THE SUPREME COURT

[RECORD NO.: 29/19]

O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

BETWEEN:

RORY ENNIS

DEFENDANT/APPELLANT

AND
ALLIED IRISH BANKS PLC

PLAINTIFF/RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 15th day of March, 2021

Background

1. This judgment deals with the approach an appeal court should adopt when there is an application to allow argument on new points, or to admit new evidence, in an appeal against a summary judgment. In this case, the respondent Bank ("the Bank") brought summary judgment proceedings against the appellant, Mr. Ennis. The High Court granted judgment to the Bank. The appellant appealed to the Court of Appeal where he sought to introduce new arguments and evidence. That Court dismissed the appeal, holding that the introduction of this new material at that stage was not permissible and that, even if it had been permitted and then considered as part of the appellant's case, the material would not have afforded an arguable defence such that the matter should have been transferred for plenary hearing. In this Court, the appellant's case is that the Court of Appeal erred in its judgment, by adopting the incorrect approach.

2. Up to the year 2009, the appellant ran what was a highly successful business as a glazier. Later, on the 23rd March, 2011, he signed a credit agreement with the Bank. He provided security in the form of lands which he had purchased earlier. He fell behind in repayments and the Bank brought summary proceedings on the security. The High Court (Baker J.) determined that the Bank was entitled to an order directing the appellant to deliver up possession of lands which he held, comprised in Folio 49514F County Kildare (2015 No. 283 SP). The Court of Appeal, in an *ex tempore* judgment, dismissed the appeal. In his application for leave to appeal to this Court, the appellant contended that the material which he had by then adduced before the Court of Appeal showed that he had an arguable defence to the claim, supported by documentary evidence, and that the High Court judgment should not have been affirmed as it was. But the Court of Appeal was not

persuaded by these arguments of the appellant, then a litigant-in-person. This Court granted leave to appeal ([2019] IESCDET 225). The sole issue identified in this Court's determination granting leave concerned the approach to be adopted on applications to make a new case in appeals for judgment in summary proceedings. The panel observed that these issues had been discussed in the context of an appeal in plenary proceedings in the judgment of this Court in *Lough Swilly Shellfish Growers Co-operative Society Ltd. and Anor. v. Bradley and Anor.* [2013] IESC 16; [2013] 1 I.R. 227 ("*Lough Swilly*"). Having represented himself both in the High Court and the Court of Appeal, the appellant decided to retain solicitors and counsel for his appeal to this Court.

3. At the outset of this appeal, however, counsel for the appellant raised an issue not mentioned in the determination. She submitted that, not only had the Court of Appeal erred in law in reaching its conclusion, but that her client should be seen as a "victim", having been denied rights under Article 6 of the European Convention on Human Rights ("the ECHR"; "the Convention")) which, insofar as material, provides that in a determination of civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Save in exceptional circumstances, parties in an appeal are confined to arguing only the issues identified by the Court at the leave stage. Even though the issue was not raised in this Court's determination, it is necessary to deal briefly with the fair procedures question, as, if an order was made in denial of fair procedures, it would be invalid.

Fair Procedures

4. The appellant claimed that the High Court hearing was procedurally flawed. Additionally, perhaps the case made might imply a violation derived from the absence of legal representation in the courts below. But, as well as not having been identified in the determination, any such case made is constitutionally impermissible. Insofar as it is sought directly to invoke an ECHR protection, it would run counter to provisions of the Constitution, relevant statute law, and decided authority. Article 29.6 affirms the primacy of the Constitution. It provides that *"[n]o international agreement shall be part of the domestic law of the State* ***save as may be determined by the Oireachtas****".* (Emphasis added). The Convention is not directly effective in our law. Rather, it operates through the filter of the European Convention on Human Rights Act, 2003. This well-established point is emphasised in the judgments of this Court (see, McD v. L [2009] IESC 81; [2010] 2 I.R. 199, at para. 322; and, more recently, *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81, at paras. 6, 7 and 62).

5. But, even if seen beyond those limitations, such a contention faces further difficulties. A question arises as to the extent to which any fair procedures point was, in fact, raised in the courts below, and as to the nature of any such point actually made. Insofar as any such issue was, in fact, raised, it was apparently only on a very narrow basis. In the High Court, the appellant applied to cross-examine the Bank's deponent. Acting within her discretion, the High Court judge refused that application. She was entitled to do so as there was no conflict of fact in the case. The same point was mentioned in the appellant's notice of appeal from the High Court. The judgment of the Court of Appeal dealt briefly

with the same issue, correctly holding that the High Court judge's decision did not involve any denial of fair procedures (see, Delany, McGrath and McGrath, *Delany and McGrath on Civil Procedure* (4th edn., Round Hall 2018), at para. 21-104 and the cases cited there). But, with that exception, it is unclear how, otherwise, it is claimed the appellant was denied a right to fair procedures.

6. Lest it be thought a potentially important issue was dismissed without due consideration, I must also refer here to the context in which the point is made, and the fact that the constitutional right to fair procedures has a number of aspects. In this case, any such issue must be seen in light of the fact that the appellant, a legally competent person, decided to represent himself in the courts below. As the law stands, that was his entitlement. If he had wished to raise some other point on fair procedures, there was a duty on him, as on any represented or unrepresented litigant, to do so in the High Court and Court of Appeal.

7. The question of legal representation in litigation is not devoid of authority. The courts have had occasion to consider whether the requirements of justice rendered it necessary that *impecunious or disadvantaged* parties be legally represented in complex proceedings on a number of occasions (See, Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) at paras. 7.3.187 to 7.3.190). Ward-of-court applications are one example. But there is no evidence that *this* appellant came within a category of person who could claim an entitlement or right to legal representation, or that he ever took steps to obtain the services of a lawyer or applied for legal aid. There is no evidence that he was prevented from retaining a lawyer through impecuniosity. In fact, material which the appellant had obtained on a Freedom of Information application to the Bank, which is referred to later, disclosed that, at least in the period prior to the proceedings, he owned a number of properties of substantial value. The appellant did not lack capacity to present his case.

8. Just as under the Constitution, any ECHR entitlement, if it arose, would, too, depend on establishing that there had been a denial of a Convention right. The jurisprudence of the European Court of Human Rights on Article 6 of the Convention sets out that such entitlement may arise only in cases where there is a genuine and serious dispute, concerning serious issues. Decisions such as *Del Sol v. France* (App. No. 46800/99, 26th May, 2002), *Denisov v. Ukraine* (App. No. 76639/11, 25th September, 2018), *McVicar v. United Kingdom* (App. No. 46311/99, 7th August, 2002), and *Steel and Morris v. United Kingdom* (App. No. 68416/01, 15th May, 2005) are describe applicable Convention principles. But here, also, the appellant faces the same *locus standi* impediments as under the Constitution. There is no evidence that he was deprived of any ECHR fair-procedures entitlement. If he had ever been at risk of some legal detriment, it must be said that this arose largely as a consequence of his own decision to represent himself where legal issues might have been raised at a far earlier stage in the High Court, rather than in the Court of Appeal, and now in this Court. There was no denial of fair procedures by any court.

