# UNAPPROVED
# THE COURT OF APPEAL

**Neutral Citation Number [2020] IECA 191**
**Appeal Number: 2018/257**

**Donnelly J.**
**Faherty J.**
**Haughton J.**

**BETWEEN/**

**A.I.B. MORTGAGE BANK AND ALLIED IRISH BANKS PLC**

**PLAINTIFFS/**
**APPELLANTS**

**- AND -**

**KEVIN O'BRIEN AND GILLIAN O'BRIEN**

**DEFENDANTS/**
**RESPONDENTS**

**JUDGMENT of Ms. Justice Faherty dated the 15th day of July 2020**

**1.** This is the plaintiffs' appeal against the judgment and order of the High Court of 8 June 2018 wherein Binchy J. concluded that the defendants had established as an arguable ground of defence that loan agreements in connection with loan facilities provided in 2010 and relied on by the plaintiffs in their application for summary judgment against the defendants were void for want of consideration. The trial judge remitted the matter for plenary hearing on this basis. It is the plaintiffs' contention in this appeal that the trial judge cited a stateable ground of defence where none exists as a matter of law.

**2.** It is acknowledged, however, by all concerned that irrespective of the outcome of the within appeal, the plaintiffs' claim against the defendants will be determined by plenary hearing. The issue in this appeal is whether the defendants should be permitted to pursue at the trial of the action the specific argument upon which Binchy J. remitted the matter for plenary hearing.

**3.** The proceedings commenced on 21 November 2014 by way of summary summons. In the special indorsement of claim the plaintiffs plead that they made loan facilities available to the defendants on foot of:

(a) A letter of loan offer dated 23 September 2010 whereby the first plaintiff offered to the defendants a loan facility of €2,563,000 on the terms and conditions set out therein which said offer was accepted by the loan facilities drawn down in full on 23 December 2010 (Account No. 93035067032-346);

(b) A letter of loan offer dated 29 October 2010 by which the first plaintiff offered a loan facility to the defendants of €774,000 on the terms and conditions set out therein which said facility was drawn down in full and the loan offer accepted on 23 December 2010 (Account No. 93025389530-234).

It is pleaded that the plaintiffs rely on the said letters of loan offer, and where applicable, the terms and conditions pertaining thereto, for their full terms, meaning and effect. It is pleaded that the defendants defaulted in making the repayments required of them pursuant to each of the letters of loan offer and that by letter of demand dated 4 September 2014, the second plaintiff made demand on behalf of the first plaintiff for payment of €2,614,719.86 in respect of Account No. 93035067032-346 and €6,982.33 in respect of Account No. 93025389530-234.

**4.** It is common case that the dealings between the plaintiffs and the defendants commenced prior to 2010.

**Background**

**5.** In 2006 the defendants were residing at No. 23 Clonfadda Wood, Mount Merion Avenue, Blackrock Co. Dublin (hereinafter "No. 23"). That property was held in the sole name of the second defendant and at the time was subject to borrowings of approximately €80,000 which were secured over the property in favour of Bank of Ireland. The defendants were then both aged 55 and had four young children in their care, three of whom were foster children and the other being the parties' still dependent child of the marriage. The first defendant is a solicitor and the second defendant a homemaker.

**6.** During 2006 the premises (hereinafter "No. 24") adjacent to No. 23 came up for sale. The first defendant considered No. 24 had the capacity to be extended, unlike No.23. He considered No. 24 a more suitable premises to meet the defendants' then needs and resolved to purchase it. In his replying affidavit to the within proceedings, the first defendant avers that by oral agreement made with an unidentified representative of the first plaintiff in 2006, it was agreed that the plaintiffs would advance 100% of the purchase price for No. 24 to the defendants. He says that as part of this arrangement, it was agreed that No.23 would be sold, with the sale proceeds then to be applied in reduction of the funding advanced by the first plaintiff for the purchase of No. 24. The case made by the first defendant is that he had an informal agreement to purchase No. 24 for up to €3m and that the first plaintiff had promised that, if necessary, it would also advance funds in respect of the stamp duty payable, together with an unspecified amount in connection with the proposed extension to No. 24.

**7.** In the event, in March 2006, the first defendant secured No. 24 at auction for €2.5m. Shortly thereafter, by letter dated 26 March 2006, the second plaintiff requested a solicitor's

undertaking in relation to the funds to be advanced. This was duly completed and returned to the first plaintiff by letter of 27 June 2006.

**8.** The completion of the purchase of No. 24 took place on 9 August 2006. On the same date, the defendants accepted an offer of mortgage loan from the first plaintiff. On 11 August 2006, both defendants executed a Deed of Mortgage in respect of No. 24 in favour of the plaintiffs. The loan offer of 9 August 2006 was an interest only loan for a term of twelve months.

**9.** By 25 January 2007, the first defendant had secured a planning permission for an extension to No. 24. In the meantime, No. 24 had been let out to tenants to assist the defendants in making the interest repayments.

**10.** According to the first defendant, following the grant of planning permission he approached the plaintiffs with a view to borrowing €350,000 to fund the cost of the extension. This request was declined, much to his surprise. He avers that the plaintiffs suggested that he produce plans for a smaller extension which he did on the understanding that the plaintiffs would be willing to advance €150,000 in funding. The first defendant asserts that the plaintiffs reneged on their commitment in this regard and, accordingly, he was obliged to raise the necessary monies by way of a loan from his solicitor's firm and from friends and relations.

**11.** The defendants moved into No. 24 in December 2007. Before moving to No. 24, they placed No. 23 on the market for sale by auction. No bidders turned up for the auction on 26 September 2007.

**12.** Documentation exhibited by the first defendant in an affidavit sworn on 16 October 2015 show that by letter dated 13 June 2008, the plaintiffs confirmed that facilities of €2.5m and €760,000 for the defendants had been sanctioned. Albeit not specified, the €2.5m sum appears to relate to the funding which had been advanced in 2006 for the purchase of No.

24. That was certainly the finding of the trial judge. The letter of offer in respect of the €2.5m sum stated that the defendants were being offered a supplemental mortgage loan to be secured by the existing legal mortgage over No. 24. The €760,000 funding related to other indebtedness, the bulk of which was held in the name of the first defendant and some of which appeared to be have been incurred in connection with the acquisition of a holiday home in County Wexford and an apartment in Venice. However, some €70,000 of the €760,000 was to be applied to the redemption of the second defendant's Bank of Ireland mortgage on No. 23. The loan sanction for the advance of €760,000 required that No. 23 should be secured in the name of the first plaintiff with the first plaintiff relying on No. 24 as additional security for this borrowing. In a letter of 21 November 2008 to the solicitor then acting on behalf of the defendants, a Mr. Eamonn Molloy of the first plaintiff advised that the loan was "a restructure and to clear other accounts." He then set out how the proceeds of the €760,000 loan facility were to be applied including, in the first instance, the discharge of the Bank of Ireland loan of €70,000, with the balance to be paid into a specified loan accounts in the name of the first defendant.

**13.** No. 23 was duly mortgaged to the plaintiffs as security. The mortgage was completed on 16 September 2008.

**14.** According to the first defendant, the defendants had received an offer of €1m for No. 23 in early 2008. He avers that the plaintiffs refused to give consent for the sale as they regarded the €1m offer as "a vulture price". In the court below, the plaintiffs denied that they refused consent and claimed that they did no more than point out that a sale at that price would result in the defendants owing a very significant amount of money to the plaintiffs. An email from a Mr. Michael Deegan of the plaintiffs to the first defendant dated 18 March 2009 advised as follows:

> "Kevin, as no. 23 forms part of the security for your facilities, you will need to revert to the bank prior to agreeing a sale. As you will be aware, a sale at €1m euro would represent a significant shortfall on the previously estimated value and would have a significant impact on the residual gearing and your repayment capacity".

