THE HIGH COURT

[2026] IEHC 585

[Record No. 2026/6317 S]

BETWEEN

HERBERT STREET PROPERTY FINANCE UNLIMITED COMPANY

SUMMONING CREDITOR

AND

PATRICK MCKILLEN JUNIOR

DEBTOR

JUDGMENT of Mr. Justice Liam Kennedy delivered on 13 August 2026.

1. The Applicant seeks to set aside a bankruptcy summons (the Summons) issued by Herbert Street Property Finance (the Creditor[1]). The Creditor claims that the Applicant committed an act of bankruptcy by failing to pay sums due pursuant to a guarantee and indemnity (the PG) which he entered into in the Creditor's favour in respect of amounts allegedly owed pursuant to a loan (the Facility) which the Creditor extended to a company called Cool Dust Limited (CD). The Applicant was CD's sole director and played a leading role in negotiating the Facility and the PG (the Agreements). The stated object was to fund the completion of a commercial development (the Pinnacle), realising profit which, as well as repaying the Facility, would enable other commitments to be met and projects completed. The Applicant says that, although *"papered"* as a corporate loan, the transaction was actually a personal loan to him which was unlawful because, in substance,

[1] *Although for brevity the Summoning Creditor is described in this judgment (and in the parties' affidavits and submissions) as the Creditor, the Applicant denies that any valid debt is due.*

it was an indirect consumer loan, which the Creditor was not authorised to provide in Ireland. That issue, and a related point as to the Creditor's claim for interest under the European Communities (Late Payment in Commercial Transactions) Regulations 2012 (the Late Payment Regulations) constitute the main ground for this application. The Applicant also says that the figure claimed was overstated due to a penalty clause and because his liability as a guarantor, if any, has been discharged due to engagement between the Creditor and CD. He argues in the alternative that the Summons is an abuse of process, was brought for an ulterior purpose, and the Court should exercise its discretion to dismiss it.

2. I am not persuaded that I should dismiss the Summons. The Applicant has neither established a real and substantial issue for trial nor satisfied me that these proceedings were brought for an improper purpose or for an ulterior motive or that they represent an abuse of process. Nor am I persuaded that the Creditor was obliged to litigate or pursue enforcement action against either CD or the Applicant before issuing the Summons. My dismissal of this application does not finally determine the substantive issues. The Applicant is entitled to pursue a claim he has initiated and which is now pending before the Commercial Court and to contest the petition in these proceedings. In so doing he may seek to revisit issues raised herein, including, where appropriate, with the benefit of cross examination.

Section 1: Irish Bankruptcy Law

3. The relevant provisions of the Bankruptcy Act 1988 (The Act) include:

a. s.8(1) which permits a creditor to apply for liberty to issue a bankruptcy summons where the debtor owes a liquidated sum amounting to at least €20,000 which is provable in bankruptcy. If the debtor fails to respond appropriately (by, inter alia, moving to set aside the summons or paying the amount due), they will have committed an act of bankruptcy which can ground a bankruptcy petition;

b. s.8(5) permits respondents to apply (within 14 days) for the dismissal of such summonses and s.8(6) provides that:

> *"(6) The Court- (a) may dismiss the summons with or without costs, and (b) shall dismiss the summons if satisfied that an issue would arise for trial. "*

4. S.8(6)(b) is mandatory. The Court must dismiss the summons if an issue would arise for trial. Even without any such issue, the Court has a discretion to dismiss under s.8(6)(a).

5. The legal principles are settled:

a. where an issue arises for trial, the Court must dismiss the Summons[2]; however, as appears below, it must be a real and substantial issue which is, at least, arguable and with some prospect of success.

b. The summons must also be dismissed if the debt is overstated[3].

c. Even if no issue for trial arises, the Court has a discretion to dismiss the summons under s.8(6)(a), including on grounds of abuse of process. A collateral purpose, ulterior motive or abuse of process may justify dismissal, but a bare assertion will not suffice if there is ample commercial explanation for the action[4].

d. A debtor seeking to go behind a judgment to assert a dispute or a collateral purpose faces a heightened threshold[5].

6. The authorities confirm that the Court must be satisfied any issue for trial is real and substantial, but the parties disagreed as to the extent to which it may consider the credibility of the evidence. The Creditor criticised the Applicant's submissions on this and other points, submitting that certain citations were unreliable, misrepresenting or overstating the authorities. The Applicant's counsel dealt with at least some of these criticisms and in any event many principles (if not their application) are uncontroversial.

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[2] *In St Kevin's Company (Against a Debtor), 27 January 1995 (Supreme Court, ex tempore), Minister for Communications v Wymes and Anor [2009] IEHC 413.*

[3] *In Re Sherlock and Wymes, Murphy v Bank of Ireland [2014] IESC 37 and Gladney v Tobin [2022] IESC 3*

[4] *Mars Capital Finance Ireland DAC v Alan Phelan [2026] IEHC 100*

[5] *Doherty v Blessville Ltd [2023] IEHC 543; Marketspreads Ltd v Graham [2014] IEHC 14; Launceston Property Finance v Wright [2018] IEHC 574*

7. The Applicant did not deny that points raised must have credibility, citing *National Bank of Ras Al-Khaimah (Rakbank) v. FK* [2021] IEHC 541 *(Rakbank)* as an authoritative restatement of the test (*Rakbank*, inter alia, affirmed the need for any defence to have credibility) and the Court of Appeal decision in *Ennis Property Finance DAC v. Carney* [2019] IECA 71 *(Ennis)* in which Irvine J. (as she then was) emphasised that the Court must not seek to resolve disputed questions on such applications. He submitted that where, as in this case, the Summons is not grounded on a judgment, the Debtor can simply dispute the debt. He also cited the Supreme Court's decision in *Minister for Communications v. Wood* [2017] IESC 16 *(Wood)* in which Dunne J. cited the decision of Clarke J. (as he then was) in *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203, a summary judgment decision, to the effect that:

> *"any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved."*

Counsel submitted that that formulation requires only that the debtor's factual case, at its height, would arguably raise an issue requiring plenary determination; the court cannot assess credibility on the application; my own judgment in *Mars Capital Finance Ireland DAC v. Alan Phelan* [2026] IEHC 100 *(Phelan)* was distinguishable as that summons was based on a consent judgment and all points which Mr Phelan sought to raise were known to him at the time of the judgment, or unsupported other than by retrospective self-serving averments.

8. The Creditor submitted, inter alia, that the Applicant's submissions misinterpreted *Wood* – Dunne J. held that the Court must consider whether the debtor's evidence was credible, that the issue must not be *"fanciful or unreal"* and a mere assertion would be insufficient, citing summary judgment jurisprudence confirming that the asserted issue must be supported by credible evidence.

9. I consider that the principles are uncontroversial. The Court must dismiss the summons if an issue arises for trial. The Supreme Court decision in *Wood* encapsulates earlier jurisprudence and its summary of the principles has governed subsequent decisions. There is little need to look beyond it. While each side focused on snippets from that decision, it is worth considering in context the guidance offered by Dunne J., the doyen of Irish bankruptcy law. At p1, she cited the leading Irish bankruptcy text, *Sanfey and Holohan on Bankruptcy Law and Practice (2nd ed., 2010)* and, *inter alia,* an early analysis of the s.8(6) obligation (the *ex tempore* judgment in *St. Kevin's Company against a Debtor (Supreme Court, 27 January 1995)),* noting that the summons must be dismissed if an issue arose and such issue would have to be litigated separately outside the bankruptcy process, adding that:

> *"In Minister for Communications v. M.W. McGovern J. described the test ... as follows: "...a real and substantial issue and which is, at least, arguable and which has some prospect of success." (at para. 24)....*
> *... the issue raised by an applicant must be a real and substantial issue. It should not be fanciful or unreal. It may be an issue of fact or law. If the issue raised is an issue of fact it must have some credibility. If, for example, the applicant ... denies that he owes the money sought in a bankruptcy summons but has already suffered judgment in that amount, then the conclusion that he or she did not owe the money would simply not be credible. If the issue raised was an issue of law which was well established and as to which there was no doubt and could not avail the applicant, raising such an issue could not give rise to the dismissal of the bankruptcy summons.*
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> *There is some assistance to a Court in considering whether the issue raised is a real and substantial issue to be found by comparing an application to dismiss a bankruptcy summons and the test as to what amounts to an arguable defence on foot of an application for summary judgment. In that context, Hardiman J. in Aer Rianta Cpt. V. Ryanair Limited [2001] 4 I.R. 607 asked (p. 623): "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?" The principles applicable to applications for summary judgment were drawn together in the case of Harrisrange Limited v. Duncan [2003] 4 I.R. 1 at pages 7 to 8, a judgment of the High Court (McKechnie J.). Of course, the analogy between an application for summary judgment and an application to dismiss a bankruptcy summons is not perfect but there are some similarities. Thus, the threshold for leave to defend against an application for summary judgment and on an application to dismiss a bankruptcy summons is a low threshold. One must consider whether there is a real and substantive issue raised by the applicant. If the issue relied on is one of fact that has to be litigated outside the bankruptcy proceedings then clearly, in accordance with the authorities already referred to, the bankruptcy summons has to be dismissed. If the issue is an issue of law which is clearly established and not open to doubt such that, as McKechnie J. in the course of his judgment in Harrisrange identified, is it clear "that fuller argument and greater thought is evidently not required for a better determination of such issues" then the bankruptcy summons should not be dismissed.*
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> *In looking at the situation overall one must of course consider whether what is deposed to on affidavit by the applicant is credible. To paraphrase what was said by McKechnie*

J. in Harrisrange once again, an application to dismiss a bankruptcy summons should not be granted unless it is very clear that no issue arises. It has been said in relation to applications for leave to defend a summary summons that mere assertion is insufficient to entitle a party to be given liberty to defend.