9. I do not preclude the possibility that in civil cases where serious or complex issues of law with the potential for serious impact on the rights of an individual might arise in the future, a court, acting under the Constitution, might decide that the vindication of constitutional rights would require that an impecunious or disadvantaged personal litigant should, or even must, be provided with legal representation. This is not such a case. I would add, however, that counsel's submission on this point had value as a reminder that, even in what are regarded as mundane "procedural matters", real substantive constitutional rights may be at stake.

Preliminary Observations

10. Turning to the main issue, and as mentioned earlier, the determination referred to the now well-known decision of this Court in *Lough Swilly*. There, the Court considered "new argument" or "new evidence" applications in the context of an appeal from lengthy High Court proceedings where many legal avenues had been explored. As will be seen, the question here arises in a rather different context, as the appeal in question here was from a judgment in summary High Court proceedings heard on affidavit.

11. The underlying issues in the appeal are not insignificant, however. It is obvious an individual has a right to litigate and have access to the courts to bring or defend a case (see, *Macauley v. Minister for Posts and Telegraphs* [1966] 1 I.R. 345, and *Bula Ltd. v. Tara Mines Ltd. (No. 1)* [1987] 1 I.R. 85). But this right is limited. Articles 34 and 35 of the Constitution, statute law, the Rules of the Superior Courts, 1986 ("the RSC"), and case law all prescribe procedures whereby legal disputes are to be determined by independent judges sitting in courts established by law, applying that law in a way aimed at providing that disputes be determined at the earliest possible time, at the lowest achievable cost, on an application of the law to the facts. To achieve these objectives, a number of considerations come into play. While there is a right of access to the courts, this is not unlimited. Cases must be conducted in accordance with the procedure laid down in the RSC and with the decided case law governing procedure (see, *Farrell v. Bank of Ireland* [2012] IESC 42; [2013] 2 I.L.R.M. 183, at para. 4.5 *et seq*.). Parties, be they plaintiffs or defendants, are obliged to set out their case fully at trial. There must be finality to litigation. There is to be no "holding back" arguments or evidence for an appeal (*Ambrose v. Shevlin* [2015] IESC 10 ("*Ambrose*"), at paras. 4.12–4.13). Subject to right of appeal, as outlined in the Constitution and statute, these objectives in the administration of justice are to be effected in cases brought and conducted in the appropriate jurisdiction. Both the RSC and case law set out how these principles and aims should be balanced in various categories of cases. These principles apply to all litigants, whether a party is represented or unrepresented.

This Judgment

12. Having outlined relevant principles concerning new arguments, and new evidence, applications on appeals generally, this judgment will deal briefly with the particular considerations which arise in appeals from interlocutory orders, and then in certain other types of proceedings heard on affidavit, including those by way of summary summons. The judgment seeks to explain why the *application* of the criteria in these types of case differs somewhat from, or can be seen as a development of, those criteria applicable in

plenary proceedings. Having dealt with the principles generally, then in interlocutory matters, and then specifically in the case of summary proceedings, the judgment turns finally to the approach adopted by the Court of Appeal in this matter.

13. The judgment also seeks to explain *why* the criteria which appeal courts apply in such cases can make a difference to the outcome. The specific question is whether the Court of Appeal applied the relevant and applicable law in reaching its decision. But it is a question with consequences. If an appeal court were to act under a misapprehension as to the appropriate approach in an application to adduce new arguments or evidence in an appeal in summary proceedings, it would follow that the court had misdirected itself in law. But it might also follow that the court's assessment of the merits of the new material, whether arguments or evidence, might be open to the criticism that the analysis was coloured by the view that the material was in any case inadmissible.

14. The discussion below begins with a consideration of how the principles have evolved in plenary proceedings. Appeal courts are not automatically precluded from considering new argument or evidence questions simply because they were not raised in a court of first instance. Some of the judgments, considered later, deal both with new arguments and new evidence applications on appeal. But it is also important to bear in mind that courts may have to apply different considerations under each of the two headings of "arguments" and "evidence". In some categories of appeal, to consider a new legal *argument* may pose little difficulty. But, by contrast, to admit new evidence might potentially create the necessity for remittal for further hearing in a court of first instance, though this may not always be so. There are, too, weighty policy issues applicable to the litigation process, such as those of finality, certainty and maintenance of the legal order. An applicant seeking to raise new matters on appeal from a plenary hearing will, therefore, have to consider the potential practical consequences arising from an application to advance new material. A plenary hearing or trial is "*not a laboratory experiment where one element can be substituted and all other elements maintained and a different outcome obtained"* (*Emerald Meats Ltd. v. Minister for Agriculture and Ors.* [2012] IESC 48, per O'Donnell J., speaking for this Court, at para. 36). An application to advance new issues after plenary hearing will require explanation as to why the point was not advanced at first instance. It will normally only be permitted in defined circumstances. The fact that such issue arises in plenary proceedings which are aimed at achieving finality may itself be a weighty consideration. Later, this judgment deals with appeals from a summary judgment where somewhat different weighting considerations apply. But I do not think the principles applicable to appeals in plenary proceedings appeals can be ignored. For this reason, they are considered first. To take one illustration, the fact that litigants are under an obligation to set out their case at the earliest opportunity is itself a matter of fairness in plenary proceedings, but should apply in all forms of case.

New Issues: The Principles in Plenary Proceedings

15. I address first, therefore, the approach in appeals from plenary hearings. In *K.D. v. M.C.* [1985] 1 I.R. 697, Finlay C.J. observed that it was a fundamental principle, arising from the exclusively appellate jurisdiction of the Supreme Court, that, save in the most

exceptional circumstances, the Court should not hear and determine an issue which "*has not been tried and decided in the High Court"* (p. 701). However, he added that, *"[t]o that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice"*. This remains the general principle. It emphasises the weight to be given to finality in litigation, subject to rights of appeal as set out in the Constitution and in statute law. To this end, litigants are required to advance their full case at first instance. But this passage from *K.D.* also appropriately places the interests of justice arising in exceptional cases as an overarching principle (see also, *Attorney General (S.P.U.C.) v. Open Door Counselling Ltd.* [1994] 2 I.R. 333, and *Blehein v. Murphy* [2000] 2 I.R. 231).

16. More than a quarter of a century later, O'Donnell J., speaking for the Court in *Lough Swilly*, took the opportunity of exceptional circumstances where appeal courts might apply a certain "sensible flexibility" regarding raising new grounds on appeals in plenary proceedings, having regard to the "interests of justice", as referred to in *K.D.* He instanced occasions where an *argument* might be "closely affiliated" to one made in the High Court. In such situations, an appeal court might exercise some latitude. But the judgment in *Lough Swilly* went on to make clear that, in plenary hearing appeals, a distinction must be drawn between, on the one hand, a variation or reformulation of arguments closely affiliated to those made in a court of first instance and, on the other hand, something entirely new. There was, therefore, a "*spectrum*" where, at one extreme, there lay cases where argument of a new point would necessarily *also* involve admitting *new evidence* with a consequent effect on the evidence already given (as in *K.D.*); or where a party sought to make an argument which had actually been abandoned in the High Court; or sought to make an argument diametrically opposed to that which had been advanced at first instance, on the basis of which the High Court case had been argued, and evidence adduced (para. 28). These latter instances are a valuable *aide memoire* of the circumstances where a court may be slower to grant leave to argue new grounds or admit new evidence in plenary proceedings, or may do so on an order as to costs.