**15.** The defendants do not gainsay that letters issued from the first plaintiff on 23 September 2010 and 29 October 2010 with loan offers, respectively, of €2,563,000 and €774,000, or that their then legal representative engaged with the plaintiffs in this regard. They, however, dispute the validity of the 2010 facilities on the basis of a want of consideration on the part of the plaintiffs. This issue, which is the crux of the within appeal, is considered in detail later in the judgment.

**16.** Between 2008 and 2012, the defendants applied the rental income from No. 23 towards their indebtedness to the plaintiffs. No. 23 was sold in 2012, at the very bottom of the property market, for €762,000. As observed by the trial judge, the defendants were left with a very considerable shortfall in the anticipated sale price for No. 23.

**17.** As can be seen from the indorsement of claim, the plaintiffs allege that the defendants failed to adhere to the repayment terms required by the 2010 facilities. Following a period of engagement between the parties, the second plaintiff wrote to the defendants on 14 September 2014 on behalf of the first plaintiff demanding repayment of the sums then outstanding on foot of the 2010 facilities, namely €2,614,719.86 and €6,982.33.

**18.** Following the commencement of these proceedings in November 2014, to which an Appearance was entered on behalf of the defendants on 8 December 2014, by notice of motion returnable for 15 February 2015 the plaintiffs sought summary judgment.

**19.** The parties have sworn several affidavits in the proceedings, including four affidavits sworn by David Nolan, an employee of the first plaintiff, on 2 February 2015, 14 April 2015, 26 July 2015 and 25 January 2017 respectively.

**20.** The narrative in Mr. Nolan's first affidavit largely reprises the special indorsement of claim to the summary summons. He exhibits a number of documents including the letters of offer of 23 September 2010 and 29 October 2010 where, respectively, sums of €2,563,000 and €774,000 were advanced to the defendants. Each of the advances was described as a supplemental mortgage loan. It was a specific condition of each of the facility letters that the existing indebtedness pursuant to Home Loan account numbers 67032-262 (No. 24) and 89530-150 (No. 23) "must be cleared in full on drawdown of the facility now approved … The existing Legal Mortgage over the property described in Part 1 of the Letter of Offer will continue to be relied on as security for the facility now sanctioned."

**21.** Mr. Nolan also exhibited two statements of accounts dated 30 December 2011 relating, respectively, to No. 24 and No. 23 which, the plaintiffs contend, show that the earlier 2008 facilities (Home Loan account nos. 67032-262 and 89530-150) in respect of No. 23 and No. 24 were redeemed by the provision of the 2010 facilities.

**22.** The suite of documentation before the High Court also included a letter from the first defendant's own solicitors firm dated 22 December 2010 requesting the drawdown of the funds advanced under the 2010 facilities for the purposes of clearing existing Home Loan accounts nos. 67032-262 and 89530-150. This request was acceded to by the plaintiff. The trial judge also had the defendants' statements of account to which, the plaintiffs contend, the sums advanced on foot of the 2010 facilities were drawn down.

**23.** Also exhibited in Mr. Nolan's affidavit were statements of account relating to the 23 September 2010 facility of €2.5m (Account No. 93035067032-346) showing repayments being made from January 2011 to 6 December 2012, and the 29 October 2010 facility of €774,000 (Account No.93025389530-234) which details the loan repayments paid on that account between January 2011 and 30 December 2011.

**24.** In his 26 July 2015 affidavit, Mr. Nolan exhibits a letter of 18 June 2014 from the first defendant to the plaintiffs referencing Account No. 93035067032-346 (the 23 September 2010 facility) and wherein he advised that he had made a lodgement of €15,000 to the account and that the proceeds of sale of a property in Venice would be applied to cover repayments on the account going forward.

**25.** The defendants' affidavits set out a range of issues said to give rise to a defence to the plaintiffs' claim. Different issues are raised by each of them in their respective affidavits. Both in the High Court and in this Court, the defendants were separately legally represented. Their written appeal submissions are, however, largely identical, save that in the second defendant's submissions, reference is made to the matters raised in her affidavit evidence, of which more anon.

**26.** In his replying affidavits, the first defendant raised twelve points of opposition to the summary judgment application. At the hearing before the High Court, these were reduced to three core points, as follows:

(1) The facilities offered by the plaintiffs in 2010 were no more than an internal banking exercise and did not give rise to any actual advance of funds by the plaintiffs to the defendants. Accordingly, those loan agreements are void for want of consideration or on the grounds that the consideration moving from the parties was past consideration.

(2) The first defendant relied upon his oral agreement with the first plaintiff that it would advance funds to him to construct an extension at No. 24. The failure on the part of the first plaintiff to honour this oral agreement caused the defendants a delay in constructing the extension. In turn this caused a delay in placing No. 23 on the market for sale. As a result of this delay, the defendants, instead of selling No. 23 at the top of the property market, were ultimately forced to sell

that dwelling at the very bottom of the market. The first defendant avers that if the proceedings are remitted to full plenary hearing, the defendants' intention is to counterclaim for what they say is the resulting loss.

(3) The plaintiffs failed to comply with the code of conduct of mortgage arrears in circumstances where the defendants made every effort to co-operate with the plaintiffs, including by signing the very agreements relied upon by the plaintiffs in support of this application. By seeking summary judgment, the first plaintiff seeks to avoid determination of any issues in relation to the code of conduct on mortgage arrears.

**27.** With regard to (1) above, in an affidavit sworn 16 October 2015, the first defendant avers, *inter alia*, that "[o]f crucial importance to the within application is the fact that the bridging and mortgage loan was advanced, drawn down and secured in 2006 and not in 2010, contrary to the impression given in the Plaintiffs' Motion Papers. The Plaintiffs claims are based *entirely* on claimed loan facilities advanced on the 23rd September 2010 and on 29th October 2010, which are not the true and/or proper basis of my actual mortgage indebtedness to the First Named Plaintiff." (at para. 5)

**28.** At para. 30, the first defendant describes the June 2008 facilities as an internal restructuring by the plaintiffs in respect of which a mortgage was executed over No. 23. He states:

> "In this regard, a mortgage was executed in favour of the Plaintiffs in respect of 23 Clonfadda Wood, then owned solely by the Second Named Defendant. By letter of sanction dated 13 June 2008 from AIB Private Banking, the Bank confirmed that loan facilities of €2,500,000.00 and €760,000.00 had been sanctioned. In the usual way, drawdown of the funds was said to require the completion of various documents…"

**29.** He goes on to assert (at para. 33) that his understanding at the time was that the purpose of the 2008 mortgage with respect to No. 23 was "the internal redemption of certain AIB loans and one Bank of Ireland loan." He further avers that notwithstanding the reference to "drawdown" in the documentation which passed between the parties in September and November 2008, his belief was that "the entirety of the sums encompassed by the 2006 and 2008 loans had been drawn down previously."

**30.** At para. 36 the first defendant states:

> "I say, and I admit for the purposes of the Proceedings herein, and not otherwise, that I am indebted to the First Named Plaintiff in respect of sums advanced to me in August 2006 in order to complete the purchase of 24 Clonfadda Wood. I do not accept that the said sums are due and owing at the present time. I say that the sums advanced to me and drawn down and paid over by Bank Draft to the Vendors solicitors for 24 Clonfadda Wood totalled some €2.5 million. Critically, I say that the last advances of the mortgage loan to me by the Plaintiffs were in August 2006 and that no further or other funds were advanced by the Plaintiffs to me thereafter. I say that from August 2006 onwards the actions taken by the Plaintiffs were with a view to protecting only their own position and not providing me with any financial payments, consideration or benefits."