This was described by Clarke J. in McGrath v. O'Driscoll [2007] 1 I.L.R.M. 203 where he said as follows (at p. 210): "So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved."

On an application to dismiss a bankruptcy summons, I would adopt that approach so that a mere assertion that an issue arises would be insufficient to succeed in an application to dismiss a bankruptcy summons but any evidence of fact which would, if true, arguably give rise to an issue that requires to be litigated outside the bankruptcy proceedings would be sufficient to establish that the bankruptcy summons should be dismissed."

10. Dunne J. had foreshadowed her analogy with summary judgment applications in her High Court judgment in *Marketspreads Ltd v. O'Neill and Rice* [2014] IEHC 14 *(Marketspreads)*, in which she cited the comment of Clarke J. (as he then was) in *GE Capital Woodchester Ltd & anor v. Atktiv Kaptial & ors* [2009] IEHC 512 that:

"6.6.… where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasised that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned."

11. Costello J. (as she then was) added in *Ennis Property Finance DAC v. Carney* [2018] IEHC 429 in a formulation endorsed by the Court of Appeal in that case:

(citing *Wood)"a mere assertion that an issue arises would be insufficient to succeed in an application to dismiss a bankruptcy summons but any evidence of fact which would, if true, arguably give rise to an issue that requires to be litigated outside the bankruptcy proceedings would be sufficient to establish that the bankruptcy summons should be dismissed."*

4. From these passages the following points emerge: (i) Once an issue for trial arises on the summons, the summons must be dismissed. (ii) The issue raised must be real and substantial. (iii) The issue raised may be an issue of fact or of law. (iv) If it is an issue of fact, it must have some credibility. (v) Mere assertion that an issue arises is insufficient. (vi) An assertion must be supported by evidence of fact which would, if true, arguably give rise to an issue that requires to be litigated outside the bankruptcy

> *proceedings. (vi) If the issue raised is an issue of law which was well established and as to which there was no doubt the summons should not be dismissed".*

12. The Supreme Court reaffirmed the *Woods* test in *Gladney v. Tobin* [2022] IESC 3 *(Gladney)*. Dunne J. noted that the Appellant's contention was unstateable and that there was no basis for describing it as a real and substantial issue, adding at para. 83 that:

> *"It is quite clear from the authorities that, if an issue is raised which meets the test set out by McGovern J. in the original Minister for Communications v. MW, and further considered in cases such as Marketspreads Limited v. O' Neill and Rice, then the bankruptcy summons should be dismissed. However, if the point raised does not meet the test set down in those cases, then the question of dismissing the summons simply does not arise. In this case, the issue raised by the Appellant does not reach the threshold for the dismissal of the summons."*

13. Accordingly, the debtor must adduce evidence of fact which would, if true, give rise to a *"real and substantial issue"* which is, at least, arguable and which has some prospect of success. It is sufficient if the factual case, at its height, raises an issue requiring plenary determination, in which case the bankruptcy court cannot resolve the merits of the competing cases but bare assertions do not suffice. Credible evidence is required. For example, Dunne J. emphasised in *Woods* that the issue must not be *"fanciful or unreal"* and, while noting that the analogy was not perfect, invoked summary judgment jurisprudence, citing *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 *(Aer Rianta)* and *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1 *(Harrisrange)* and adopting Hardiman J's oft cited formulation in *Aer Rianta*:

> *"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?"*

Significantly, in *Aer Rianta* Hardiman J. also cited the English Court of Appeal decision in *National Westminster Bank v. Daniel* [1993] 1 WLR 1453 as authority for the proposition that a mere assertion on affidavit did not suffice to justify the grant of leave to defend.

14. Although the Applicant claims to meet the summary judgment test, he argues that the test to dismiss a summons is even lower than to oppose summary judgment. I disagree. In my view the tests are equivalent. Although the language differs, the two formulations are directed to the same end. If a debtor established a real or substantial issue for trial which was at least arguable and had some measure of success, then he must surely have met the test required to resist summary judgment and the converse is equally true. That follows as a matter of principle because a creditor who secures a summary judgment is entitled to enforce it, including by bankruptcy proceedings. As the authorities confirm (and the Applicant acknowledges), the debtor can only look behind such a judgment or order in exceptional circumstances. The Applicant's own submissions repeatedly asserted that the Creditor should have initiated (summary or plenary) proceedings before resorting to bankruptcy proceedings. Anomalies would arise if the standard required to resist summary judgement was less onerous than that required to secure the dismissal of a Summons. That would mean that evidence might suffice to ground summary judgment against a debtor but not to ground bankruptcy proceedings to enforce that judgment, an illogical result. Accordingly, on the basis of *Woods* and *Marketspreads* (and as a matter of principle), I am satisfied that the summary judgment jurisprudence is applicable to applications to dismiss such summonses. As the Applicant noted, the summary judgment test was reformulated by the Supreme Court in *Aer Rianta,* as refined in *Harrisrange* and *Ulster Bank Ireland Ltd v. O'Brien* [2015] IESC 96. *Chadwicks v. Byrne Roofing Ltd* [2005] IEHC 47 is an example of that approach. Clarke J. (as he then was) stated at para.14(b) that the court should only grant summary judgment where:

> *"The facts asserted by the defendant amount to a mere assertion of a defence where there is no credible evidence for the defence which the defendant seeks to assert…Thus it may be clear that the facts asserted by the defendant cannot be true by reference to indisputable or cogent evidence and in the absence of any real evidence put forward by the defendant. In addition the disputed facts may turn upon a relatively straightforward construction of documents which the court is in as good a position to construe on a motion for summary judgment as on a full hearing."*

Accordingly, the plaintiff secured summary judgment on elements of the claim where no arguable defence had been shown; other points were referred to plenary hearing.

15. Clarke J.'s comments in *Irish Bank Resolution Corporation v. McCaughey* [2014] 1 I.R. 749 *(McCaughey)*, para.6, were to similar effect:

> *"[t]he sort of factual assertions, which may not provide an arguable defence, are facts that amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or facts which are in themselves contradictory and inconsistent with uncontested documentation…".*
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> *"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?"*

16. Such summary judgment decisions chime with the bankruptcy authorities. In *Woods* Dunne J. stressed the need to consider the credibility of the applicant's averments, stressing that a mere assertion is insufficient. As Humphreys J. observed in *Rakbank,* citing *Ennis*, any issue for trial should be a real, substantial issue *"and, if a factual matter, must have some credibility going beyond mere assertion and going to an issue that requires to be litigated outside the bankruptcy process."*

17. A judgment undoubtedly simplifies a creditor's proofs and increases the challenge facing a debtor and the converse is true, but the Act does not require that a Summons be grounded on a judgment and it would be simplistic (and inconsistent with *Woods)* to say that, absent a judgment, a Debtor can simply assert that the debt is disputed. The dismissal test must be met irrespective of any judgment (but it is harder to meet the test if there is a judgment).