17. But by contrast, at the other end of the "*continuum*", there might be cases where a new formulation of argument was made in relation to a point already advanced in the High Court, where new materials were submitted concerning an argument already made, or 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 would not in any way be dependent upon the evidence adduced. In such instances, while again possibly imposing terms as to costs, courts may nevertheless retain the power in appropriate cases to permit the argument to be made (para. 28). It is a misapprehension to infer that *Lough Swilly* constituted some radical or total reordering of the established jurisprudence of the Court (see, *Westlink Toll Bridge Ltd. v. Commissioner of Valuation and Ors.* [2013] IESC 42, at para. 49). Rather, it outlined the circumstances where, by contrast to earlier decisions considered, such applications might be made in appeals in plenary proceedings. While not amounting to a reordering of the established jurisprudence, the approach in *Lough Swilly* was, however, a significant development of

the law. In the context of this case, it should best be seen as a harbinger of other, later, statements, prompting the question whether, if there is to be "sensible flexibility" in appeals from plenary proceedings, whether, subject to sensible limitations, an analogous approach should be adopted in appeals from a summary judgment?

18. But. although a grant of leave to argue new points, or raise new evidence, may arise in the interests of justice, it must be viewed from another perspective. Exceptions are not to be seen as a licence for lax procedure. There are serious competing considerations which will also concern a court when new arguments are sought to be raised on appeal. A person entitled to win a case should not be faced with the prospect of losing it because a valid and decisive point was not made at the trial at first instance. There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only encourage either sloppiness, imprecision, or lead to attempts to take tactical advantage (per Clarke J. (as he then was) in *Ambrose*, paras. 4.11 - 4.13).

19. Whilst agreeing with what had been said in *Lough Swilly*, in *Ambrose*, Clarke J. went on to emphasise that a case which would necessarily involve *new evidence*, and not simply a new legal argument, would place much greater weight on the side of the equation which lay against permitting a new point to be raised for the first time on appeal. There, the risk of real prejudice will be significant. Speaking in the context of that appeal, he pointed out that the prospects of a new trial would be difficult to avoid, and that the need to encourage a party to bring forward its full case at trial would carry more weight (para. 4.14).

20. These observations emphasise the duty on litigants, whether represented or not, to ensure that both legal and evidential issues should be raised first in courts of *first* instance where conflicts of evidence are best dealt with in their appropriate context, and where parties have the right to testify and cross-examine. Such procedures are not easily carried out in an appeal. An application to admit new evidence may have the consequence of de-contextualisation. While what is advanced in an appeal as "new evidence" may, at first sight, have some apparent significance, it may not, in fact, touch on the true issues in the case, with which the trial judge will be conversant. In an extreme case, an application to hear new evidence might result in a court having to direct a rehearing of part, or the entirety of, the matter before it, with serious consequences in costs as well as depriving the respondent party of entitlement to finality in litigation.

New Issues: Appeals in Interlocutory Proceedings

21. I now move to deal briefly with interlocutory matters, for the reason that there are analogies between the principles applicable to such appeals and those which apply to summary judgments. In what may be described in shorthand as "interlocutory appeals", there is, too, a "spectrum" and a "continuum". The considerations applicable in appeals from plenary proceedings may *also* apply to interlocutory matters but, in such cases, the courts will adopt a somewhat more flexible approach, dependent upon the justice of the

case. It is necessary to explain why there is this flexibility and, also, to explain this is relevant to summary proceedings.

22. An "interlocutory order" is generally understood as one made during the course of proceedings, after the entry of appearance and before final judgment. Such orders are made to progress litigation or assist a party in advancing or defending their case, but are made before the court has finally spoken and will, therefore, be provisional in nature, subject to final orders made after a plenary hearing. An interlocutory injunction, pending a full hearing, is one example. But an interlocutory injunction is not generally conclusive of the rights of parties. Rather, it temporarily protects or preserves the status of things or rights pending the ultimate outcome of the case. This simple distinction between final and interlocutory orders is one of long standing (see, *In re Stockton Iron Furnace Company* (1879) Ch D 335, at p. 339, as discussed in *F. McK v. A.F.* [2002] 2 I.R. 242, at p. 245). An interlocutory order will, generally, not have the quality of finality sufficient to give rise to a plea of *res judicata*. It may, however, have that effect if it was intended finally to determine rights between the parties. Courts have a wide discretion in relation to variation or setting aside interlocutory orders (see the comprehensive treatment in Delany, McGrath and McGrath, *Delany and McGrath on Civil Procedure* (4th edn., Round Hall 2018), at para. 25-43 et seq.). In fact, divergent views have been expressed in the common law world regarding precisely what comes within the definition of an interlocutory order, but these are not material to this appeal.

23. For present purposes, what is relevant is that interlocutory matters are heard on affidavit. One or other party may not have had the opportunity of stating their full case. There may not have been cross-examination; not all the evidence may be readily available at the interlocutory stage. The parties will not be in a position to avail of the full panoply of procedures designed to elicit truth in plenary proceedings, such as discovery. For these reasons, Order 58, Rule 8 of the RSC provides that further evidence may be given without any leave upon any appeal from an interlocutory judgment or order. Such orders are not intended to be final. The policy-end of achieving finality does not arise in the same way as in plenary proceedings. These considerations have, therefore, led courts to adopt a more flexible approach in applications to raise new arguments, or perhaps with more caution, new evidence, on appeal from interlocutory orders. Nonetheless, one can envisage circumstances where, to accede to an application to adduce new evidence, even in an interlocutory matter, might potentially have significant consequences including potentially the need for rehearing, which would raise the need for consideration of the objectives of litigation, described earlier. But, at least in some instances, it may be possible that any detriment or injury to the interests of a party may, in the memorable words of McCarthy J., "*be assuaged by the balm of costs*".

24. I mention also that in *Minister for Agriculture v. Alte Leipziger A.g.* [2000] 4 I.R. 32, a case arising from Order 12, Rule 26 of the RSC, seeking to set aside proceedings wrongly brought in this jurisdiction, Keane C.J., albeit in the minority, identified a further distinction, that is, between the nature of *an application* before a court and *the order* thereafter *made* by the court. This definition does not cover every contingency either, but

it is nonetheless useful as it makes the point that certain forms of application to a court may not require finality; rather, there could be a number of potential outcomes. But there are nonetheless occasions when an order in what might be seen as "interlocutory-type" proceedings may have a conclusive effect.

Similarities between Interlocutory and Summary Procedures

25. These distinguishing features also arise in summary summons procedure. Just as in interlocutory matters, the application is heard on affidavit; also, the court may make a wide variety of orders, only some of which may be final and conclusive. On appeals from summary judgment, the courts have, therefore, adopted an approach analogous to interlocutory appeals on such "new argument" or "new evidence" applications. For reasons which appear later in the judgment, it is worth considering the rationale in a little more detail.

26. Summary proceedings may be brought upon a contract, bond, statute, guarantee, or trust (Order 2, Rule 1(1)(a) – (c) of the RSC). The procedure is set out in Order 37 of the RSC. As such proceedings are heard on affidavit, there will rarely be cross-examination and parties will seldom have the opportunity of availing of any of the vast range of "plenary hearing procedures". But summary judgments may nonetheless have conclusive or final effects.