**31.** I note that the trial judge surmised that the apparent contradiction in the first defendant acknowledging that he was indebted to the first plaintiff for the sums advanced in 2006 but at the same time stating that no monies are due and owing at the present time (see below) was probably explained by reference to the defendants' intended counterclaim against the first named plaintiff on account of its failure to honour the agreement the first defendant alleges he had with the first plaintiff in relation to the funding of the extension to No. 24. (at para. 14)

**32.** With regard to the 2010 facilities, the first defendant avers that "there was no commercial reality and no consideration whatsoever, for the said Letters of Loan" and that the letters "were a retrospective 'papering over' of earlier facilities, with no legal effect."

**33.** He goes on to state (at para. 39):

> "At this remove I cannot explain why I and the Second Defendant, acting on my direction, signed the acceptances on the 20 December 2010, except that we were under pressure from the Plaintiffs to do so. I say that I had no and I still have no understanding of the real purpose of these Letters of Loan Offer as the Plaintiffs had already previously advanced the funds to me and to the Second Defendant. Neither I, nor the Second Defendant, who were now grossly overborrowed in late 2010, had any interest in increasing our indebtedness or in taking on new indebtedness. I say that I signed the two letters of loan sanction solely in order to accommodate the demands of the Plaintiffs. I say that I can only assume that these Letters of Loan Offer were part of the Plaintiffs' internal arrangements…I say that these letters were offered to me on the initiative of the Plaintiffs, not on my application or at my request."

**34.** The first defendant goes on to dispute Mr. Nolan's contention that funds were drawn down by the defendants in 2010.

**35.** As evident from her replying affidavits, the second defendant resists the application for summary judgment on two grounds. Firstly, she relies on the ground of *non est factum*. Secondly, she maintains that she was subjected to duress and undue influence in relation to the loan transactions.

**36.** The *non est factum* defence is advanced on two bases. In her first replying affidavit, the second defendant avers that she was apprehensive about the parties' incurring debt, given their ages, but allowed herself to be persuaded by the first defendant against her better

judgment that they should acquire No. 24, extend it and then sell No. 23 and apply the proceeds of sale towards the cost of the acquisition and extension of No. 24. She avers that she expressed very grave concerns to the first defendant in relation to the proposal to purchase No. 24 and sell No. 23, having regard to their respective ages at that time, their various responsibilities to their children and the fact that they owned No. 23 which was subject to a modest loan at that time. She states that she entrusted the management of the business and financial affairs of the household to the first defendant. She avers that she knew little of his engagement with the plaintiffs and that she was not involved in any way with the decision-making process. She states that she was not made aware by the first defendant of the amount of the purchase price of No. 24 or how much would have to be borrowed. She states that after the purchase of No. 24 the first defendant presented her documentation and she signed such documents as she was required to sign. She avers that at this time that she was under extreme pressure because of issues concerning the children and also struggling to manage a medical condition from which she suffered.

**37.** She states that she did not receive any independent legal advice in connection with the transactions and did not have any direct contact of any kind with the plaintiffs until February 2012. She avers that she was never made aware of the true nature and extent of the financial arrangements that were put in place in 2006, 2008 and 2010.

**38.** In her second affidavit, the second defendant exhibits a report of Dr. Niall Pender, Principal Clinical Neuropsychologist at Beaumont Hospital. This report was obtained in the course of these proceedings for the purposes of providing an opinion as to the second defendant's capacity at the time of the 2006, 2008 and 2010 transactions. Dr. Pender concludes his report by stating that he cannot say definitively that the second defendant did not have the capacity to manage her financial affairs between 2006 and 2011 but he opines

that during this period she was very vulnerable and that given her chronic pain and the demands of her children, she did not have any "spare capacity" to engage with her finances.

**39.** The second defendant further maintains that the plaintiffs should have met with her as part of their duty to her as a customer. She avers that insofar as she was approached by the first defendant to sign mortgage deeds in 2008, she was left in the dark as to why documentation was being put in place in 2008 when No. 24 had been purchased in 2006. She avers that she was completely unaware that loan facilities were being made available to the first defendant in relation to borrowings that were unrelated to No. 24, which borrowings were personal to the first defendant which the plaintiffs had earlier advanced to him with no security. She alleges that letters of offer were generated in 2008 in order to regularise the situation, and which culminated in the first plaintiff taking No. 23 as security.

**40.** In relation to the 2010 facilities, the second defendant agrees with the first defendant that no new advances were made to them at that time and that what occurred was merely a restructuring of existing facilities. She avers that the first defendant exerted considerable pressure on her to enter these transactions on the basis that he was being put under pressure by the plaintiffs to do so.

**The Judgment of the High Court**

**41.** In his judgment the trial judge carefully summarised the defendants' asserted various points of defence and the responses of the plaintiffs thereto, including their response to the defendants' alleged counterclaim and their denial of any breach of the code of conduct on mortgage arrears. He also noted the plaintiffs' denial that the second defendant could rely on grounds of duress and/or undue influence or that the defence of *non est factum* was open to her.

**42.** On the issue of alleged absence of consideration for the 2010 facilities, he noted the plaintiffs' reliance on the suite of documentation pertaining to the 2010 facilities as exhibited

in Mr. Nolan's affidavits and the fact that the defendants made payments to the first plaintiff. He further noted their reliance on the first defendant's repeated references in his affidavits to his efforts to repay the loans drawn down. He noted the plaintiffs' submission that the consideration advanced by the plaintiffs in respect of the 2010 facilities was the extension of supplemental loan facilities as recorded and accepted in writing by the defendants.

**43.** At para. 50, under the heading "Discussion and Conclusion", the trial judge found that it was "an undisputed fact that the first named plaintiff advanced to the defendants jointly the sum of €2.500,000.00 for the acquisition of no. 24, in 2006 and that "it is not disputed now that a loan agreement governing the advance was in fact signed by the defendants on 9th August, 2006, and a mortgage over no. 24 securing the same was granted by the defendants in favour of the plaintiffs on 11th August, 2006."

**44.** At para. 51, he referred, *inter alia,* to the first defendant's contention that there was an absence of consideration for the 2010 facility as no funds were in fact drawn down. He then referred to the plaintiffs' contention that the correspondence passing between the defendants' solicitor and the plaintiffs at the time of the 2010 loan facilities "clearly shows a request for drawdown of funds and, subsequently, the confirmation of drawdown of funds. They argue that the loans are also evidenced by the relevant accounts, in which one account a credit in the sums drawn down can be seen, and in another account a debit in the corresponding account may be seen. The defendants however categorised all of this activity as merely an internal bank exercise. The plaintiffs also rely on the payments made by the defendants subsequent to the acceptance of the 2010 facilities by the defendants."

**45.** The trial judge next addressed the absence of consideration argument, in the following terms:

> "52. The exercise in which the plaintiffs and the defendants were engaged in 2010 became very common practice in the years following the onset of the financial crisis.

There are a number of reasons why this practice developed and the reasons for it will vary from case to case. In this case, the reasons were not put forward by the plaintiffs, and in these proceedings the transactions were characterised by the defendants in the manner described above, i.e. that the provision of the 2010 facilities by the plaintiffs amounted to no more than an internal bank exercise.