18. The Applicant cited *In the Matter of Green D Project Ireland Ltd* [2023] IEHC 773 *(Green D)* as authority for the uncontroversial proposition, based on *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] 1 IR 63 *(RAS Medical)*, that conflicts of fact arising on affidavit evidence must be determined by an oral hearing and that it was not appropriate for the Court to reject affidavit evidence purely on the basis that it was contradicted by exhibited documents. That case concerned a majority shareholder's application to wind up a company on the grounds of its alleged insolvency rather than, as Sanfey J. stressed, for failure to meet a statutory demand (which would have been more analogous to this application and the decision should possibly be seen in the light of that tactical choice). Sanfey J. determined that a conflict arising on affidavits could only be resolved by cross-examination, declining the petitioner's submission that the company's account could be rejected as it was contradicted by its own recent management accounts. The need for a plenary hearing emerges clearly from the judgment:

> *"46. In the present case, the evidence relevant to the issue of the company's ability to pay its debts is as set out in the affidavits. The company's accountant, Mr David Bolger – not an accountant employed by the company it should be said – has expressed a view that "ultimately the company will be owed a substantial sum of money more than €31m by the petitioner" [affidavit 12 December 2023, para. 14]. Mr Bolger expresses that view against a backdrop of figures produced some months earlier which show a very different position, albeit that it is not clear how much input Mr Bolger had into those figures. There is also the question of the relationship between Mr Bolger's view of the solvency of the company and his valuation of its worth for the purpose of Eromettap's invocation of the shareholders' agreement.*
> *47. It may well be that Mr Bolger and Mr Pattemore would have very difficult questions to answer regarding their view, as expressed in the affidavits and the accompanying documentation, of the company's prospects and its ability to pay its debts as they fall due. However, it does not seem to me to be appropriate to disregard such evidence in circumstances where that evidence is not challenged by cross-examination. I am of the view that the resolution of the dispute on the affidavits in relation to the solvency of the company and whether it is unable to pay its debts is necessary to the proper disposition of the petition. The challenge to Mr Bolger's evidence is that it is not credible or reliable. In such circumstances, Mr Bolger must be given an opportunity to respond to the criticism made of his evidence. This follows clearly from the decision of the Supreme Court in RAS Medical, and the interpretation of that decision by Butler J in Bayview, with which I agree."*

19. Accordingly, Sanfey J. was satisfied that there was an arguable reason for the company's position and for the apparent discrepancy (the management accounts omitted a significant and undoubted asset, RTF certificates which, depending on the valuation, bridged the gap between solvency and insolvency). As Sanfey J. explained at paras 27-28, both parties accepted that the certificates were an asset but there was a dispute as to their value. He noted at para. 36 that if the company's view of the valuation was correct then the company had a healthy balance sheet and was owed a very considerable sum by the petitioner. The petitioner was best placed to lead evidence on the valuation but, as Sanfey J. stressed at para. 37 it presented no definitive evidence on the point. Sanfey J. concluded that a hearing was required to resolve the issue, citing *RAS Medical* and Butler J's decision in *In the Matter of Bayview*

Hotel (Waterville) Ltd [2022] IEHC 516, in which she concluded based on *RAS Medical* that she could not determine the conflict of facts in affidavit evidence without cross examination. Accordingly, *Green D, Bayview,* and *RAS Medical* reaffirm the principle that cross examination is necessary to resolve conflicts of evidence on affidavit but those decisions do not in my view supplant the longstanding summary judgement jurisprudence (nor, in this case, the dismissal of summons test). Such cases turn on their particular facts, a point made by Clarke CJ at para. 7.5 of *RAS Medical*, where he noted that the issue may depend on what exactly it is that the judge has to decide and that the Court is clearly entitled to make findings in respect of unchallenged documents. Likewise, Sanfey J. noted at para. 52 of *Green D* that

> *"Much will depend on exactly what the court is required to determine and on the extent to which and the basis on which the evidence is challenged."*

20. The decisions do not suggest that a bare assertion on affidavit which is inconsistent with overwhelming evidence is not enough to justify cross examination in the absence of an explanation for the inconsistency. There was such an explanation in *Green D,* so cross examination was required.

21. The Applicant submitted that in *Green D*, the Court rejected a submission that the company's position on affidavit should be disregarded on the basis that it was inconsistent with the documentary evidence but Sanfey J. was more nuanced, concluding:

> *"48. It is suggested that the court should infer from the documentation, and in particular the various iterations of the balance sheet, profit and loss account and projections exhibited to the affidavits, that it establishes the company's insolvency. However, for the reasons I have explained, the provenance and authorship of these documents are not entirely clear. The management of the RTF certs appears to have been within the control of the petitioner – not the company. The petitioner has not put before the court expert or otherwise compelling evidence as to the value of those certs.*
> *49. The central issue of the company's ability to pay its debts is canvassed squarely in the affidavits. In the absence of cross-examination, it is not appropriate to draw conclusions about the solvency of the company. The petitioner did not avail of the 21-day procedure which would have forced the company to identify how it disputed the debt, "in good faith and on substantial grounds". The perceived desirability of appointing provisional liquidators may have militated against the use of this procedure. However, if a petitioner wishes to proceed by way of affidavit evidence, it may transpire*

> *that it cannot discharge its evidential burden without cross-examination where there are conflicting affidavits. This is what has happened in the present case."*

22. Accordingly, there were doubts as to the provenance of the documents relied upon to impugn the certificates and the petitioner, which was best placed to address the issue, had failed to adduce compelling evidence in that regard. The judgment implies that there may have been a different outcome if it had done so. In any event, there was an explanation for the divergence between key documents and the affidavits - although the existence (if not the value) of the asset was acknowledged by the petitioner, the management accounts did not reflect the value of the certs. The valuation dispute had to be settled by cross examination. The facts of this case are closer to *First National Commercial Bank plc v. Anglin* [1996] 1 IR 75 than to *Green D.* In *Aer Rianta*, Hardiman J. endorsed *Anglin*, noting that in that case *"the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the Defendant quite untenable"* adding that

> *"23. In all of these cases, however, the issue of credibility arose rather starkly. In Daniels the defence affidavits were mutually contradictory. In de Naray the Defendant's averments were flatly contradicted by those of the Plaintiff's private detective which were accepted to be accurate. In Anglin, the indisputable documentation of a commercial transaction rendered the alternatively chronology proposed by the Defendant quite untenable.*
> *24. I consider that the references in these cases to credibility and to fair and reasonable probability may be misleading if read without reference to their own unique facts. Read in context, I do not consider that the passages quoted either alter the well-established criteria for the granting of summary judgment."*

23. Accordingly, issues of credibility and genuine conflicts of fact must be resolved by cross examination. Real and substantial issues must also be referred for plenary hearing. However, the authorities cited at paras 9 – 16 above (and, indeed, many others) confirm that mere assertions flatly contradicted by uncontroverted evidence (such as undisputed contemporaneous documents) do not suffice to establish an arguable defence, a real and substantial issue or an issue requiring a plenary hearing, particularly in the absence of any meaningful explanation for the discrepancy between such averments and all other evidence. The *Green D* trilogy invoked by the Applicant does not in my view overrule the authorities cited in paras 9 – 16 above. I expect that if the Supreme Court had intended to overrule authorities such as *Woods, Aer Rianta, McCaughey* and *Anglin*, it would have made that clear. My conclusion is reinforced by Sanfey J's observation at para. 45 that:

> *"... there may be occasions where, even though there is a conflict on the evidence between two sets of deponents, the court considers nonetheless that there is sufficient documentary or other uncontested evidence which would establish definitively, in a winding up petition, that the company is unable to pay its debts. Indeed, Bayview is a very good example of a case in which this occurred. Butler J considered that she could not make findings of fact as between affidavits in the absence of cross-examination; nonetheless, there was sufficient material elsewhere before the court which enabled it to be satisfied that the company was unable to pay its debts. ...*

24. Accordingly, a case must go to plenary hearing if a real and substantial issue might arise. If the Applicant establishes a credible basis to assert a material conflict of evidence which could give rise to such an issue, then the same conclusion follows. Nor can a Court reject an affidavit asserting a defence in summary judgment proceedings or in response to bankruptcy proceedings purely on the basis that it considers evidence tendered by another party to be more credible – as Clarke J. reaffirmed in *McCaughey,* it is *"no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence but forward by the defendant"*. However, a defence based on mere assertion which contradicts the Applicant's own contemporaneous position is insufficient to constitute a real and substantial issue for trial in this instance, unless, as in *Green D*, the apparent discrepancy is explained.

25. Another controversy concerned whether the Applicant's independent proceedings (the Plenary Proceedings) sufficed to establish an issue for trial. He submitted that; (i) the existence of independent proceedings is conclusive evidence of a real and substantial issue, citing *Lee v Lee* [2024] IEHC 127 (*Lee*), *"irrefutable evidence"* of a bona fide claim; (ii) The Summons must be dismissed; the Court could not hold (using the summary judgment test as in *Lee)* that it was *"very clear"* that the Respondent had no case or that there was no issue to be tried and the same result was required on a s.8(6)(b) application; (iii) such proceedings also reinforce the case for dismissal on the basis of the exhortation in *Gladney* that the jurisdiction to dismiss a Summons must be exercised with due regard to proportionality and the severity of the consequences for the Applicant. An Adjudication Order would be disproportionate if proceedings are pending, depriving the respondent of the opportunity to litigate the proceedings and rendering them nugatory. In the absence of a judgment or Order, the Court should not permit the bankruptcy jurisdiction to be used to short-circuit High Court proceedings in which the debt's validity is in issue.