Low Threshold

27. For this reason, the courts adopt particular care and apply long-established principles in applications for summary judgment. I repeat them, as they become material to this Court's conclusion. Generally, judgment will only be granted in clear cases, and will not be granted where there is any serious conflict on facts or real difficulty on matters of law (see, *Crawford v. Gillmor* (1891) 30 L.R. Ir. 238; *Goodchild v. Duncan and Son* [1895] 2 I.R. 393; *Dolan v. Henry and Ors.* (1905) 39 I.L.T.R. 70; *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep 21; *National Westminster Bank Plc. v. Daniel* [1993] 1 WLR 1453; and *First National Commercial Bank Plc. v. Anglin* [1996] 1 I.R. 75). A court may engage in some limited assessment of documents or the evidence, but may only do so where there is no risk of injustice (*Cahill v. O'Driscoll and Ors.* [2005] IEHC 179; [2005] 4 I.R. 100). The procedure is intended to enable speedy justice to be done, but only in appropriate cases. Each step in the procedure, as laid down in the Rules of Court, filters out claims where a defendant may have a *bona fide* defence, and separates those from others where judgment may be entered summarily, either because there has been no appearance or there is no real defence.

28. Also material is the well-established point that a defendant need only meet a low evidential threshold for a court to conclude that the case should be remitted for plenary hearing (see, *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1; *Aer Rianta cpt v. Ryanair Ltd.* [2001] 4 I.R. 607; and *Ulster Bank Ireland Ltd. v. O'Brien* [2015] IESC 96, [2015] 2 I.R. 656).

29. Finally, bearing in mind Keane C.J.'s distinction in *Alte Leipziger*, summary summons *applications* do not always, or necessarily, lead to finality in the *orders* granted, save in

clear cases. A court may, rather, transfer the matter to plenary hearing or make a range of other procedural directions which stop far short of a conclusive determination of the entitlement of one or other party (Order 37, Rules 6-10, RSC).

The Approach in Appeals in Other Types of Proceedings Heard on Affidavit Only, including Summary Judgment

30. Against this background, this Court has outlined a somewhat more nuanced approach to applications to entertain new material in appeals from judgments in procedures which have characteristics which make them analogous to interlocutory proceedings. This approach involves a proportionate balancing of the rights and interests at stake within the procedural framework. In *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21; [2014] 2 I.R. 301 ("*Lopes*"), the Court had to consider an application to admit new grounds of appeal in what had been an application heard on affidavit to dismiss a claim in the High Court as being trivial and vexatious. *Irish Bank Resolution Corporation (in special liquidation) v. McCaughey* [2014] IESC 44; [2014] 1 I.R. 749 ("*IBRC*") concerned an appeal from an application also heard on affidavit for a stay pending appeal after summary judgment. Similarly, *Moylist Construction Ltd. v. Doheny* [2016] IESC 9; [2016] 2 I.R. 283 ("*Moylist*") involved an application to dismiss a claim in summary proceedings as being bound to fail.

31. In each of these, this Court pointed out that, in cases of this type, appeal courts may apply a degree of flexibility in entertaining new arguments or, in the cases considered, further evidence. This is a proportionate approach. It reflects the fact that orders might be final and conclusive but the procedure afforded is less than in plenary proceedings. The distinct nature of the application is also relevant.

Motions for Summary Judgment: The applications and the orders which may be made

32. In an application for summary judgment, a court may grant the relief to which a plaintiff appears entitled, but may also dismiss the action, or adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons or, alternatively, make such directions as to pleadings, discovery, settlement of issues, leave to defend on conditions, or grant leave to defend subject to security, time and mode of trial, or otherwise as may be appropriate. (Order 37, Rules 6-10, RSC). In such instances, the nature of the *application* does not *require* that there should necessarily be a final determination of rights or entitlements, although this may be the *effect* of the *order* made by a court. As a result, when appeal courts are asked to receive a new argument or new evidence, they may look first to the criteria as in plenary proceedings; but they will do so having regard to the fact that the "default position" in respect of any proceedings is that they should go to trial, and that depriving a party of a full trial will be a departure from the norm which should be adopted only when there was no real risk of injustice (*Moylist*, at paras. 25 – 28). The courts will *then* consider whether, applying this consideration, but with less rigour, the application should be entertained. There may be circumstances where there might be a degree of tension between a simple admission of a new argument at one end of the scale and, on the other, occasions where to allow that new argument may also entail that new evidence is required. The justice of the case will be the overarching consideration.

33. I now turn to deal with "new evidence" applications under the same headings, that is, first, plenary, second, interlocutory, and, third, summary proceedings, always bearing in mind that there also may be circumstances where, in considering whether there should be new evidence permitted, courts may adopt a different approach from applications for new arguments.

New Evidence: Principles in Plenary Proceedings

34. In appeals in plenary proceedings, the general rule is that the leave of a court is required to admit evidence which was in existence at the time of the decision from which the appeal is brought (Order 86A, Rule 4(c), Court of Appeal; Order 58, Rule 30(c), Supreme Court). Applications to admit additional evidence are, in general, subject to greater rigour and require a commensurately closer analysis. The criteria identified in *Lynagh v. Mackin* [1970] 1 I.R. 180 are well-established and explained by Finlay C.J. in *Murphy v. Minister for Defence* [1991] 2 I.R. 161 at p. 164. These very well-known principles also come into the assessment later.

35. In summary, these establish, first, that the evidence must have been in existence at the time of the trial and must be such that it could not have been obtained with reasonable diligence for use at the trial; second, the new evidence must be such that, if given at the trial, it would probably have had an important influence on the result of the case, though it need not be decisive; and third, the new evidence must be presumably to be believed; that is, it must be apparently credible, though it need not be incontrovertible (see, *Fitzgerald v. Kenny* [1994] 2 I.R. 383; *McMullen v. Clancy (No. 2)* [2005] 2 I.R. 445; ***McMullen v. Kennedy*** [2012] IESC 56; *Murphy v. Gilligan and Ors.* [2014] IESC 43; *Inland Fisheries Ireland v. O'Baoill and Ors.* [2015] IESC 45, [2015] 4 I.R. 132; and *Law Society of Ireland v. Coleman* [2018] IESC 80).

36. Where there is an application to admit new evidence in appeals in plenary proceedings, therefore, courts will exercise caution, because to admit such new evidence may potentially involve an order for a rehearing of part, or all, of the case. There may conceivably be a degree of flexibility if, for example, a trial took an unexpected turn, and where the evidence was cogent, and where its potential relevance could not have been known in advance of the trial (*Emerald Meats*, at para. 37). But courts will require a cogent explanation as to why the evidence was not adduced at a first instance hearing. An applicant will have to address the *Murphy* criteria, as outlined in that judgment and in subsequent case law. The potential risk that an issue would have to be remitted to the court of first instance in order to ensure that fair procedures are observed will be a weighty consideration. Appeal courts do not, generally, have the role of considering contested issues of fact for the first time (see, *Rye Investments Ltd. v. Competition Authority* [2012] IESC 52, at para. 6.2). Courts will have close regard to the "countervailing principles" as identified, particularly, in *K.D.* and *Ambrose*.

