norton was unaware of the February 2010 demand until Mr. Crean swore his affidavit grounding this application. It was not provided pursuant to a data access request. She is not guilty of a lack of diligence in relation to this evidence. She undoubtedly satisfies the first limb of the *Murphy* test in respect of this demand.

50. I do not accept that she should be debarred from making the case that the claim is statute barred based upon her acknowledgements on affidavit in these proceedings. For the reasons stated above, I have no doubt that the advice she received from her legal advisers would have taken account of these letters had they been aware of either, or both, of these demands, prior to advising her or swearing affidavits on her behalf.

51. In *Fitzgerald v. Kenny* [1994] 2 I.R. 383, the Supreme Court permitted the appellant to adduce evidence in relation to events occurring subsequent to the trial on the grounds that the High Court had proceeded upon a basic assumption, common to both sides, that had clearly been falsified by subsequent events. To proceed without the new evidence would be an "affront to a sense of justice." In my judgment, the discovery of the two demands shows that all parties proceeded on a false basis before the High Court, and it would be an affront to justice for the appeal to be confined to the evidence before the High Court, which omitted all reference to these documents.

52. I accept that Promontoria did not suppress this evidence, but it is by no means clear how great an effort was made to ensure that the case was fairly presented to the High Court, and that all demands for repayment of the facility were before the court. At the very

least, it was responsible for presenting a misleading and incomplete picture in a potentially highly material respect. As was said in *Danske Bank v. Kelly* [2020] IECA 126, in circumstances where the bank sought to rely upon a particular letter of demand but the bank's records indicated that there may have been an earlier demand which the defendant had not exhibited, the bank may not in those circumstances "close its eyes" to its own records and to its own documents. Anglo Irish Bank Corporation Limited's file, and that of IBRC and NALM relating to the loan, are within Promontoria's procurement, if they are not in its possession. In the circumstances, it would be neither safe nor just to refuse Mrs. Norton leave to adduce the December 2009 and February 2010 demands in evidence on the appeal.

53. The situation in relation to Mr. Crean is somewhat different. He said that he did not search for these documents until Mrs. Norton retrieved the December 2009 demand under her data access request. When he searched all of his papers in relation to the loan, including papers retrieved from storage, he found the February 2010 demand. At all times it was in his possession, though he did not find the December 2009 demand in his papers. In such circumstances, this court would not normally grant special leave to adduce evidence. The document was in his possession and it was for him to prepare his case for trial.
54. However, I am satisfied that this is not a normal case and that there are special circumstances such that I should exercise my discretion to allow Mr. Crean to adduce both demands as additional evidence.
55. First, there was no obligation on Mr. Crean to make a data access request to IBRC for the reasons I have stated. He was unaware of the December 2009 demand and he did not have a copy of that letter. Therefore, he should be permitted to adduce this in evidence.
56. Second, I have held that Mrs. Norton may adduce both demands as new evidence. Mrs. Norton and Mr. Crean are sued jointly and severally. In the circumstances, it would be an affront to justice to permit one defendant to adduce the evidence of prior demands made to all the defendants, but not the other.
57. Third, the primary obligation to introduce these documents into evidence lay on Promontoria. It was not entitled to "close its eyes" to these earlier demands. While it is possible that Promontoria may have acted in good faith initially, once the documents came to light it ill behaved it to seek to benefit from its dereliction. It appears that it was content to rely upon the documents in the central folder furnished to it by NALM, and did not ascertain that there were other highly relevant documents which it could procure by asking NALM or IBRC for copies of them. In the circumstances, it is distasteful, to put it no higher, to hear arguments that an elderly widow in poor health should be criticised for not making a data access request to IBRC prior to the trial in the High Court. It begs the question as to the enquiries made by Promontoria before it proceeded with these proceedings. I would have expected that this application would have proceeded on consent, or at least unopposed, by Promontoria.

58. Fourth, the trial judge accepted that Mr. Crean genuinely believed that the claim against him had been settled. That being so, it is entirely understandable that he did not try to recover papers from storage to prepare to defend the claim. The situation changed in late February 2018, and Mr. Crean then had to play catch up to prepare for the trial in April 2018. The trial judge was sympathetic to his dilemma and the scale of the task to be undertaken to conduct a full preparation of a complex defence to the claim. While this factor alone probably would not amount to special circumstances within the meaning of the O.86A, r.4(c), it is a factor to be weighed in the balance.

**Conclusion**

59. Both Mrs. Norton and Mr. Crean have shown special circumstances which justify this court granting them each leave to adduce the letters of demand of 14 December 2009 and 1 February 2010 into evidence. I am satisfied that they have each met the three criteria for such leave set out in *Murphy v. Minister for Defence*. I direct that they each swear a short affidavit, within 21 days of this judgment, setting out the circumstances in which the two documents came to their attention and exhibiting them.