26. In my view, whether pending proceedings justify the dismissal of a summons depends on the substance of any such proceedings. I agree that it would be an abuse of process to attempt to bypass a summary and/or plenary hearing if a real or substantial issue had been raised. However, s8(6)(b) addresses that scenario. The converse proposition is equally true. It would be an abuse of process if, in the absence of a real and substantial issue, a debtor was to use plenary proceedings to delay or obstruct the statutory bankruptcy process. The Applicant overstates the significance of the issuing of proceedings and the service of a Statement of Claim. Certainly, the *failure* to take such steps to progress a claim might raise doubts as to the credibility of an asserted issue. However, as I noted in *Phelan*, the mere issuing of proceedings or delivery of pleadings is not conclusive - otherwise any Applicant could stop a bankruptcy in its tracks, frustrating the statutory regime. The question remains whether the Applicant has demonstrated a real and substantial issue. The existence of plenary proceedings is not dispositive. Such proceedings and associated evidence are only a reason to dismiss if they disclose a real and substantial issue.

27. *Lee* does not assist the Applicant. It concerned a counterclaim in response to a summary judgment application. Bradley J. noted at para.14 that the counterclaim was a factor to consider (as is the case here) but did not suggest that its mere existence was dispositive. The Applicant emphasised Bradley J.'s citation of *Moohan & Bradley t/a Bradley Construction v S&R Motors*

(Donegal) Ltd [2008] I.R. 650, as confirming the court's wider discretion where a defence amounts to a cross-claim or counter-claim as *"slightly different considerations may apply"* in such circumstances. There is a general issue with counterclaims as to whether they relate to the same facts as the plaintiff's claims in the underlying proceedings or whether they relate to different circumstances.[6] Bradley J. applied the summary judgment test, concluding on the facts that the defendants had shown that they had a fair or reasonable probability of having a real, bona fide and credible defence to the claim in relation to the sum of €127,400 and the evidence

> *"could not be characterised as mere assertions unsupported by either evidence or by any realistic suggestion that may be available or comprise facts which are either self-contradictory or inconsistent. There are, in addition, credible issues of fact between the Plaintiffs and the Defendants which were not easily determinable in the summary application and which, if resolved in favour of the Defendants, would disclose a fair and reasonable probability of defence".*

I agree with that conclusion, but it does not follow that the same conclusion would flow from the different facts of this case.

28. I disagree with the submission that it is necessarily an abuse of process to pursue bankruptcy proceedings rather than litigating. While it is an abuse of process to launch bankruptcy proceedings in respect of genuinely disputed debts, this is addressed by the mandatory dismissal obligation. The creditor is entitled to invoke the statutory bankruptcy procedure without waiting for litigation unless there are real and substantial defences. Nor does *Gladney* support the proposition that a summons must be dismissed whenever separate proceedings have been issued challenging the underlying debt, or that an adjudication would be *"wholly disproportionate"* in such circumstances. To the contrary, Dunne J. reiterated that the question was the existence of a real and substantial issue, which was at least arguable and with some prospect of success, noting at para. 83 that *"the question of dismissing the summons simply does not arise"* unless that threshold was met. As the Creditor observed, independent

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[6] *Different considerations may arise in circumstances where a defence which disputes the substantive claim on factual or legal grounds (such as that there was no contract or the goods were never delivered) or where a counterclaim arises from the same set of circumstances, and in circumstances where the counterclaim is unrelated to the plaintiff's claim.*

proceedings cannot be self-proving evidence. Independent proceedings only require the dismissal of a summons if they disclose a real and substantial issue. Absent such an issue, it was not necessary for the Creditor to issue civil proceedings against the Applicant or to allow him to litigate his threatened (and eventually issued) proceedings. Accordingly, the circumstances and substance of the plenary proceedings will determine whether they disclose a real and substantial issue.

Section 2: The Parties

29. In summarising the background, it is important to consider the (limited) evidence about the parties to the proceedings and the transaction, the principal protagonists and also those who, in Hollywood terms might be regarded as supporting actors. The Creditor is Herbert Street Property Finance. Mr Agar represented it in the negotiation of the transaction. He and Mr Egan each swore an affidavit on its behalf. Mr Egan also swore the affidavit seeking liberty to issue the Summons. The Applicant, a well-known businessperson and developer, associated with the McKillen/Press Up Group (the Group) and with developments such as the Dean Hotel in Dublin, is a director of some or all of the companies mentioned in these proceedings which, in addition to CD, are Keillan Ltd (Keillan), Blue Whisp Ltd (Blue Whisp) and Ingaro Ltd (Ingaro) (the Four Companies). All four are apparently part of the Group. The following may be gleaned from the affidavits and exhibits; (a) Mr Tuite is the Group Financial Officer; (b) CD has one director, the Applicant. It was incorporated in Ireland on 1 June 2022 and has not filed financial statements or annual returns for any period since 1 December 2022. Although not directors, Messrs Delaney and Cunningham have been associated with it but their precise interest and role is unclear; (c) Blue Whisp was party to an *"Intra-group Facility"* between CD (Lender) and it (Borrower) which the Applicant executed on the same day as the Agreements and which recorded CD's agreement to lend Blue Whisp €3m. The Applicant signed for both Blue Whisp and CD; (d) The Facility (extended by the Creditor to CD) defines

Keillan as *"the Shareholder",* presumably of CD, and notes that Keillan is incorporated in the Isle of Man. It also envisaged that Keillan would execute or had executed *"a limited recourse guarantee and limited recourse share charge"* in the Creditor's favour. This may have foreshadowed the undertaking which the Applicant executed on 22 February 2024 in Keillan's name (as its director) confirming its commitment to pay substantial sums to the Creditor in discharge of CD's liability under the Facility; (e) Ingaro is the entity to which the Creditor transferred the monies borrowed by CD. No information is furnished as to the composition of its board, shareholder base or its connections to other Group companies.

30. There is no suggestion that the Creditor had any material role or interest in the Four Companies or the Group generally. Save for the details noted above, the relationship between those companies, the Group and the Applicant is opaque as are details of their immediate or ultimate beneficial ownership. I assume that the Applicant is a stakeholder with a direct or indirect interest in some or all of the Four Companies and/or the Group. However, he has not disclosed the extent of his interest. Nor has he suggested that he is the sole shareholder, nor has he explained the relationship between the Four Companies and the Group or the precise roles played (or interest, if any, enjoyed by) by Messrs Cunningham and Delany, nor has he clarified whether those or other parties had any interest in the Four Companies or the Group.

Section 3: The Parties' Positions

31. The Summons claimed, in short, that; (a) pursuant to the 22 December 2022 Facility the Creditor provided a €3m loan facility to CD; (b) the Applicant executed the Facility on CD's behalf and simultaneously executed the PG under which he personally undertook to pay CD's obligations on demand subject to a €3m limit (plus interest and fees); (c) CD defaulted and the Creditor made demand of both CD and the Applicant on 16 February 2024, following which the Applicant furnished an undertaking on Keillan's behalf and €2-2.3m was paid on foot of that undertaking; (d) The Creditor served particulars of demand (Particulars) on the

Applicant on 24 November 2025 demanding repayment of the outstanding balance; (e) The Summons issued on 26 January 2026. This motion was issued on 13 February 2026.

32. The Applicant denies owing any debt or its quantum, submitting that the Summons should be dismissed on the following grounds; (a) **Illegality** – the "debt" was unenforceable as the Agreements constituted the illegal advance of consumer credit; (b) **Incorrect Quantum –** no liquidated sum is due and the figure claimed is unlawfully inflated by; (i) the inappropriate application of interest pursuant to the Late Payment; and (ii) a penalty clause; (c) **Discharge of Guarantor** - the Applicant's liability has been discharged; (d) **Abuse of Process –** the Summons was issued for an ulterior or collateral purpose. The Creditor says that it seeks repayment of monies long due, and that the Applicant is manufacturing shifting and unparticularised *"disputes"* based on bare assertions unsupported by credible evidence, contradicted by contemporaneous evidence, which do not disclose a defence.

Section Four: The Agreements

33. At the outset it is important to identify the Agreements' core provisions. There was no real[7] dispute as to their execution. The Summons is grounded upon the PG which the Applicant (as Guarantor) furnished to the Creditor (as Lender) entitled *"Limited Sum Guarantee and Indemnity (Individual)".* It is a guarantee and indemnity, a distinction considered below. The recitals noted the Applicant's agreement to guarantee CD's obligations and that CD

> *"is now, or may from time to time after the date of this Guarantee become, indebted whether as principal, surety or otherwise to the Lender".*

34. Its operative terms confirmed, inter alia, the following:

a. Clause 2.1 provided that

> *"the Guarantor as principal obliger and not merely as surety hereby … covenants to pay and guarantees payment on demand by the Lender of all and every sum or sums of money … which are now or shall at any time …be due, owing or incurred and payable to the Lender anywhere on any account whatsoever from (CD) … with in all cases aforesaid all indemnities and interest …at such rates and upon such*

[7] *An attempt in solicitor's correspondence to take issue with the Applicant's execution of the documents was not pursued.*

terms as may from time to time be payable by the Charger ... (together the "Guaranteed Obligations").

b. Clause 2.1 confirmed the consideration as being

"… the Lender at the request of the Guarantor making or continuing advances or otherwise giving credit or affording banking facilities, for as long as and to the extent agreed between (CD) and the Lender, to or with (CD)."