New Evidence: Applications in Appeals from Interlocutory Orders

37. New evidence applications in interlocutory appeals may be dealt with more briefly. A party may adduce further evidence in an interlocutory appeal without special leave (Order 6A, Rule 4(b), Court of Appeal; Order 58, Rule 30(b), Supreme Court). Such evidence may be

adduced generally on appeal. Procedural fairness requires there should be a right to reply, recognising that where there is a conflict, the matter may have to be remitted to the High Court.

New Evidence: The Approach in Appeals in other Types of Proceedings Heard on Affidavit Only, including Summary Proceedings

38. Just as in the case of new *arguments* on appeal, there will also be instances where a court will allow additional evidence in appeals from orders which have the special characteristics analogous to interlocutory proceedings. *Lopes*, *IBRC*, and *Moylist* are illustrations of this approach and are discussed in more detail later in the judgment. Significantly however, in those cases, this Court was in a position to address the new evidential material adduced without any need for consideration of remittal to the High Court.

The Criteria Applicable in this Appeal

39. Drawing these strands together, it can be said that the general criteria applicable to admitting new arguments in appeals proceedings are as outlined in *K.D.*, but as developed in *Emerald Meats*, *Lough Swilly*, and *Ambrose*. Admission of new evidence is, generally, governed by the principles in *Murphy v. Minister for Defence*, as explained in subsequent case law. In proceedings where the procedure is akin or analogous to interlocutory proceedings, such as in *Lopes*, and including judgments in summary proceedings, courts will be somewhat more flexible in admitting new arguments on appeal, and may consider new evidence, but exercise caution because of the potential consequences.

Consideration of these Proceedings

40. Throughout the consideration of these proceedings which now follows, it is worthwhile keeping in mind a simple question as to what would have been the outcome if the appellant had made the case in the High Court which is now put forward on his behalf? I turn then to how matters evolved in these summary proceedings. The Bank claimed that, on foot of the credit agreement, Mr. Ennis was provided with a loan facility of €231,438. He signed the agreement form on the 24th March, 2011, in five places which indicated his acceptance of the terms and conditions set forth. The loan was to be secured by an all-sums mortgage on the 60-acre property in question. On the front page of the agreement there was information that, as at the 22nd March, 2011, the loan would be repaid by 151 monthly repayments of €1,857.59, expiring on the 10th October, 2023.

The High Court Hearing

41. The application came on for hearing in the High Court. A transcript of the hearing, which is available, shows that the appellant was given ample opportunity to present his case. He raised just two points in his submissions. He asserted that Aoife Scanlon, who had sworn the grounding affidavit on behalf of the Bank, had not been a bank employee at the time of the swearing. He also claimed that he had not received copies of the pleadings from the Bank's solicitors. The first was a narrow technical point. The second point had no merit. The appellant had obtained any relevant documentation.

42. However, rather than dismissing the first point as to Ms. Scanlon's employment capacity, the judge directed that Ms. Scanlon should swear a supplemental affidavit setting out her

employment status at the time she swore the grounding affidavit, and adjourned the application. At the resumed hearing, the Bank adduced a further affidavit from Ms. Scanlon indicating that she had been an employee of the Bank at the time she swore the affidavit, though she had subsequently retired. The appellant did not have any evidence to controvert the Bank's new affidavit. There was no conflict on the facts. Exercising her discretion, the judge considered there could be no point to cross-examination. There was not a denial of fair procedure in the circumstances (see, Order 40, Rule 1, RSC). In his written submissions, the appellant fairly accepted that the judge was left with no alternative but to grant judgment against him. He was not deprived of any other aspect of fair procedures in the hearing. He was given every opportunity to present his case. In fact, the Court took positive steps to ensure his entitlements were protected.

43. The appellant filed a notice of appeal. He also applied to the High Court for a stay on the High Court order. The application was granted. For the stay application, he swore an affidavit, dated the 20th January, 2017, which now requires some detailed consideration. This judgment expresses no view on the merits of what is asserted in this or other subsequent affidavits. That is work for another day. The immediate question is whether it can be said that, even although filed after the High Court proceedings, and seen in the correct legal context, the material now considered could fairly be said to raise an arguable defence?

44. The affidavit describes the appellant's relationship with the Bank going back some years. In 2006, he was advanced a loan facility of €400,000, secured on the subject property and on two sites with separate folios. He engaged in a further series of loan transactions with the Bank. He stated that he naively understood that the first loan he obtained was to be for 30 years, but in fact it transpired to be a one-year facility. His understanding was, however, that he would never have had to discharge the loan within a one-year time period. He accepted that he must take some responsibility for this misunderstanding.

45. The appellant deposed that he later had sought to reduce his indebtedness by paying in or about €62,271 to the Bank. But, he said, the Bank gave him no financial recognition on foot of this, and his repayments remained at the same level. He described that with the funds he had bought lands for cattle raising, with a side-business of car, or cart, racing. He set out a series of subsequent transactions which, he deposed, indicated his good-faith relationship with the Bank. But, in or before the year 2010, he came under financial pressure. He decided to sell part of his lands. He says that he did so for a price substantially less than less than peak market value. The property sold for €120,000. He was given permission to discharge his obligations to the Revenue and also paid back a balance of €62,271 to the Bank. He deposed that, between March 2006 and September 2012, he had paid back to the Bank a total sum of €286,664.98.

46. The appellant did not deny that he had signed the credit agreement in 2011. But he said this, too, had been to his detriment, because the agreement did not reduce his interest payments to the Bank, as had been his understanding of what was agreed. He deposed that he stopped making repayments in the year 2012 out of sheer frustration with what

the Bank had done. He acknowledged that his anger had led him to conducting his defence poorly before the High Court. He was granted a stay on the High Court, which was subsequently extended by the Court of Appeal.

The Notice of Appeal

47. The content of the appellant's notice of appeal is also relevant to the decision now under appeal. In this document, the appellant contended that the High Court judge had erred in failing to take into account the absence of the original mortgage deeds before that Court; and had erred in that he had not been permitted to cross-examine Ms. Scanlon. He claimed he had been denied his constitutional property right. He asserted he had been denied a fair trial pursuant to Article 6 of the ECHR and that the proceedings had been generally unfair. He made no reference to new arguments or new evidence.

48. In fact, a consideration of the High Court transcript shows that there was no basis for the allegations of any procedural unfairness in that Court. The appellant was granted a fair hearing before an impartial judge who extended considerable latitude to him. He accepted that he put up a poor case. Courts understand that persons unfamiliar with the courtroom environment may be hesitant; but personal litigants sometimes reduce their submissions to writing. While not referred to in argument, the appellant did, in fact, file a replying affidavit, but this contained what can best be described as formulaic content with no evidential value on the true issues. It did not raise any arguable defence. The appellant did not refer to the affidavit in the High Court or his written submissions to the Court of Appeal.

49. The appellant appears to have received some assistance from a third party in preparing his appeal. He brought a motion to the Court of Appeal to adduce new evidence. The Bank seems to suggest that that application was confined to the appellant seeking to have his own bank statements exhibited. For reasons set out later, I do not agree. In the meantime, the appellant submitted a data access request to the Bank. He dealt with what emerged in two further affidavits sworn before the Court of Appeal.