*Prima facie* however, the underlying point made by the defendants is not an unreasonable one; while the plaintiffs may point to credits and debits on paper, the fact is that no new funds were advanced to the defendants by the plaintiffs. It is true that the defendants' own solicitor requested a 'drawdown' of funds but this was all part of the very same exercise which the defendants describe as an internal bank exercise, and with which they were, in effect, obliged to co- operate. It may well be that the plaintiffs took this course as an act of forbearance rather than call in repayment of the monies due pursuant to the 2008 facility, and that that would represent consideration for the 2010 facilities, but the plaintiffs have not pleaded such an argument. They have relied exclusively on the documentation associated with the 2010 facilities, but this ignores the substantive reality that the plaintiffs did not in fact advance any additional funds to the defendants at this time, other than the €70,000 approximately to clear the Bank of Ireland loan over no. 23, to which I refer below; they simply credited some loan accounts (which were then closed) and opened new loan accounts which were debited the amounts owing on the former accounts. Another way of looking at this is to ask the question: ignoring other transactions in the course of its business, would the first named plaintiff's accounts, if drawn up immediately after the acceptance of the 2010 letters of offer by the defendants, have disclosed any additional lending on the part of the first named plaintiff? It seems highly unlikely, other than the €70,000 approximately advanced to clear the Bank of Ireland mortgage over no. 23. But this

was clearly advanced so that the plaintiffs could take security over no. 23, and is arguably not consideration given to the defendants, but a facility provided to benefit the plaintiffs so that they could take that security.

53. For these reasons it cannot in my view be said that there is not some substance in the argument that there was an absence of consideration provided by the plaintiffs to the defendants in connection with the 2010 facilities. Or, to put it in the words of Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607, it cannot be said, under this heading, that the defendants' affidavits 'fail to disclose even an arguable defence'. This does not mean that, even if they are successful with such a defence, the defendants are not indebted to the plaintiffs, whether pursuant to the original advance in 2006, or pursuant to the 2008 facility letters. But the exact amount due may vary depending on which loan facility is applicable to the debt, and the interest rate payable thereunder. But it is no function of the Court, on this application, to anticipate such matters. For this reason alone, I consider it appropriate to send the proceedings forward for plenary hearing.

54. The question then arises as to whether it is necessary or desirable to consider the other points raised by the defendants, with a view to deciding whether or not they should be entitled to raise at the hearing all or some only of the issues raised by them on this application. Having considered the matter, it seems to me that having succeeded in establishing their entitlement to a full plenary hearing, it would not be appropriate in this case to restrict the defendants as to the matters they may wish to raise in their defence, other than to restrict them to the matters that they have already raised on this application, as set out above in this judgment."

**The grounds of appeal**

**46.** In their Notice of Appeal, the plaintiffs assert that the trial judge erred in fact and in law:

**1.** In finding some substance in the argument that there was an absence of consideration provided by the plaintiffs to the defendants such as to amount to an arguable defence to the plaintiffs' claim.

**2.** In finding that the defendants had an arguable defence to the plaintiffs' claim on the basis that no new, or additional, funds were advanced to the defendants pursuant to the 2010 facilities despite the fact that: -

(a) the court had before it the letters of loan offer in respect of the 2010 facilities.

(b) the court had before it the statements of account in respect of the indebtedness of the defendants which was discharged on the basis of the application of the funds advanced on foot of the 2010 facilities;

(c) the court had before it the statements of account in respect of the bank accounts of the defendants from which the facilities advanced on foot of the letters of loan offer in respect of the 2010 facilities were drawn down;

(d) the court had before it the letter from the firm of solicitors representing the defendants in connection with the refinancing- of which firm the first defendant was a partner- requesting the draw-down of the 2010 facilities;

(e) the first defendant's affidavit evidence of the fact of his efforts to make repayments in respect of the defendants' obligations on foot of the 2010 facilities;

(f) the court had before it the statements of account in respect of the 2010 facilities which recorded the defendants' repayments in respect of the said facilities;

(g) in addition to the refinancing of the defendants' existing liabilities – the court had before it the undisputed evidence of the receipt by the defendants of a further €70,000 by way of the 2010 facilities;

(h) the first defendant swore to the fact of his indebtedness to the plaintiff in respect of the sums claimed in the proceedings.

**3.** In finding that the provision of €70,000 to the defendants on foot of the 2010 facilities was, *inter alia*, "arguably not consideration given to the Defendants" a finding which the plaintiffs assert is not an arguable proposition.

**4.** In finding that the defendants had an arguable defence on the basis of their assertion that the funds advanced pursuant to the 2010 facilities were only an internal bank exercise.

***The issue on appeal and the parties' submissions***

**47.** As I have already outlined, the salient issue for consideration in this appeal is whether the High Court properly determined that the defendants had an arguable case that no consideration passed from the plaintiffs to the defendants in respect of the 2010 facilities.

**48.** The plaintiffs' core contention is that the High Court was wrong in law in determining that the defendants had an arguable ground of defence that there was an absence of consideration for the 2010 facilities. It is submitted that this finding was in the teeth of the facility letters of September 2010 and October 2010, the defendants' acceptance of the terms contained therein, the fact that monies were advanced and existing debts redeemed and new loan accounts opened following which the defendants made repayments until they could no longer do so, all of which was available to the trial judge. Counsel points to the first defendant's affidavit wherein he avers, *inter alia,* to having made individual repayments of €15,000 and €19, 660.23, together with cumulative repayments of more than €50,000 post

the 2010 facilities and emphasises the first defendant's acknowledgment (as set out in his affidavit sworn 16 October 2015) that he is indebted to the plaintiffs.

**49.** It is contended that the trial judge's finding as arguable the defendants' contention that the plaintiffs' reliance on the 2010 facilities is void for want of consideration was clearly contradicted by, *inter alia* "*… the indisputable documentation of a commercial transaction [which] rendered the alternative chronology proposed by the Defendant[s] quite untenable"*, quoting Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607)

**50.** Counsel contends that the trial judge actually correctly identified, at para. 52 of the judgment, the process pleaded at para. 5 of the special indorsement of claim to the summary summons but then fell into error in refusing to treat the suite of documentation pertaining to the 2010 facilities- which show the redemption of old debts and the creation of a new liability- as valid consideration. It is submitted that the High Court ought to have had regard to the incontrovertible commercial documentation exhibited in Mr. Nolan's affidavits and then concluded that it was not stateable for the defendants to contend that there was no consideration from the plaintiffs for the 2010 facilities or to assert that these facilities represented only an internal bank exercise. In this regard, counsel relies on the decision of the Court of Appeal in *Bank of Ireland v. Flanagan* [2015] IECA 56.

**51.** It is asserted that the only issue for this Court is whether the trial judge could ever have concluded that it was arguable that no consideration passed from the plaintiffs to the defendants in 2010, a conclusion which the plaintiffs assert is not stateable in light of the *dictum* of the Court of Appeal in *Flanagan.*

**52.** In *Flanagan*, the Bank were seeking summary judgment in the sum of €1,743,896.15 plus interest on foot of various loan facilities which were ultimately restructured on foot of a loan facility dated 4 March 2009. The defendants raised a number of issues by way of *bona fide* defence to the Bank's claim, including that the facility comprised in the 4 March 2009

letter was unenforceable as no money had been drawn down and there was no consideration. None of the defences advanced by the defendants found favour with Ryan J. in the High Court and he gave judgment to the Bank for the amount claimed. The defendants duly appealed. Again, none of the arguments advanced was found by the Court of Appeal to meet the threshold of a *bona fide prima facie* defence to the Bank's claim.