c. Clause 2.3 recorded the Applicant's agreement

"*as a separate and independent obligation that the Guarantor's liability hereunder shall be as sole or primary obligor and not merely as guarantor or surety and that any sum or sums of money which may not be recoverable from the Guarantor on the footing and in respect of the guarantee contained in this Clause 2 whether by reason of any legal limitation, disability or incapacity on or of the Chargor or any other reason or circumstance whether known to the Lender or the Guarantor or not shall nevertheless be recoverable (on a full indemnity basis) from the Guarantor as principal debtor and shall be paid by the Guarantor on written demand."*

d. Clause 3 imposed a €3m (plus interest owed by CD and costs/expenses) limit on the amount recoverable under the PG.

e. Clause 5 provided for, inter alia, the following representations and warranties:

> *"5.1 The Guarantor acknowledges and agrees that this Deed is and at all times shall be a continuing security and shall extend to cover the ultimate balance due at any time from the Chargor to the Lender and this Deed shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sum or sums of money owing pursuant to the provisions of this Deed but shall be a continuing security ...*
> *5.6 The Guarantor represents and warrants to the Lender that:*
> *…*
> *(e) he is not a "consumer" within the meaning of:*
> *(i) the Consumer Credit Act 1995;*
> *(ii) the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000;*
> *(iii) the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004;*
> *(iv) the Consumer Protection Act 2007; or*
> *(v) the European Communities (Consumer Credit Agreements) regulations 2010 and he is not a "personal consumer" within the meaning of the Central Bank of Ireland's Consumer Protection Code 2012…"*
> *5.8 The Guarantor hereby waives all or any of the Guarantor's rights as surety which may at any time be inconsistent with any of the provisions of this Deed.*
> *5.9 The Guarantor acknowledges that the Lender has accepted this Deed in full reliance on the representations and warranties set out in this Clause 5.*

f. Clause 7 was a broad provision, inter alia, noting, in brief, the Applicant's agreement that his liabilities would not be reduced, discharged or affected by any; (i) variation, release, discharge, waiver, compromise, dealing, etc as between the Creditor and CD, (ii) act or omission by the Creditor in enforcing against CD, (iii) amendment or variation of the Facility, (iv) grant of time, indulgence, waiver or concession granted to, or arrangement with CD, (v) change payment terms or arrangements, or (vi) act or omission which would not have discharged or affected the Applicant's liability if it had been a principal debtor instead of guarantor. In clause 8 the Applicant waived all demands on CD for performance of its covenants to the Creditor and any defence based upon laches or set-off or counter-claim relating to such obligations.

g. Clause 8.2 stipulated, inter alia, that the Creditor was not required to make any demand, enforce any claim or take any action or obtain judgement in any Court against CD or any other persons before taking steps to enforce its rights and remedies against the Applicant.

h. The Applicant signed both the PG and a confirmation that he was fully aware of the nature of the *"Guarantee and Indemnity, the effect of which has been explained to and understood by him"* and that he had been advised to take separate independent legal advice but had declined to so and he was willing to be legally bound by its terms.

35. The following points arise with regard to the Facility:

a. The parties are CD, the Applicant and the Creditor, respectively identified as Borrower, Guarantor and Lender.

b. Clause 1.1 included the following definitions:

"Commitment"	*Means €3,000,000.00 ... to the extent not cancelled, reduced or transferred by it under this Agreement"*
*"**Facility:***	*means the term loan facility made available under clause 2 of this Agreement;*
Finance Documents:	*means this Agreement, the Security Documents and any other document designated as such by the Lender and the Borrower*
Guarantee:	*means the guarantee dated on or about the date hereof entered into by the Guarantor with the Lender;*
Indebtedness:	*means any obligation to pay or repay money, present or future, whether actual or contingent, sole or joint;*
Loan(s):	*means a loan made or to be made by the Lender to the Borrower under this Agreement or (as the context requires) the principal amount outstanding for the time being of that loan(s);*
Property:	*means the development known as the Pinnacle, Mount Merrion, Dublin 14.*
Secured Liabilities:	*means all present and future obligations and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) of each Transaction Obligor to the Lender under each Finance Document;*
Security:	*means any mortgage, charge (whether fixed or floating, legal or equitable), pledge, lien, assignment by way of security or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect;*
Security Documents:	*means the Debenture, the Guarantee and the Share Charge, and any other document designated as such by the Lender and each a Security Document;*
"Shareholder"	means *"Keillan Limited a company incorporated in the Isle of Man with company number 012146V and having its registered office at P.O. Box 665*

	Bridge Chambers, West Quay, Ramsey, Isle of Man, IM99 4PD".
"Share Charge"	means "*a limited recourse guarantee and limited recourse share charge executed by the Shareholder in favour of the Lender";*
"Transaction Obligor"	means *"means the Borrower, the Guarantor and the Shareholder".*

c. Clause 2 confirmed the provision of the facility to CD in three tranches.

d. Clause 3 specified the purpose– the Facility was to be made available to CD:

> *"towards the provision of an intercompany loan to Blue Whisp Limited (624599) to assist with the building costs associated with the Property"* and *"for no other purpose".*

e. any such provides for draw down instructions from CD to specify, inter alia "*the bank account to which payment is to be made",* any such notice to be irrevocable and expressly acknowledging the tranches drawn down on 19 October 2022 and 10 November 2022.

f. Clause 10 set out CD's representations and warranties that, inter alia, it had the power and authority to execute, deliver and perform its obligations under the Finance Documents and the contemplated transactions which would not contravene or conflict with its constitutional documents or any law or regulation or judicial or official order, applicable to it, confirming that its obligations under the Finance Documents were legal, valid, binding and enforceable in accordance with their terms.

g. Clause 11 provided for undertakings by CD to the Creditor, including, under clause 11.2, to

"advise the Lender of the completion of the redemption of the loan in full as between Blue Whisp Limited and Castlehaven Property Finance DAC within 10 Business Days of the said redemption".

h. The Applicant signed the Facility both on CD's behalf, as its sole director, and on his own behalf, as Guarantor.

i. The Facility's conditions precedent imposed obligations on CD, the Applicant and CD to furnish copies of governance documents effectively confirming their authority to enter into the transaction and to give the various commitments they had proffered, including a copy of their respective board resolutions confirming, inter alia, in response to clause 1.2 (iv) that entry into the Finance Documents was in CD's commercial interests, stating the reasons for that conclusion. Clause 2 provided for the provision of undertakings to the Creditor from Blue Whisp to execute a Charge in its favour over the Pinnacle Development (once Castlehaven Property Finance DAC had been repaid in respect of that Property) and Drew Point Limited, Warlington Key Limited, and Holtend Limited in respect of the Stella, Press Up Management Limited and the Dean Hotel.

The Intra-Group Loan Agreement

36. The exhibits also include an *"Intra-group Agreement"* between CD (Lender) and Blue Whisp (Borrower) dated 22 December 2022 (the same date as the Agreements) recording CD's agreement to lend Blue Whisp €3m. The Applicant signed it on behalf of both parties.

The Affidavit Evidence as to Illegality

37. The grounding affidavit averred, inter alia, that; (a) The Facility constituted, in substance, an indirect loan to the Applicant, an individual consumer but the Creditor is not a *"retail credit firm"* within the meaning of the Central Bank Act, 1997 (the CBA) so it was an offence for it to provide such credit without authorisation from the Central Bank of Ireland (CBI), rendering the debt and loan illegal and thus not recoverable; (b) There was an issue for trial - the Applicant denied owing any debt to the Creditor, disputing the enforceability of the

PG, asserting that that issue should be resolved by litigation and that the Summons was an abuse of process since the Applicant was aware of the controversy; (c) The Applicant's solicitors' 9 December 2025 letter had put the Applicant on notice of *"non-exhaustive, points of concern",* but they dismissed those points *"without any proper engagement or adjudication by the Courts".* There was no basis to issue the summons in the light of such issues. The debt was disputed and the Creditor's solicitors rejection of the Applicant's solicitors' points of itself indicated a bona fide and substantial dispute. The Applicant was considering issuing proceedings; (d) The Creditor had not explained the purpose of the alleged loans to CD or for whose benefit they were made; (e) The interest claimed under the Late Payment Regulations was not recoverable as against an individual.

38. Mr Egan's replying affidavit; (a) noted the Applicant's shift from the stance in his solicitor's correspondence and the *"broad, unparticularised and unsubstantiated"* allegations in the grounding affidavit, giving examples; (b) Recounted the background, emphasising that, as principal obligor, the Applicants covenanted to pay CD's obligations (subject to the limit in the PG), referring to CD's default and the letters of demand; (c) Noted differences between the Applicant's position in the 9 December 2025 letter and in his first affidavit and stating that the letter was fully answered on 16 December 2025; (d) Noted that the PG's terms addressed the Applicant's contentions, confirming that: (i) he is a primary obligor; (ii) his obligations under the PG's guarantee and indemnity are independent; (iii) he warranted that he was not a consumer; (iv) He waived the requirement for demand to be made of CD; (e) Expressed surprise at the criticism of the Creditor for not explaining *"the purpose of such loans, and for whose benefit those loans were made"* as those facts were well known to the Applicant, CD's sole director, confirming that, as appeared from clause 3 of the Facility, the funds were intended to finance the completion of the Pinnacle development in Mount Merrion but instead used to pay other liabilities of the Applicant and/ or his other companies; (f) Noted CD's limited corporate filings with the result that there was no objective financial information to suggest that the Creditor's position as against CD was protected by CD's assets.