Affidavit of the 22nd May, 2017 for the Court of Appeal Motion

50. The appellant's second affidavit was dated the 22nd May, 2017. This was a grounding affidavit for the motion he brought to the Court of Appeal to permit further evidence. In this, he again set out the history of his relationship with the Bank. But, additionally, he referred to a number of Bank emails and memoranda which he had obtained on foot of a Freedom of Information request. He exhibited a Bank email dated the 18th November, 2010, which on his case showed that the Bank intended to grant him a new facility with the intention that his annual repayments would be reduced by €4,000 per annum.

51. But the appellant says that another internal Bank email, of the 21st January, 2011, showed that the terms of the loan as actually offered did not correspond with what he had agreed with his local bank official in Newbridge AIB. Instead, he contended that the offer, as proffered, actually reduced the term of the loan by 37 months and had the effect that his repayments remained at the same level as before despite his having sold the lands for the purpose of reducing the level of his repayments. The appellant rhetorically posed the

question of why such an agreement would have made sense for him? The appellant also refers to further internal emails dated on or after the 7th February, 2011, which, he says, show that, in fact, the Bank had accepted that there was to be a reduction of €4,000 in his repayments, to take place over what he had understood to be a longer repayment period. The email dated the 21st January, 2011, states, under the heading "recommendation": "*Recommend renewal of reduced loan @ existing rate of repayment following personal reduction & clearance of cr. Card debt",* and, beneath these words, after some additional remarks, there occur the words, "*No option but to recommend as sought as Br. RM has committed to customer to restructure as sought*".

Affidavit of the 9th June, 2017

52. The appellant swore a further affidavit on the 9th June, 2017, for the motion. There was controversy in the Court of Appeal, and in this Court, as to whether he had been granted leave to adduce the internal Bank emails. It is important to note these were referred to in the appellant's grounding affidavit seeking leave to admit additional evidence on the 9th June, 2017, as well as an earlier affidavit sworn for the same purpose on the 22nd May, 2017. Here a point appears to have been missed. In fact, the relevant order of the Court of Appeal, made by Ryan P. on the 30th June, 2017, recited that the court had read the affidavits of the 22nd May and the 9th June, 2017, and the documents and exhibits therein respectively referred to, and the further documents referred to in the motion document. The order provided that, by consent, the appellant was to be at liberty to include as evidence in the appeal, documents as set out in his affidavit of *9th June, 2017*. But it is important to note that this affidavit included reference to the Bank emails. It also referred back to the affidavit of 22nd May, 2017, which also referred to the Bank emails. While the order may have been a little unclear in its phraseology, its effect was to grant the appellant liberty to adduce the internal bank emails, *as well as* the bank statements. In this appeal, and I think in the Court of Appeal, counsel submitted otherwise. I think this submission was based on a misapprehension. The Court of Appeal order made by Ryan P. granted the appellant leave to introduce the internal emails, as well as his own bank statements.

The Appeal Hearing

53. The Court of Appeal heard the full appeal on the 28th January, 2019. The Bank submits that, in the appeal, the appellant sought to introduce a further document, a "Bankcheck Report", and he was refused leave to refer to this. It appears this report was not referred to in any affidavit. It is unclear whether the Bank had any prior notice of this document. A litigant cannot avoid the fact that the last-minute or eleventh-hour introduction of a new document, without notice, is likely to create an adverse impression on a court. The Court was entitled to refuse the appellant permission to refer to this report in the appeal.

54. But, in the appeal, the appellant made a number of new submissions not made in the High Court. He contended that he had an arguable defence, based on ss.30 and 38 of the Consumer Credit Act, 1995 ("the 1995 Act"), arising from the fact that the credit agreement was signed on behalf of the Bank on the 7th April, 2011, and that the text of the agreement provides that it was to come into effect when "it is signed on behalf of the Bank". The 1995 Act provides that a copy of the agreement is to be handed personally to

the consumer on the making of the agreement, or delivered to the consumer within 10 days of the making of the agreement (s.30(1)(a)). It also provides for a "cooling-off" period during which the consumer may withdraw from the agreement or, alternatively, may waive that entitlement (s.30(2)(a) and (b)). This point hinges on the contention that the agreement actually only came into effect on the 7th April, 2011, outside the 10 day period referred to in s.30(1)(a). But the appellant contends that s.38 of the 1995 Act requires strict compliance with s.30 of the Act, including the term that a copy of the agreement should be handed to a consumer personally, or within 10 days of the agreement being made. It is said that this alleged failure of compliance with the s.30 time-limit by the Bank renders the agreement unenforceable by virtue of s.38. I express no concluded view, save that as it stands the point is arguable. One more immediately relevant matter is that the credit agreement was exhibited by the Bank in the High Court, but the appellant did not raise any point in the High Court hearing about it, save as to doubts about the signatures, and only raised the broader points in the Court of Appeal in the midst of other points.

The Court of Appeal Judgment

55. Any judge with experience of dealing with a busy list will sympathise with a court which was presented with "scattergun" material, some, apparently, at the eleventh hour. This was an *ex tempore* ruling. In matters where a court is likely to deliver such a judgment, there is a particular duty on the parties to ensure the court is provided with all relevant documents, presented clearly, and relevant legal authorities. Obviously, the appellant argued his case forcefully in the appeal. The Court expressed some sympathy for his situation, but observed that it was not its function to renegotiate the credit agreement or to restructure the appellant's loan arrangements. Counsel for the Bank had submitted that the Bank email material was inadmissible evidence in the appeal, and objected to any reliance on it. I have already observed, it appears this was a misapprehension.

56. The main Court of Appeal judgment, with which all members of that Court concurred, comprehensively outlined the background and the appellant's intended new arguments. It then turned to the legal criteria relating to raising new matters on appeal. The judgment observed that Mr. Ennis had failed to comply with the RSC, in particular Order 86, Rule 12. This provides that an appeal to the Court of Appeal shall be brought by the lodgement in the Office of the Registrar of the Court of Appeal for issuance of a notice (in that Order called the "notice of appeal") in Form No. 6, which should set out the grounds of the appeal. The Court's observation here was in the context of the scope of the appeal as defined in the notice of appeal.

57. Speaking now with the benefit of hindsight, I am not sure the full effect of the order of the 30th June, 2017, permitting new evidence, was made sufficiently clear to the court. Putting things charitably, the papers were not filed in an orderly manner, and were liable to cause confusion. Insofar as the issue concerned "new evidence", the point had *already* been dealt with by Ryan P. in his order of 30th June, 2017. The judgment of the Court of Appeal addressed the criteria for allowing new material on appeals, stating that a party would be permitted to raise issues on appeal only in certain limited circumstances. The

judgment referred to the passage from Finlay C.J.'s judgment in *K.D.*, cited earlier, and to some of the wording in *Lough Swilly*, which dealt with the "*spectrum of cases*". It cited the judgment in *Koger Inc. and Anor. v. O'Donnell and Ors.* [2013] IESC 28, where Clarke J. (as he then was) held that the Court of Appeal had a discretion to allow a new point to be argued on appeal but would not exercise its discretion in cases in which the new point that the plaintiff sought to raise was completely opposed to the points raised during the trial in the High Court (paras. 12 to 14). The judgment then turned to consider what had transpired in the High Court, where Mr. Ennis had raised the points mentioned earlier. But at para. 18, the judgment went on to state that it was clear that the grounds the appellant now sought to advance on appeal were entirely new grounds, and the position was that the bank statements which he contended were not produced before the High Court had, in fact, been before that Court, where Mr. Ennis would have had an opportunity to make whatever submissions he wished to make on foot of those documents. The judgment made the point that the appellant had all the relevant documents and must also have been aware of any prior oral agreement with the bank, as this was within his own knowledge (para 18).