**53.** In dealing with the defendants' argument that the 4 March 2009 facility letter was an unenforceable contract because money was never actually drawn down and there was also no consideration, the Court of Appeal stated:

> *"17. In this ground of defence, the appellants are attempting to make something out of nothing. As already set forth, the facility dated 4th March 2009 is a loan for the purpose of restructuring all the previous borrowings. No new funds were being advanced. The appellants refer to the fact that, nonetheless, the facility letter more than once refers to a drawdown of funds, which it undoubtedly does. But, as noted by the judge in his judgment on page 8 thereof:*
>
> > *'the facility letter put in place a new arrangement between the parties which replaced the earlier provisions and this was done by agreement between them. In return for the agreement by the defendants to make the payments as now scheduled in the facility letter, the Bank agreed to give up its entitlement to enforce the agreements that were previously in place. The submission that there was no actual transfer of cash, either from the Bank to the defendants or internally from one place to another in the Bank, is a misunderstanding of what happened as a matter of contract between the parties when this last facility was agreed'.*

*For the appellants to try and argue that because the facility refers to drawdown and where no actual drawdown in fact took place the Bank are in some way disentitled to the repayment of the monies the subject of this facility is a contrived and empty argument devoid of any merit whatsoever. It is quite obvious that being a loan in the nature of a restructuring of existing borrowings, no physical drawdown of any additional funds took place in the sense of funds being made available to the borrowers for use by them. The drawdown, quite obviously, was achieved by way of an internal accounting exercise whereby the previous borrowings were repaid by the restructuring loan. The judge rejected this as a bona fide ground of defence, and this Court agrees completely with that conclusion."*

**54.** In *LSREF III Achill Investments limited v. Corbett* [2015] IEHC 652, the defendants sought to resist an application for summary judgment, *inter alia*, on the ground that a facility letter of 11 June 2011, upon which the plaintiff relied, was unenforceable because no new drawdown occurred. Barrett J. addressed that argument as follows:

*"25. As mentioned above, the facilities made available under the June 2011 Facility Letter had largely been drawn down in full and the facility letters documented the basis on which Ulster Bank was satisfied to continue the relevant credit. A small portion of Facility F represented fresh credit. The consideration offered by Ulster Bank for the June 2011 Facility Letter took the form, inter alia, of the release of its entitlement to enforce a prior facility letter of 11th January 2011 against the borrowers, an offer to make previously drawn facility letters available going forward, and an offer of materially altered terms in relation to certain of the facilities. So there was a binding fresh agreement between the parties, the validity of which was unaffected by any want of fresh drawdown. In some ways, it is surprising to see this argument being proffered, given that a like argument was clearly and*

*completely rejected by the High Court and the Court of Appeal in Bank of Ireland v. Flanagan and Another [2015] IECA 56."*

**55.** Barrett J. went on to quote the *dictum* of Ryan J. in *Flanagan* as endorsed by the Court of Appeal, as referred to at para. 53 of the within judgment.

***Are the circumstances of the present case distinguishable from Flanagan?***

**56.** The defendants submit that the plaintiffs misunderstand their case. They say that they are not asserting that can there never be a restructuring of loans which banks have made, or that any drawdown (even if there is no actual physical drawdown) on foot of such restructuring is meaningless. The nub of the defendants' case in this appeal is that the consideration for the 2010 facilities was not pleaded by the plaintiffs, nor readily apparent from the evidence adduced by the plaintiffs in the High Court. It is asserted that the decision of the trial judge to remit the matter to plenary hearing did not turn on the issue of "an internal bank exercise" but rather as a consequence of his finding that the defendants' contention that consideration was required to be pleaded was an arguable defence. The defendants say that it is not their case that the restructuring of loan facilities cannot amount to consideration: their contention is that the restructuring must be *shown* to have been underpinned by consideration. In this regard, the defendants rely on the *dictum* of Ryan J. in *Flanagan,* a matter to which I will return in due course.

**57.** The defendants' primary contention that the pleadings in the instant case did not meet the requirements for summary summonses as identified in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84. What was in issue in *O'Malley* was the level of detail which a party seeking summary judgment was required to specify in both the summary summons and, potentially, the evidence required to substantiate a claim. In that case the summary summons had fully established the fact of the loan agreement, the drawdown, the existence of arrears and the calling in of the full sum. However, a question mark hovered over how

the amount said to be due was calculated. Giving judgment for the Supreme Court, Clarke J. referred to the requirements of O. 4, r. 4 RSC that "all necessary particulars" be stated. The *"underlying rationale"* for this was said by Clarke J. to be to enable a defendant to a summons to have sufficient particulars *"to satisfy his mind whether he ought to pay or resist"*. At para. 5.5 he stated:

> *"So far as the pleadings are concerned, it does seem to me that a court may be entitled to take into account, in assessing the adequacy of the manner in which a debt claim is particularised, any documentation which has been sent to the defendant in advance of the commencement of the proceedings. The procedures are intended to be summary. They are not intended to involve an overly detailed account of every twist and turn of a banking relationship which might go back many years and involve, in at least some cases, thousands of transactions or measures potentially affecting the liability of the borrower. The more detail the borrower has been given in advance, the more it may be possible to justify a relatively shorthand way of describing how the amount due is calculated. But even there, it seems to me that it is necessary for a plaintiff, if they wish to rely on previously supplied details, to at least make some reference to those details in its special indorsement of claim... If the indorsement specifies the liquidated sum due but says it is calculated in accordance with some identified document or documents already sent to the defendant, then he has sufficient information, provided that those documents, in turn, themselves provide the necessary detail."*

**58.** At para. 6.7, Clarke J. opined as follows:

> *" ... it does not seem to me to be too much to ask that a financial institution, availing of the benefit of a summary judgment procedure, should specify, both in the special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes*

*surcharges and/or penalties as well as interest. Indeed, if it really is as simple as counsel suggested, then I cannot see any reason why Bank of Ireland should not have set out those calculations. A person confronted with a claim or a court confronted with a question of whether there is prima facie evidence for that claim is entitled to at least enough detail to know the basis on which the sum claimed is calculated. The defendant is entitled to that information to decide whether there is any point in pursuing a defence or, indeed, potentially expending monies on procuring professional advice in that regard. The court is entitled to that information to enable it to form an assessment as to whether there is sufficient evidence to say that the debt has been established on a prima facie basis. Neither the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court."*

**59.** The defendants submit that the plaintiffs' claim is marred by a complete dearth of information about the circumstances in which the 2010 facilities arose and what consideration existed for them. They assert that insofar as the plaintiffs rely on "drawdowns" by the defendants in 2010, the fact of the matter is that the request made by the solicitor for the defendants for drawdowns in 2010 was in response to emails from the plaintiffs advising him to make such request. They point to the fact that it was they who brought the 2006 and 2008 arrangements to the attention of the High Court. They say that the plaintiffs chose not to express any view on that evidence, resting their entitlement to summary judgment solely on the 2010 facilities. Moreover, they argue that there was a substantial paper trail which the plaintiffs did not put before the High Court as a result of which the defendants were obliged to do so.