39. The Applicant's later affidavits developed the illegality argument. His second affidavit stated that Mr Egan's affidavit had effectively admitted his defence consistent with why the grounding affidavit averred that the arrangement was illegal, adding, inter alia, that:

a. he accepted that the Creditor offered to make the Facility available to CD, stating that the agreement was prepared for the Creditor and named the Applicant as a party ("Guarantor") and that:

> *"... this was solely due to the fact the alleged loan being advanced by the Creditor was intended to be an indirect loan to me. While the structure of the Facility Agreement refers to the sums passing from the Creditor to CD, the alleged loan was effectively made directly or indirectly to me".*

b. Although *"papered"* as a loan structured to benefit CD, CD was a shelf company incorporated as the recipient of the alleged loan.

c. The sums advanced were paid to other entities confirming *"that the Creditor knew the sums were not for the benefit of CD".*

d. The Creditor failed to disclose that €1.25 million was advanced before the Agreements were executed, offending the doctrine of past consideration.

e. He denied that his defence had *"shifted"* since the pre-action letter which *"was issued urgently to protect my position immediately following the receipt of the Creditor's Particulars of Demand"* and *"the fundamental regulatory and legal defects in the Creditor's claim"* only became apparent following *"a more comprehensive review of the documentation with my legal advisors, and notably in light of the startling factual admissions now sworn to by Mr. Egan himself",* characterising para.32 of Mr Egan's affidavit as an admission that the loan funds were not used for the commercial property development specified in the Facility and *"that his muddying of the waters by suggesting the funds were utilised to pay other liabilities of mine "and/or other companies" of mine is prima facie evidence of my defence".*

f. The Petitioner was on notice and aware

"that the funds were not being advanced to CD, and none of the sums were transferred by the Creditor to CD, but were in fact an indirect loan to me. I believe the Creditor was fully aware of this reality at all material times. I am advised that the interposition, which did not in reality occur, of CD was an artificial device sought by the Creditor designed to suggest a sidestep of mandatory consumer protections. The Creditor cannot rely on boilerplate corporate warranties to mask the true, personal nature of this loan to an individual which was at all times discussed and known".

g. Denied that the Creditor could rely on Clause 5.6(e) of the PG, *"claiming I warranted that I was not a "consumer"")* a lender

"cannot contract out of mandatory statutory and consumer protections by forcing a borrower or guarantor to sign a boilerplate warranty denying their consumer status. The Court must look to the substance and reality of the transaction - a reality Mr Egan himself admits involved the discharge of my personal liabilities".

h. Stated that the amount demanded was misstated because, inter alia, the sum claimed included interest under the Late Payment Regulations which was inapplicable to monies used for the Applicant's personal liabilities.

i. The Creditor received €2.3m from Keillan and/or CD, accusing the Creditor of misapplying those payments against the interest.

j. As his solicitors' 9 December 2025 letter observed, Mr. Ronnie Delany, acting for CD, approached the Creditor

"to address the balancing liability", stating at para.34 that *"any separate negotiations, settlements, or variations of the underlying contract between the Creditor and the principal debtor (CD) without my express consent serves to prejudice my equitable rights of subrogation and operates to discharge me from my obligations as guarantor including under the Civil Liability Act 1961 (as amended)",* and that *"Mr Egan conveniently glosses over the substance of these interactions in his affidavit".*

40. Mr Agar's affidavit, inter alia:

a. rejected the Applicant's explanation for belatedly asserting that the Creditor knew that the Facility was a personal loan, observing that he was on notice of the claim since at least February 2024. The bankruptcy process commenced with service of the Particulars on 24 November 2025, yet no such defence was raised in the 9 December 2025 letter. The case advanced in para. 21 of the grounding affidavit also differed from the case belatedly asserted and there was no contemporaneous documentary support for the *"newly minted defence"* - the contemporaneous records demonstrated the Creditor's understanding that the intended purpose was the completion of the Pinnacle development.

b. Rejected the suggestion of admissions on the Creditor's part, noting that the averments did not have the meaning contended for, noting that the issue was not how the funds were ultimately applied but whether the Creditor advanced the Facility on the basis that it was to be used for other than the stated purposes and noted that the Applicant had not particularised the purposes to which the loan monies were actually applied.

c. Stated that the Applicant also failed to explain why he signed the Facility as CD's director, warranting that it would be used for an intercompany loan to complete the Pinnacle development and for no other purpose, stating that far from being a *"boilerplate"* clause, this was a bespoke purpose clause, which could not have been clearer.

d. Confirmed the dates of the advances to CD, with two payments predating the execution of the Agreements.

e. Confirmed that, prior to the execution of the Agreements, the first tranche was released on foot Mr Tuite's 16 October 2022 email informing the Creditor that the Group would circulate a draft facility agreement and proposing that *"your loan is made to an SPV which in turn will provide the funds to Blue Whisp"*, noting that that email is consistent with the transaction as subsequently documented. In particular, it identified CD as the borrower and its purpose as being to enable it to fund the intercompany loan to Blue Whisp Limited to complete the Pinnacle development.

f. Stated that the payment mechanism (via Ingaro at the request of the Group), did not alter the position documented in the Facility as to the borrower, the purpose of the Facility, and intercompany loan structure. Indeed, Blue Whisp entered into an Intra-Group Loan Agreement with CD in relation to the Facility.

g. Noted from the correspondence that; (i) Contemporaneous WhatsApp Messages (Messages) do not suggest an understanding that the Facility was for the Applicant's personal purposes but that it was intended for *"the Pinnacle", "Mount Merrion"* and *" to finish the build";* (ii) the Messages rebut the suggestion that the loan was an indirect loan to the Applicant. His 1 November 2022 Message stated, *"I'm giving you a pg"*, presenting it as an additional comfort to the Creditor, not as a mechanism to facilitate personal borrowing; (iii) the Messages repeatedly reflect the Applicant's acceptance that the monies were repayable with no suggestion of illegality or other defences now invoked.

h. The suggestion that the Facility was advanced to the Applicant personally was also belied by Keillan's repayment of (at least) €2m to be applied against CD's debt. The Applicant signed the Undertaking for Keillan as its director on foot of which such payments were made.

i. A further €300,000 payment was received from CD's solicitors on 1 November; the transfer confirmation bore the payment message, *"Cool Dust Limited"*.

j. Rejected the Applicant's assertions in respect of Mr Delany's approach to the Creditor, noting that the Applicant did not explain why Mr Delany approached the Creditor to address the balancing liability on behalf of CD if the Facility was not advanced to CD and confirmed that no settlement or variation occurred.

41. The Applicant's third affidavit rejected Mr Agar's testimony and reiterated previous points. His points, other than those already noted, were as follows:

a. in response to the characterisation of his objection that loan monies were paid to Ingaro as *"belated"* he said that Mr Egan's admission at para.32 of his 23 February 2026 affidavit was *"the primary factual foundation for the illegality defence"* and only emerged in that Affidavit - the Applicant could previously not have relied upon it. The Facility stated that its purpose was to enable CD to provide an intercompany loan to Blue Whisp to assist with the completion of the Pinnacle development. The Applicant observed that the Intra-Group Loan Agreement between Blue Whisp (as Borrower) and CD (as Lender) for €3m dated 22 December 2022,*"purported to document"* that intercompany structure, but noted that Mr Agar's Affidavit confirmed that the Facility monies were instead transferred to Ingaro *"at the McKillen side's request"*. The Intra-Group Loan Agreement was accordingly never implemented; the monies never reached the intended beneficiary. Contemporaneous correspondence and transaction documents describe a structure that was never implemented. The Creditor cannot rely on documentary formalities to characterise the transaction as commercial when those formalities were not implemented. It admitted that the monies were transferred to Ingaro not to Blue Whisp, the entity identified as the recipient in the Facility and in the Intra-Group Loan Agreement.

b. He acknowledged signing the warranty as to the use of the funds *as "a director of"* CD (he was its sole director and he also signed in his own right) but says that that warranty was not honoured because the funds went to Ingaro and the