58. There were brief concurring judgments which expressed the view that the criteria to admit new issues and evidence were "*strict*", and that *Lough Swilly*, like *K.D.,* was against the appellant. Here, again, I think a distinction again should be drawn. The judgment in *Lough Swilly* should not be understood as being strict in the same sense as *K.D.* If a "*sensible flexibility*" could be applicable in appeals in plenary proceedings subject to conditions, *a fortiori*, it might be thought, such flexibility could apply in this form of proceeding heard on affidavit.

59. The Court of Appeal observed that Mr. Ennis had not brought a motion for discovery, in which case he would undoubtedly have had the material upon which he now sought to rely, which was the material contained in the data access request (para. 19). But I would comment that discovery is rarely permitted in motions for summary judgment. The main judgment stated that the appellant had been given considerable leeway by the Court, in that he had been permitted in effect to put the arguments before the Court, having been advised that it was for the Court to decide whether or not he should be permitted to advance new grounds (para. 21). The judgment went on to hold that while the appellant was a lay litigant, this did not mean he should be entitled to run a defence which he ultimately believed did not avail him, and which he believed was inappropriate, and that he should then be permitted to raise entirely new points by way of appeal.

60. The judgment made the point that the same rules applied, whether a person was represented or unrepresented, and that the reason why people cannot make a new point on appeal is that both parties have a constitutional right of appeal from the High Court. It contained the observation that, if the appellant were to succeed on a new point before the Court of Appeal, this would have the effect of denying the Bank of its constitutional right to appeal. On this basis, therefore, the Court held that it was *not* satisfied to exercise its discretion to allow new points to be argued on appeal by the appellant, as what was before the Court of Appeal was not a new formulation of an argument made in relation to

a point advanced in the High Court, nor were the arguments which the appellant sought to advance closely affiliated to the arguments he raised in that Court (paras. 21 and 22).

61. Those words mirror some of those in *Lough Swilly*, referred to earlier. But I think that they do not reflect the underlying sense of that judgment which, when analysed in its entirety, made clear areas where there may be flexibility, by contrast with earlier authorities, referred to in that judgment, such as *Movie News Ltd. v. Galway County Council* (Unreported, Supreme Court, 15th July, 1977), which contained a quite rigid view, to the effect that new material should not be permitted in appeals to the Supreme Court. I add that the observation in the Court of Appeal concerning depriving a party of a right of appeal might beg the rhetorical question as to whether it may follow that a party should be entitled to succeed in a claim on an incorrect application of the law by a court of first instance? That cannot be so.

62. It is true to say that the appellant was, indeed, advancing new arguments and evidence, and that these could hardly be seen as a new formulation of arguments already made, nor were the arguments closely affiliated to those raised in the High Court. But, against this, while the judgment *notes* that there had been an issue in the full appeal hearing as to the effect of the order permitting new evidence, there does not seem to have been a full appreciation that the appellant had *already* been granted liberty to adduce this additional evidence.

The Respondent's Case

63. The argument in the appeal before this Court focussed on the hearing of the full appeal to the Court of Appeal, rather than on the effect of the order of 30th June, 2017, where, I think, there was a misapprehension as to the true scope of the order permitting the appellant to adduce the emails, as well as his bank statements. Counsel for the Bank submitted to this Court that, given the manner in which the appellant's grounds of appeal had been drafted, it was difficult to take issue with the Court of Appeal's decision not to allow the appellant to argue new grounds. He contended that the principle in *K.D.* remained the general approach. He acknowledged that *Lough Swilly* envisaged a relaxation of this rigorous principle, however, he submitted, only when new arguments were closely related to those made in the lower court, or a refinement of those arguments. But the judgment did not countenance permitting entirely new arguments and evidence, which was the situation with which the Court of Appeal was presented. Counsel submitted that the Court of Appeal was correct to refuse leave to argue a new point in circumstances where new evidence would have been necessary. He reiterated that at least some of the new defences should have been comfortably within the appellant's own knowledge, even in the High Court.

64. Counsel further made the point that what, in fact, was proposed was not only the admission of new grounds of appeal, but a step which would also require new evidence. For the Bank to dispute Mr. Ennis's assertion that the credit agreement was not in line with the terms he had previously agreed would require further evidence from the Bank's files and employees. To dispute the assertion that Mr. Ennis was a consumer for the purpose of the loan, and that he was not provided with a copy of the agreement in

sufficient time, would also require the Bank to adduce further evidence. He said these were not arguments appropriate for an appeal.

65. I accept these submissions have some force. But they are a little double-edged. They beg the question as to whether, if these matters *had* been raised in the High Court, the claim would there and then be remitted for plenary hearing. I add that the Bank's written submissions in this Court properly drew attention to the judgments of this Court in *Lopes*, *IBRC* and *Moylist*, but contended that, on the facts of this case, the Bank's case should be based on the overarching principle such as that enunciated by Finlay C.J. in *K.D.*

Issues Arising

66. A number of difficulties arise from the judgment under appeal. The first is that the judgment referred to the judgments in *K.D.* and *Lough Swilly* in almost the same breath, when the latter undoubtedly develops the law concerning exceptional circumstances. The judgment under appeal did not refer to *Lopes*, *IBRC* or *Moylist*, which make clear that a more flexible application of the criteria was appropriate in this appeal from a judgment in summary proceedings. If those judgments had been cited to the Court, it would be surprising if they were not referred to in the judgment. But second, and understandably in the context of its application of the law, the Court of Appeal would not appear to have considered in great detail arguments based upon the text and signatures of the credit agreement or, indeed, the other issues arising from the data access report. The evidence on the credit agreement was actually not "new"; it was before the High Court. It can, however, be fairly said that the *argument* was new. The three relevant authorities must now be considered.

Lopes, IBRC and Moylist

67. In *Lopes*, mentioned earlier, this Court was prepared to extend latitude to the appellant, a litigant in person, to advance new material under Order 19, Rule 28, RSC on an appeal from a High Court decision dismissing his claim as being frivolous and vexatious, or under inherent jurisdiction as being an abuse of process (paras. 16 - 18). Clarke J. adverted to the distinction between that type of proceeding before the Court and, by contrast, those where procedures under the Rules had been deployed in establishing the facts at trial. He referred to the availability of discovery procedures, interrogatories, and the power to subpoena, in the circumstance where all the defendant needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted (para. 19). In the appeal in *Lopes*, the appellant raised a considerable amount of evidential material not considered by the High Court at first instance. But this Court was nonetheless prepared to consider it in the appeal.