**60.** The defendants also assert that the within case is distinguishable from *Flanagan* as in the latter case consideration (forbearance to sue) was expressly pleaded. It is contended that

it is not sufficient for the plaintiffs to argue that a suite of documentation preceded the issuing of the summary summons: the basis for the plaintiffs' claim was required to be pleaded in the manner outlined by Clarke J. in *O'Malley,* which the defendants say the plaintiffs failed to do in the within case. They assert that it is not for the High Court in a summary summons procedure to infer the plaintiffs' methodology. Accordingly, it was not sufficient for the plaintiffs to come before the High Court with a twelve-paragraph "laconic" affidavit and voluminous documentation and to request the High Court to join the dots regarding the issue of consideration. In short, the defendants assert that the summary summons did not contain such detail or information as to allow the defendants to satisfy themselves whether they ought, in the words of Clarke J. in *O'Malley*, *"to pay or resist".*

**61.** The defendants submit that the plaintiffs failed to give any prior information regarding the provenance of the 2010 facilities or whether there was consideration for them. In those circumstances, it is argued that the finding of the trial judge (at para. 53) is entirely in accordance with the approach of Clarke J. in *O'Malley.*

**62.** Counsel for the second defendant specifically makes the case that it is not clear from the documentations exhibited in the plaintiffs' affidavits as to what occurred in 2008. Therefore, it is not sufficient for the plaintiffs to say that the 2010 facilities constituted a reorganisation of what occurred in 2008 or rely on the 2010 facilities as a stand-alone arrangement. This is in circumstances where it is not clear what consideration pertained to the 2008 agreement. He submits that the plaintiffs were required to set out what occurred in 2006, 2008 and 2010 and that it behoved the plaintiffs to put a pen picture before the High Court of what in 2008 constituted the consideration for repackaging the 2006 facility and what in 2010 constituted the consideration for the reorganisation of the 2008 facility.

He lays emphasis, in particular, on the second defendant's averment that she had no dealings with the plaintiffs in 2006, 2008 or 2010.

***Discussion***

**63.** I consider that an issue in the present case, as indeed identified by Binchy J., is whether the requisite degree of particularity was contained in the special indorsement of claim to the summary summons. I accept that, on their face, the pleadings refer to the offer of facilities in September 2010 and October 2010, the acceptance of those offers by the defendants and that the respective facilities were "drawn down" in December 2010. However, to my mind, what is in issue here is that in the absence of funds having actually been drawn down, what was required of the plaintiffs was a more expansive narrative (than heretofore provided) explaining the consideration which underpinned the facilities upon which the plaintiffs now rely as the basis for the recovery of monies they claim are due and owing to them. In this context, the *dictum* of Clarke J. in *O'Malley* is apposite when he refers to the necessity, where reliance is being placed by a plaintiff on previously supplied details, *"to at least make some reference to those details in its special indorsement of claim"* and when he states that *"[n]either the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court".* (emphasis added)

**64.** To my mind, neither the special indorsement of claim nor the affidavit evidence of Mr. Nolan (including his exhibits) provide the requisite narrative (as envisaged by *O'Malley*) pertaining to the consideration for the 2010 facilities, without the Court having to involve itself in joining copious dots in an attempt to ascertain exactly what benefits, if any, passed to the defendants (including to the second defendant *vis a vis* the €744,000 facility) in 2010. As Charlton J. remarked in *Bank of Scotland plc v. Fergus* [2019] IESC 91, with reference to and applying *O'Malley*, *"not only is any proposed defendant in a claim for a liquidated sum required to engage with the evidence and to demonstrate a defence and to be denied a*

*plenary hearing unless those steps are taken , but it is also required of a plaintiff financial institution to make it clear as to the precise basis that a sum of money is owed."*

Albeit the High Court judgment in the within case pre-dated *O'Malley* and *Fergus*, the onus which rests on a plaintiff financial institution in summary proceedings to establish a *prima facie* entitlement to the sum claimed in both its pleadings and evidence was something which very obviously engaged the trial judge in the within case and informed his decision that in the absence of sufficiently pleaded particulars of the basis for their monetary claim against the defendants an entitlement to summary judgment for the plaintiffs did not arise.

**65.** The Court was referred by the defendants to a number of judgments which they say support the approach of the trial judge in this case. In *AIB Plc v. Marino Motor Works Limited* [2017] IEHC 522 a motion for summary judgment was resisted on the basis that interest allegedly due had not been properly explained and also that the defendant had a potential counterclaim against the plaintiff arising out of its having actively contributed to the defendant's financial difficulties, culminating in their losing a car dealership and their inability to repay the bank. Ní Raifeartaigh J. refused summary judgment because she was not satisfied that the calculation of the interest due was correct, and on the basis of the potential for a counterclaim due to possible negligence by the bank.

**66.** In *AIB v. Maguire* [2018] IEHC 561, also relied on by the defendants, the bank sought judgment against the second and third defendants over guarantees they had made in respect of a loan to the first defendant to buy land which had been drawn down in 2007. The original loan agreement was renewed annually but the guarantees were only entered into in 2009, after the agreement was renewed twice. The last such renewal relied upon by the bank was contained in a 2010 facility letter which post-dated the execution of the guarantees. The second defendant contended that the first defendant did not receive the loan from the bank in July 2010 as stated in the affidavit on behalf of the bank, but in 2006 when the land in

question was bought. Both the second and third defendants contended that the guarantees were not supported by any consideration, since the monies had been advanced years before the execution of the guarantees, no further money being advanced thereafter. Refusing to grant summary judgment, McDermott J. pointed to the fact that the bank had not given a full account of the dealings it had with the parties in the case. At para. 16 he stated:

> *"… The issue of past consideration is a mixed question of fact and law. The plaintiff has chosen not to give a full account of the course of dealing between the parties in this case concerning the delay in seeking the guarantees from the two defendants for a number of years after the money was drawn down and the purchase of the property was completed. There is no evidence of how or why the further credit agreements were made annually or why or how the special condition in respect of furnishing the guarantee was required and repeated in these agreements or, to what extent, if any, the two defendants were involved in these transactions. I am satisfied that an arguable defence has been raised …"*

**67.** I consider the penultimate observation of McDermott J. particularly apt in circumstances where the second defendant's evidence (to date undisputed) is that she had no dealings whatsoever with the plaintiffs during the relevant timeframes, which included the plaintiffs taking her property at No. 23 as security for facilities advanced in 2008 and which the plaintiffs say were restructured in 2010.

**68.** In *AIB v. Purcell* [2018] IEHC 534, summary judgment was refused because the bank had not disclosed all relevant information to the court. The bank had sought to recover an unpaid loan from the third defendant. However, although the loan was said to have been subject to the bank's general terms and conditions governing business lending, they had not been put in evidence. At para. 4 of his judgment, Barrett J. stated:

*"[The bank] comes to court claiming that the third-named defendant is jointly and severally liable under a loan agreement for the entire sum… (a) without putting the entirety of the loan agreement in evidence before the court, and (b) merely putting in evidence a letter of sanction which issued to three borrowers but which makes no reference whatsoever (none at all) as to whether, for example, those three persons are jointly and/or severally liable. The proposition that a court, at the behest of one party to a contract, would grant an order of €3.7+m on the basis of selected provisions of that contract when the whole is readily available and there is no good reason for the omission is, with respect, unsustainable."*

**69.** At para. 5 he stated:

*"there is and can be no question of AIB getting summary judgment for the amount sought … by reference to a loan agreement which, to the (incomplete) extent that it has been exhibited before the court, makes no reference to the nature of the liability of the borrowing parties."*

**70.** Barrett J. concluded his judgment by referring to the necessity to be mindful of the *"discernible caution"* which McKechnie J. indicated in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 should be brought to the exercise of the power to grant summary judgment and stating that there was *"no question but that this is a case which requires to be sent to plenary hearing."*

**71.** Quite obviously, the rationale employed by the respective learned judges in *Marino Motor Works Limited*, *Maguire* and *Purcell* to deny summary judgment foreshadowed the approach adopted by Clarke J. in *O'Malley* as to the necessity for proper pleading, as indeed did the approach adopted by Binchy J. in the present case. More recently, the *O'Malley* principles were pithily summarised by Humphreys J. in *Allied Irish Banks PLC v. McGowan* [2020] IEHC 148:

*"The law on the criteria for summary judgment has been rebalanced somewhat recently by the Supreme Court in Bank of Ireland Mortgage Bank v. O'Malley [2019] IESC 84 (Unreported, Supreme Court, Clarke C.J. (Charleton and Ní Raifeartaigh JJ. concurring), 29th November, 2019) in a manner that imposes somewhat more onerous requirements on plaintiffs than was previously understood. That judgment was applied recently by that court in Bank of Scotland v. Fergus [2019] IESC 91 (Unreported, Supreme Court, Charleton J. (McKechnie and McGovern JJ. concurring), 18th December, 2019), and I have had occasion to discuss the law in this area recently in Havbell Ltd v. Harris (Unreported, High Court, 21st February, 2020). Essentially, there are four criteria:*

*(i). is the plaintiff's claim sufficiently pleaded and particularised;*

*(ii). has the plaintiff adduced evidence establishing a prima facie case;*

*(iii). if so, whether there is a fair and reasonable probability of the defendant having a real or bona fide defence; and*

*(iv). if so, has the defendant shown that this goes beyond mere assertion and is supported by evidence or other indicators."*

**72.** As far as the present case is concerned, albeit his focus was on whether the defendants had established arguable grounds of defence, implicit in the trial judge's conclusions was a finding that the plaintiffs had failed to establish that their claim was sufficiently pleaded or particularised, or that there was sufficient evidence before him, to sustain a *prima facie* case that consideration passed from the plaintiffs in relation to the 2010 facilities.

**73.** While we are not in this appeal concerned with the question of whether summary judgment should be granted since the matter has gone to plenary hearing in any event, in my view the *"discernible caution"* advocated by McKechnie J. in *Harrisrange* (and very obviously exercised by Ní Raifeartaigh J., McDermott J. and Barrett J. in the above cited

jurisprudence and by the trial judge in this case) is nevertheless an apt roadmap when considering whether the defendants should be precluded from arguing that no consideration passed from the plaintiffs in 2010, particularly having regard to the arguments that the second defendant intends to advance at the plenary hearing, an issue to which I will return.

**74.** As already stated, the plaintiffs contend that insofar as the trial judge found that consideration was not identified or pleaded he erred in so finding given the suite of documentation that preceded the issuing of the summary summons. It is argued that the plaintiffs did not need to plead consideration given the documentation that was before the High Court, all of which preceded the issuing of the summary summons. As I have referred to, in support of their contention that the trial judge fell into error in finding the defendants' contentions regarding consideration arguable, the plaintiffs rely on the decision of the Court of Appeal in *Flanagan.*

**75.** While, at first blush, the decision of the Court of Appeal in *Flanagan* would appear to be an answer to the consideration question, I do not believe, however, that *Flanagan* is necessarily dispositive of the defendants' argument that no consideration passed from the plaintiffs in respect of the 2010 facilities. As is apparent from the judgment of the High Court in that case (see [2012] IEHC 197), in rejecting the argument that no monies had been drawn down Ryan J. pointed out that the restructured facility was, in fact, underpinned by good consideration stating:

> *"The facility letter put in place a new arrangement between the parties which replaced the earlier provisions and this was done by agreement between them. In return for the agreement by the defendants to make the payments as now scheduled in the facility letter, the Bank agreed to give up its entitlement to enforce the agreements that were previously in place."* (emphasis added)

**76.** I note that the above passage was specifically endorsed by the Court of Appeal. It seems also to be the case that in *Corbett,* on which the plaintiffs also rely, Barrett J. dismissed the absence of consideration argument in that case by reliance, *inter alia,* on the fact that *"the June 2011 Facility Letter took the form, inter alia, of the release of its entitlement to enforce a prior facility letter of 11th January 2011 against the borrowers",* the release of that entitlement being obviously part of the consideration passing from the bank for the June 2011 facility.

**77.** As far as the within case is concerned, in circumstances where no monies were in fact advanced in 2010, and there being no immediate suggestion in the pleadings or evidence that the plaintiffs had relinquished their entitlements under the prior borrowings, I accept the defendants' contention that in the absence of a more expansive pleading as to what was the consideration for the 2010 facilities (and where forbearance to sue was not pleaded), the defendants are entitled to make the case at plenary hearing that their circumstances are distinguishable from *Flanagan.*

**78.** Fundamentally, in this case the plaintiffs' focus in the High Court, for their entitlement to summary judgment, was that there had been a drawdown by the defendants of the funds which formed the subject of the 2010 facilities, and in respect of the repayment terms the defendants defaulted. Yet what occurred in 2010 was a paper exercise that did not in any sense involve the provision of new funds to the defendants. The plaintiffs did not plead or indeed argue before the High Court that the giving of forbearance amounted to a valid legal consideration. This was sufficient for Noonan J. to distinguish the present case from the factual matrix which pertained in *Allied Irish Banks PLC v. Gormley* [2018] IEHC 744. Likewise, I am satisfied that what distinguishes the present case from *Flanagan* is that the giving of forbearance formed no part of the plaintiffs' pleadings or evidence on the question of what consideration passed from the plaintiffs to the defendants in 2010.

**79.** At this juncture, this Court is not concerned with whether or not the defendants will succeed at trial on the basis of what they say about the 2010 facilities and the absence of consideration. That is a matter for the plenary hearing. Indeed, as observed by the trial judge, even if they were to succeed, that does not mean that the defendants are not indebted to the plaintiffs, whether pursuant to the 2006 or 2008 facility letters.

**80.** Accordingly, I agree with the defendants' submission that leaving the issue of consideration to be decided by the High Court in plenary hearing does not (for the reasons outlined above) fly in the face of existing jurisprudence. Moreover, given what I have said about the trial judge's approach having foreshadowed the *dictum* of Clarke J. in *O'Malley,* it is entirely in order that this Court would be very slow to pre-empt the conclusions to be drawn by the judge trying this case at plenary hearing.

**81.** Moreover, in concluding as it does, this Court cannot ignore the history set out in the defendants' replying affidavits, particularly the second named defendant's contention that she had no engagement with the plaintiffs during the relevant times, and where one of her arguments is that she has no understanding as to what benefit was conferred on her by the advance of €760,000 in 2008 a time when the plaintiffs took security over her property (No. 23). The sum of €774,000 which was the subject of the October 2010 restructuring on which, *inter alia*, the plaintiffs rely in the within proceedings is, to my mind, inextricably linked with one of arguments which the second defendant wishes to advance at plenary hearing, namely that she derived no benefit from the €760,000 which was advanced in 2008.

**82.** Albeit that it is undisputed that €70,000 of the €760,000 advanced in 2008 that otherwise went to discharge the indebtedness of the first defendant was applied to discharge her relatively modest indebtedness to Bank of Ireland, it is arguable for the second defendant to maintain as she intends to do at the plenary hearing, (without prejudice to the other defences she advances and upon which this Court makes no comment, their being matters

for the plenary hearing) that any benefit to her from the monies advanced by the plaintiffs had accrued by 2006 when No. 24 was acquired.

**83.** In response to questions posed by this Court, counsel for the plaintiffs asserted that the benefit that the second defendant received from the monies advanced in 2008 was the opportunity to participate in the purchase of No. 24. It appears to me, however, that the second defendant obtained that benefit in 2006 when No. 24 was acquired. I hasten to add that in making that observation I am not in any sense determining issues which fall to be determined at the plenary hearing; rather the observation is made in the context of the necessity for an informative narrative in the special indorsement of claim in this case, or at least in the grounding affidavit or the exhibits contained therein, which would have given the trial judge a clear perspective of what exactly was the consideration passing from the plaintiffs to the second defendant in respect of the €774,000 sum which was the subject of the October 2010 facility.