Creditor never required CD to apply the funds to the stated purpose and having accepted a deployment of funds for other purposes, cannot rely on the stated purpose as the true nature of the transaction. Mr Agar’s 16 September 2024 message is the most significant evidence, showing that, after the fact, and knowing what had occurred, he confirmed that the money was not used for Pinnacle but *"to shore up other issues in the group."*

c. He acknowledged his own description of the anticipated use of the funds in 2022 and 2023 in terms associated with Pinnacle project in his Messages to Mr Agar, explaining that at that time he expected and intended that the group's financial position would stabilise, Pinnacle would be completed, and the funds would be repaid from development but, in practice, Ingaro received the funds and applied them in accordance with its commercial objectives.

d. Clause 4 of the Intra-company Agreement provided for interest on CD’s loan to Blue Whisp *"at a rate of interest to be agreed between the Lender and the Borrower from time to time, which rate of interest may include a zero% rate of interest",* asserting that the failure to mirror the Facility’s interest provisions was irreconcilable with a genuine and commercially rational lending arrangement and was consistent only with the conclusion that the transaction served a purpose different from that documented.

e. He agreed that the Late Payments Regulations argument was a rearticulation of the argument about the personal nature of the transaction.

f. He emphasised Mr Agar’s acknowledgment that €1,250,000 was advanced before the Agreements were executed, so the PG was accordingly given, at least in part, in respect of obligations incurred before it came into existence, raising issues as to whether it covered advances made as past consideration and, if so, upon what terms the pre-execution advances were made.

g. He notes that his 16 September 2024 Message, referred to *"the deal you did with Ronnie"* and suggests that that reference reflected his genuine belief and understanding at the time that

> *"arrangements had been reached or at least substantially advanced with Mr Delany on behalf of CD. Whether those arrangements constituted a formal "settlement or variation of the Facility" in strict legal terms is precisely the kind of question that requires examination at plenary hearing, with full discovery of all communications between the Creditor and Mr Delany. I say that the Creditor's bare denial - contained in a single sentence of the Agar Affidavit - neither resolves this question nor meets the evidential standard required to negate a real issue for trial".*

h. He said that Mr Agar's Messages contain evidence of *"informal but material accommodations"* given by the Creditor to CD/the McKillen group without the Applicant's knowledge.

i. He acknowledged his signature of the Keillan Undertaking on 22 February 2024. He criticised the Creditor's application of the payments against interest stating that such a unilateral appropriation:

> *"against disputed and prima facie unenforceable charges, to my detriment as guarantor and without my consent, constitutes a dealing by the Creditor with the principal obligation that adversely affects my position and my rights of subrogation".*

j. He confirmed that Mr Delany approached the Creditor on CD's behalf because it was the principal debtor.

The Applicant's fourth affidavit argued that Mr Agar's 11 April 2026 text message, proposing *"a chat about making a respectable total to deal with your loan to me"* and an email dated 27 July 2023 using similar terminology confirmed that Mr Agar understood the loan to have been to the Applicant personally.

Section 5: Communications between the parties

42. It is necessary to consider the contemporaneous documents in the light of the averments and submissions, the following being the particular focus:

a. the Applicant's messages which explain the McKillen Group's proposition and the genesis of the Agreements:

   i. **11/10/2022, 10:32:**

   "Hi David, what return do you want for the €3m only on the Pinnacle? Thanks paddy"

   ii. **11/10/2022, 10:54**

   "I'm going to use your money to finish the build. We will start advertising the thing for sale asap as an entire block and get out of it asap. Any slowdown in build now is taking the momentum out of the entire thing. Will get shone to get a different loan doc over to your guy in Amoss? Thanks a mil"

   iii. **11/10/2022, 19:56**

   "Knight frank are saying it's much better to sell the units individually once they are completed... They say that the sales value selling them individually is 39m after paying vat on the sales. We will then owe 28m to castlehaven and you your 3m back plus your return and lm free cash back for us. Can we get this agreed and done this week as we really need to push on the construction on site and get it finished, this will really help us out David and we will seriously owe you one, it will be a Maximum loan of 2 years. But expect to pay you back before that. Thanks a mil paddy"

   iv. **01/11/2022, 11:00:03**

   "We will give you €1m back from either the Dean or the Stella which ever closes first, we will give you another 500k from whatever closes next, and then we will give you another €1m from the hotel management company sale to Hyatt. That means you will only have €1m plus profit outstanding in pinnacle. And I'm giving you a pg. I would pay you back no matter what happens even without a pg. thanks a mil David 👍👍👍"

b. On 16 October 2022 Mr Tuite, the McKillen/ Press Up Group's Group Financial Controller emailed Mr Agar, under the subject heading *"Blue Whisp Documents"* attaching executed facilities stating:

"Please see attached as requested the loan documents in respect of Blue Whisp…
We hope to have a draft of the facility agreement with you tomorrow(Monday). We propose that your loan is made to an SPV which in turn will provide the funds to Blue Whisp".

The Attachments were described as including executed documents but the Agreements were executed later so I am unclear as to the enclosures.

c. The Applicant's appreciation of the Creditor's willingness to offer the Facility is reflected in his Christmas Eve 2022 Message to Mr Agar:

"Thanks so much for doing the deal with us in Mount Merrion, looks forward to a successful completion in 2023.
… thanks Paddy "

d. However, a few months later, on 19 May 2023 the Applicant messaged Mr Agar about repayment difficulties:

"We have just signed heads of terms via Eastdil with an English fund called LHC to buy 80% of our 8 open hotels which is due to close on the 30th of July. This will clear down all our debt on the Hotels. Can we please amend your deal to move this €1m from Dean refi to the LHC closing please and we will pay you down €2m from that instead please?
We will be finishing the pinnacle ourselves now with Pure … let me know if you are free to meet on Monday or over the weekend if it suits you better? Thanks a mil Paddy"

e. Mr Agar's 17 September 2023 message to the Applicant (in response to a meeting request) reflected the Creditor's evident frustration:

"Happy to meet up, but not to be told of a plan that entails me waiting in the wings for some other event to cash in!
I have a huge amount at stake here, which I gave you in good faith, when you needed it and now need it back.
If we are meeting I want Ronnie Delaney·or Liam Cunningham there to as I don't want anything lost in translation afterwards to your partners!"

f. The 16 February 2024 letter of demand referred to the Facility, noting the €1.5m payment missed on 22 December 2023, constituting an Event of Default, and that the Creditor had declared the loan and all interest and other amounts outstanding due and payable. It set out amounts claimed, referencing interest pursuant to the Late Payment Regulations and demanding €4m by 20 February 2024, failing which it threatened, inter alia, winding up proceedings. A simultaneous letter to the Applicant referred to the Agreements on foot of which the Creditor advanced loan facilities to CD and to the Applicant having *"as principal obligor, guaranteed the repayment of the Loan Facilities to our client and indemnified our client in respect of same"*. It cited an event of default pursuant to clause 12.1 of the Facility (the failure to make the (€1.5m) payment required (by clause 8.1) by the Initial Repayment Date (22 December 2023)). The Creditor declared the Loan and accrued interest immediately due and set out details, including interest pursuant to the Agreements and ongoing interest under the Regulations. It noted that the Creditor's liability was limited and demanded payment by 20 February 2024, failing which the Applicant reserved the right to issue summary judgment proceedings without further notice.

g. The Applicant signed a 22 February 2024 letter to the Creditor on behalf of (and as a director of) Keillan. The letter referred to the Facility between the Creditor and CD (Borrower) and the Applicant (Guarantor), undertaking that, on the completion of an unrelated transaction, Kellian would pay the Creditor €2m in part payment of CD's liability under the Facility.

h. The Applicant's 6 March 2024 message to Mr Agar stated:

> *"Hi Dave, thanks so much for baring with us on that first 2m. You really helped us out and I very much appreciate you.*
> *Thanks so much 🙏 🙏🙏"*

i. the Applicant's message to Mr Agar at 19:33 on 16 September 2024 complaining about the threat to put a lien on his wife's house in view of how long they had known each other and all they had been through adding that:

> *"you weren't even going to take a personal guarantee on the loan at the start because you know we are good for it. ...We've sold the hotels, I paid you back*

2m from that, we've done the deal with Cheyne which is a mega deal for everyone. Your money you lent was for mount Merrion, it iust started back on Friday with enough funds to finish it. …We need your support. I told you I would never let you down. Can you please stick with the deal you did with ronnie. We will really reward you on the apartments very soon. Please don't try and kill me when im going through the final stages of having everything sorted. Please"

j. Mr Agar responded 30 minutes later, stating:

"The reality is the money I lent you was supposed to be used to finish the Pinnacle in a short space of time.
It is very evident the money was simply used to shore up other issues in the group and the Pinnacle is still a long way off being finished and sold.
With Castlehaven having to be sorted first I can't see how you can give me any comfort from that asset in the short term!
My problem is I have no real security for my money and the vultures appear to be closing in on your various indebtness and I can't afford to be left at further risk.
I have consistently asked for some concrete Tangible undertakings to secure my risk, but none have yet been tabled ! I don't know what other personal guarantees you have given, which puts me at strong risk of someone else getting in ahead of me !
Unless you can come up with a solution post haste, you are pushing me down a road I certainly don't want, but am advised that it is my only option, in the absence of an alternative!
The fact that you saw the need to transfer your house to your wife's name only a short while ago, and clear the debt on it, is evidence of your desire to put it out of reach of your lenders.
Can you please come back to me urgently if you feel you can propose a real solution as my solicitors are pushing for instructions!"

k. The Applicant replied at 9:39am the following morning, denying that his transfer of the home into his wife's name was an attempt *"to put anything out of reach of any lender, that just coincided with a loan been repaid and the paperwork been filed"*. He reassured Mr Agar that: *"You were also repaid 2m in march and you will definitely get the rest. We will come back to you today with a proposal. Thanks"*

l. On 1 November 2024 solicitors presumably representing CD or the Group transferred €300,000 to the Creditor identifying the payment as relating to CD.