68. In *IBRC*, this Court was prepared to adopt a similar flexible approach on an appeal from an application for a stay pending appeal from a summary judgment. Again, speaking for this Court, Clarke J. pointed out that because a motion for summary judgment had the potential of shutting out a defendant from the right to have a full trial between the parties, an appellate court was required to be "*more flexible in relation to the consideration of arguments or materials brought forward on appeal"* (para. 24). He pointed out that, while it remained important that a defendant put forward his full case on

the summary judgment motion, and while it followed that the courts would be reluctant to allow a different or additional case (backed up by evidence) to be run on appeal, nonetheless some proportionality needed to be achieved between the consequences of granting summary judgment and the rigour with which the rules applicable to new evidence on appeal ought be enforced. Clarke J. pointed out that in *IBRC*, counsel for the respondent had quite properly accepted in that context that it was appropriate for the Supreme Court, in reaching its overall conclusions on this appeal, to have regard to *additional affidavit* evidence which had been filed by the parties in the context of a motion which had been brought before this Court on behalf of Mr. McCaughey seeking a stay (para. 24).

69. In *Moylist*, this Court adopted a similar approach in relation to an appeal in a motion to dismiss proceedings as bound to fail. Having referred to *Lopes* and *IBRC*, and having alluded to the strong countervailing factors which might apply, Clarke J. held on the facts that one issue which might "tip the balance" in an appropriate case might be that the appellant would be "shut out" from presenting his full case (para. 27).

70. As the authors of *Delany and McGrath* point out, there are, too, occasions when a court will adopt a more flexible attitude where a lay litigant seeks to raise a new point on appeal (para. 23-190. See also, *Lopes*, and *Devrajan v. District Judge Ballagh* [1993] 3 I.R. 377).

Decision

71. I preface this concluding section of this judgment with the simple observation that courts can do many things, but cannot always protect people from making misguided decisions. There is no evidence the appellant could not have afforded a lawyer to advise him before the matter came to court. He availed of the opportunity to have legal representation only in the appeal to this Court. Courts are unlikely to be impressed where legal points are not made at first instance when they should have been. To allow for any different regime would be a recipe for procedural chaos. Courts will not be impressed, either, by last minute applications to entertain additional material, like the Bankcheck Report. Such applications can give the impression or appearance of drip-feeding, or holding back. Applications made on a scattergun basis do not attract sympathy. It is true that the appellant's application not only involved new grounds, and also adducing new evidence. But, in fact, on the 30th June, 2017, the then President of the Court of Appeal had already granted leave to admit the new evidence on foot of the appellant's motion brought for that purpose.

Further Unusual Features

72. There are, moreover, a number of other unusual features, as well as the self-evident fact that, if the order under appeal stood, the appellant would be "shut out" from presenting his full case. The judgment of the Court of Appeal did not refer to relevant legal authorities applicable in this, an appeal from summary summons proceedings. The fact that the judgment under appeal did not advert to what were undoubtedly relevant legal authorities is itself a weighty consideration. But it also may have had the consequence that consideration of new arguments and new evidence took place under the

misapprehension that the arguments and evidence were respectively impermissible and inadmissible.

73. I return then to the rhetorical question posed earlier in this judgment, under the heading "Consideration of these Proceedings". Had the appellant made the points now described in the High Court, and having regard to the "low threshold" jurisprudence cited earlier, I have no doubt that the case would, then and there, have been transferred for plenary hearing. The significant legal issues in the case, and potential conflicts of evidence, could only be resolved in plenary hearing.

74. This Court must then ask itself what would have been the outcome if a more flexible approach had been applied in the Court of Appeal? Setting aside any point regarding the order of the 30th June, 2017, it would follow, on the face of things, that, had the material been seen as admissible and part of the appeal, the Court of Appeal would have viewed it from a different perspective, and concluded that there were arguable grounds sufficient for the matter to have been transferred to plenary hearing on the basis of the low evidential threshold as described earlier. Assuming the High Court order stood, the Court of Appeal would, therefore, have reviewed it, and set it aside with possible consequential costs orders to reflect the fact that the points now raised should have been made in the High Court.

75. The legal issue regarding the Consumer Credit Act, 1995 was at least arguable. In actual fact, the *evidence* on which this point was based was not new, even if the argument itself was. As matters stood, the appellant could have raised an arguable defence in the High Court based on the dates of the signatures and s.38 of the Act. But he did not make these points. There may also be an arguable defence that there was a lack of *consensus ad idem* between the parties. The contractual defence of *non est factum* may arise. As matters now stand, these arguments on what was agreed between the appellant and the Bank are now arguably supported by documentary evidence emanating from the Bank.

76. Were it necessary, one could even go so far as to say also that the three criteria outlined by Finlay C.J. in *Murphy v. Minister for Defence* (see para. 32 above) would each be satisfied. The first test is whether the material was in existence, but could not have been obtained by reasonable diligence. I would comment that, in summary proceedings, courts will permit discovery only rarely, and in very exceptional circumstances. The second test is whether the material would probably have had an important influence on the result of the case. It is indeed arguable that, applied by analogy, the arguments and evidence could have had an "important influence" on the application for summary judgment, again bearing in mind the low evidential threshold. As to the third test, that of apparent credibility, it is not disputed that the material emanated from the Bank itself. All of these features make the circumstances of this case truly exceptional, and place it within a rare category. They lead to the conclusion that the judgment of the Court of Appeal should be set aside, and a different form of order should now be made, having regard to the overarching consideration of the balance of justice to both parties.

Proposed Order

77. Any order must take account of the fact that, at minimum, the appellant failed to put his full case before the High Court. No matter how much he regrets his earlier missteps, he must, as a legally competent person, accept consequences for non-compliance with the duties of a defendant in summary proceedings, especially his failure to put forward his full case at the earliest opportunity. The order made must respect the ends and objectives of the administration of justice.

78. It would be inappropriate now to direct that the matter be remitted to the Court of Appeal. I emphasise that neither this Court, nor the Court of Appeal, should be asked to act as a court of first instance, thereby depriving either party of rights to adduce further evidence, or perhaps to a further appeal. The Court of Appeal has a heavy case load and weighty functions vested in it by the Constitution and by statute. Both the constitutional order, and the policy considerations outlined earlier, militate against that, or any appeal court, hearing an appeal in a civil matter, having to put itself in the place of a court of first instance as a result of a failure by a party to present a case properly in the High Court.

79. It seems to me that the balance of justice requires that this Court must now recognise the reality of the situation. That reality is that the appellant has now presented issues which indicate that he does, at least, have an arguable defence, where there is now, apparently, relevant documentary evidence, and points were made in the Court of Appeal which should have been made in the High Court, but were not. I would allow the appeal, and set aside the judgment and order of the Court of Appeal. Even were the motion remitted for further consideration by the Court of Appeal, or the High Court, the reality is that, even if the Bank were now to adduce further arguments of evidence, there would still be real legal issues to be considered, and conflicts of evidence which could only be resolved at plenary hearing. In these circumstances, I would direct that the case be transferred to the High Court for plenary hearing in substitution for the order of the Court of Appeal. The appellant will be allowed three weeks from the date of this judgment to file his defence.

80. Having regard to the outcome, the appellant will have suffered no detriment, but rather will be placed in the position where he ought to have been in at the conclusion of the High Court motion, where the rules of fair procedures will continue to apply as they have hitherto. The question of costs incurred to date must arise. The parties will be allowed the opportunity of making brief submissions to this Court on that matter. I would propose that the appellant be allowed two weeks to make short written submissions on that issue, and the respondent two weeks thereafter to reply. The parties should make clear if they have any objection to that question being decided without the need for any further oral submissions.