**84.** It is important to note that the defendants acknowledge (albeit subject to the somewhat confusing caveat expressed by the first defendant at para. 36 of his affidavit sworn 16 October 2015) that monies were advanced in 2006 to acquire No. 24. The first defendant's case is that in 2006 agreement had been reached between him and the plaintiffs for the provision of €350,000 to fund the construction of the extension to No. 24. He also claims that when that was not forthcoming, the later agreement reached between the parties for the provision of €150,000 was reneged on by the plaintiffs. I accept his counsel's submission that these oral agreements are important in circumstances where the case made by the plaintiffs in the summary summons proceedings do not deal at all with the 2006 facility or the basis on which that facility was repackaged in 2008. The defendants maintain they have grounds for a counterclaim and contend that if they are successful, a set off ought to apply. These arguments fall to be determined at the plenary hearing.

**85.** While I am satisfied, for the reasons already set out, that the plaintiffs cannot succeed in this appeal based on their reliance on *Flanagan*, I also accept that there is some force in the defendants' overarching submission that if they were to be precluded from raising as a defence the absence of consideration for the 2010 facilities this would undermine to a not insubstantial degree the very basis on which they wish to maintain their counterclaim for breach of an alleged agreement in 2006 whereby the plaintiffs were to provide funding for the extension of No. 24. Moreover, inherent in the submissions of the second defendant is the concern that an adjudication at the appellate stage of the consideration issue could impede arguments she wishes to advance at the plenary hearing regarding the absence of a specific benefit passing to her on foot of the 2008 facilities the restructuring of which culminated in the 2010 facilities. To my mind, that concern is a not insubstantial matter.

**86.** It is also important to bear in mind that no finding was made by the trial judge as to whether there was consideration or not for the 2010 facilities. All he concluded was that the defendant's contention that there was no consideration was an arguable defence. Accordingly, the issue of whether or not there was consideration for the 2010 facilities falls to be determined at plenary hearing.

**87.** The question for this Court was whether the trial judge erred in law or fact in concluding that the issue of consideration for the 2010 facilities merited the benefit of a plenary hearing. In assessing the defendants' arguments on the issue of consideration, the trial judge had regard to the test laid down by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607, to wit:

> *"[T]he fundamental questions to be posed on an application [for summary judgment] such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily*

*determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

**88.** For the reasons already set out, I perceive no error on the part of the trial judge in the manner in which he applied the *Aer Rianta* test and no basis on which to interfere with the findings made by the trial judge or the basis on which he determined that the defendants had an arguable defence to the plaintiffs' claim on the basis that the 2010 facilities lacked the requisite consideration.

***Implied forbearance to sue as the requisite consideration?***

**89.** By way of a default argument to their contention that the trial judge erred in remitting the proceedings to plenary hearing on the basis that it was arguable that no consideration passed from the plaintiffs in respect of the 2010 facilities, in their written and oral submissions the plaintiffs contend that quite apart from the suite of documentation which was before the court below, there was, in addition, a readily implied forbearance to sue on the expired, but unpaid, 2008 facilities in providing the 2010 facilities as a replacement for the earlier facilities from which the trial judge could have concluded that the necessary consideration was present.

**90.** Counsel for the plaintiffs submits that it is beyond dispute, as a matter of law and fact, that the effect of advancing the 2010 facilities to the defendants was to relinquish the opportunity to sue on foot of the 2008 facilities. The plaintiffs maintain that this forbearance was implicit in the request by the defendants to drawdown the funds on 23 December 2010 which request benefited the defendants by extinguishing their liability under the 2008 facilities. In those circumstances, albeit forbearance was not pleaded, counsel asserts that the trial judge erred in failing to infer forbearance to sue as the requisite consideration, particularly when the provision of facilities to the defendants in the time period 2006 and 2010 (i.e. the 2008 facilities) could also be inferred as forbearance to sue.

**91.** It is well established at common law that forbearance to sue is good consideration (*Fullerton v. Bank of Ireland* [1903] AC 309 refers).

**92.** However, objection is taken by the defendants to the plaintiffs' submission on the grounds that the argument was not canvassed in the High Court by the plaintiffs. It is accepted that this is the case. While the trial judge in his judgment surmised that the provision of the 2010 facilities by the plaintiffs might have been an act of forbearance rather than the plaintiffs calling in the 2008 facilities, he noted that the plaintiffs had not pleaded such an argument. Most certainly, the trial judge did not make any determination for or against the plaintiffs on the issue of forbearance as consideration.

**93.** The defendants submit that on the principles set down in *Lough Swilly Shellfish Growers v. Bradley* [2013] 1 I.R. 227, the plaintiffs should not be permitted to advance the argument they now seek to make at the appeal stage.

**94.** In *Lough Swilly Shellfish Growers*, O'Donnell J. articulated the relevant principles as follows:

> *"There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K D. for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new*

*legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retained the power in appropriate cases to permit the argument to be made."*

**95.** While one could take the view, at one level, that the argument now sought to be advanced by the plaintiffs could not be said to be "*diametrically opposed to that which had been advanced in the High Court"* and that, accordingly, consideration should perhaps be given to the plaintiffs' argument, I nevertheless agree with the defendants' submission that the plaintiffs should not be allowed to pursue the matter on appeal. My conclusion in this regard is based on the following: albeit raised by the trial judge, the issue of forbearance as consideration was not canvassed before him by the plaintiffs. In those circumstances, particularly where the trial judge noted that the plaintiffs "relied exclusively on documentation associated with the 2010 facilities" (at para. 52), and where no evidential basis was laid by the plaintiffs in the High Court for their now argument, I fail to see how it could be fairly entertained at appellate level.

**96.** I note that notwithstanding their objection to the plaintiffs having raised forbearance to sue as consideration at the appeal stage, the defendants' written and oral submissions addressed the substance of the plaintiffs' argument. In essence, they contend that insofar as the plaintiffs seek to rely on forbearance to sue, this argument is not open to them as there is nothing in the plaintiffs' affidavits from which forbearance could be inferred. They point to the fact that there were no demand letters sent to them pursuant to the 2008 facilities or any evidence of such before the High Court. They also assert that there was no evidence before the High Court suggesting that the plaintiffs were contemplating litigation against them such as might have induced them to enter into the 2010 facilities. It is in those circumstances that

the defendants contend that the case law relied on (*Fullerton v. Bank of Ireland* and *Alliance Bank v. Broom* (1864) 2 Dr & Sm 289) cannot assist the plaintiffs.

**97.** As I have determined that it was not open to the plaintiffs to raise the issue of forbearance to sue at the appeal stage, I will refrain from commenting on the merits of either sides' arguments on the issue. All these matters are capable of being resolved at the plenary hearing.

**98.** For the reasons set out in the within judgment I would dismiss the appeal.

**99.** Both Donnelly J. and Haughton J. are in agreement with this Judgment and the Order I propose. That is an Order dismissing the plaintiffs' appeal. Having failed in their appeal costs will normally follow the event. It is proposed however that execution of the costs Order in favour of the defendants be stayed pending the determination of the High Court proceedings. It is the intention of the Court to so order within fourteen days from the date of judgment unless either party applies within that time to request that the Court should otherwise order. If so applying the party should first notify the Office of their intention to object within the period and should file short written submissions within one week of their notification to the Court. The other party will then have a further week to file their submissions.