43. The correspondence between the parties' solicitors included:

a. The Applicant's solicitors' 9 December 2025 letter to the Respondent's solicitors denying that Particulars of Demand had been validly served and stating that the Demand was *"misplaced, and utterly denied"* because:

> "*(a) It is not accepted that our client executed the Guarantee and Indemnity to which you refer, dated 26th December 2022. Please provide a certified copy thereof, and your confirmation that you hold the original, that is, an original Guarantee with our client's signature thereon;*
> *(b) Our client is a stranger to the assertion;*
> *(c) No demand has been made on the 16th February 2024 for payment of €3 million as asserted, or at all;*
> *(d) It is noted that you admit receipt of the sum of €2 million, which, on the basis of an alleged liability of €3 million, would suggest a balancing sum of €1 million was due;*
> *(e) You concede that an additional sum of €300,000 was received. Again, based on your calculations, a sum of €700,000 would remain;*
> *(f) A table has been produced, in respect of figures, which has not been explained, nor understood;*
> *(g) Notwithstanding the calculations, as identified herein, it is noted that a sum of over €2.14 million is demanded, which, in its most benign interpretation, is incorrect.*
> *Further, and perhaps more illustrative of the unsavoury nature of your demand, we are instructed that Ronnie Delany for CD has approached to address Cool Dust's balancing liability.*
> *It is surprising that this is not mentioned in your said email. Please confirm whether you have contacted Mr Delany, and what steps have been taken in respect thereof.*
> *In these circumstances, please confirm that your purported Particulars of Demand stand withdrawn."*

b. The Creditor's solicitors' 16 December 2025 response addressed all points in the 9 December letter, including points which have not subsequently been pursued[8], stating, inter alia:

> *"(d)-(g) you will note from the enclosed Guarantee and Indemnity that your client's maximum liability was for €3m together with, inter alia, all interest due and owing by CD. On 16 February 2024 demand was also made of CD for the €4m then owed by it. We believe that the tables showing the calculations of the sum demanded of your client are clear.*
> *Your client is the sole director of CD and Mr Ronnie Delaney is neither a director nor shareholder of that company. In any event, you will also note*

[8] *These included the Applicant's solicitors' initial objections in respect of; (a) the service of the particulars of demand; (b) whether the Applicant had executed the Guarantee; (c) whether he was a stranger to the Agreements; and (d) whether the Creditor had previously demanded repayment from the Applicant.*

from the Guarantee and Indemnity that your client's liability to our client is separate to and independent of the liability of CD and that your client is liable to our client as sole and/ or primary obligor.
Your client's position as set out in your letter is untenable and disingenuous and will not succeed in preventing our client from applying for the grant of a Bankruptcy Summons against your client and we are arranging for same to issue in early course."

c. The Applicant's solicitors did not reply to the 16 December letter. However, following service of the Summons on 30 January 2026, the applicant's solicitors' 12 February 2025 letter claimed that it was an abuse of process given the controversy, referring to the December 2025 correspondence and stating:

> *"There is no undisputed debt in this case; and the party asserting a debt must prove that the sums are due. Even on the technical points mentioned in our letter, your client has merely asserted a contrary view - which of itself indicates a dispute.*
> *It is trite to say where there is a dispute, your client ought to ask the Courts to adjudicate on the issue.*
> *However, there are other fundamental issues which highlight the erroneous nature of your client proceeding by way of a bankruptcy summons.*
> *Your client asserts that it lent money to CD. Your client has not explained the purpose of such loans, and for whose benefit those loans were made. We are instructed that no steps have been taken to pursue recovery of the sums from CD. Your client has not explained why it has failed to take steps against CD.*
> *We are instructed that your client is not a "retail credit firm" within the meaning of the Central Bank Act, 1997 and that the sums advanced (of which your client admits €2.3mil has already been repaid) constituted an indirect loan to our client, an individual consumer, which constitutes an offence under that Act by an entity not regulated by the Central Bartle of Ireland.*
> *It is not lost on our client that no steps have been taken to seek to recover the sums from CD. We also note with surprise your client's sworn averment that it has taken "no security or bills or notes for the said debt".*
> *Should your client wish to dispute the fact that it has made an illegal loan, the appropriate course would be for your client to seek Judgment against our client, which please note would be contested by our client."*

d. The Applicant's solicitors' 12 February 2026 response stated that its 16 December letter addressed all points in the 9 December letter, ending the exchange, denying the existence of a bona fide dispute and noting positions adopted in the 9 December letter but not subsequently pursued on this application, such as whether the Applicant ever executed the PG:

"It is disingenuous for you to profess that your client is a stranger to the purpose of the loan made to CD, given that he was at all times and remains the sole director of that company. Keillan Limited is the sole member of that company and our client understands that to be an Isle of Man company of which your client is the ultimate beneficial owner.
With regard to the other points of "concern" raised in your letter, a careful reading of the Guarantee and Indemnity show as follows;
- your client is a principal obligor (clause 2.1);
- your client's obligations under the Guarantee and Indemnity are separate and independent obligations (clause 2.3);
- your client waived the requirement for demand to be made of CD (clause 8.1)
- our client is not obliged to take any action against CD prior to pursuing your client under the Guarantee and Indemnity (clause 8.2);
- your client warranted that he was not a consumer (clause 5.6(e)) and he acknowledged that our client was relying on, inter alia, this Warranty (clause 5.9);
- your client also confirmed that he was fully aware of the nature and effect of the Guarantee and Indemnity and that he had been advised to take independent legal advice and had declined to do so.
For all of the above reasons, your client's attempt to create a "dispute" are without sound basis and not reasonably made or made bona fide.
Our client intends opposing your client's application to dismiss the Bankruptcy Summons and we confirm that we will not present a Bankruptcy Petition pending the determination of that application. However, in the event that your client's application is unsuccessful, as we expect, we are instructed to present a Bankruptcy Petition without delay."

e. An email from Mr Agar to the Applicant on 11 April 2026, shortly before the hearing of this application proposed *"a chat about making a respectable total to deal with your loan to me"*.

Submissions as to illegality

44. The Applicant's submissions suggested that; (a) The Agreements contravene Irish law because s.28 of the CBA (as amended) requires any entity that advances credit to consumers to be authorised by the Central Bank of Ireland (CBI) as a *"retail credit firm"*. The sums advanced constituted an indirect loan to an individual consumer which the Creditor was not authorised to make, rendering the loan illegal and an offence and the debt irrecoverable, especially via bankruptcy (Interest is likewise not recoverable as against an individual under the Late Payment regulations); (b) The true nature of the lending was known and agreed in advance. While a Facility expressed to be for financing a commercial property development would not ordinarily attract retail credit regulation, para. 32 of Mr Egan's replying affidavit undermined that characterisation, establishing that; (i) the stated purpose was not the purpose for which the funds were actually applied; (ii) it was in substance an indirect consumer loan to the Applicant to discharge his personal liabilities; and (iii) CD's interposition as the nominal borrower was a mere artifice designed to disguise the true nature of the transaction; (c) An entity which advances funds to a natural person - directly or through a corporate intermediary - to discharge that person's personal liabilities is engaging in consumer credit activity and such activity requires CBI authorisation. The Creditor had no such authorisation. The contract was therefore void; (d) The Creditor cannot invoke the Applicant's warranty that he was not a *"consumer"*. The substance of the transaction is determinative, not its form. Under Irish and EU law, mandatory statutory consumer protections cannot be waived out of by private agreement; (e) These constitute real, substantial, and credible issues requiring determination at plenary hearing. They are not mere assertions - they are established on the Creditor's own evidence and go to the jurisdiction to entertain the Summons. Section 75(1) of the Act defines provable debts as those arising from *"obligations incurred by the bankrupt"*. A void obligation is not an *"obligation"*; (f) The statutory prohibition of unauthorised retail credit lending is mandatory. A transaction concluded in contravention of a criminal prohibition is void, and no enforceable obligation arises. Debts tainted with illegality or which are otherwise unenforceable are not recoverable, as per *Exp. Hardaway, in Re Lopes* (1882) 6 Morr. 245. Bankruptcy courts refuse to permit the insolvency process to be used to enforce what the general law condemns, as demonstrated by the caselaw cited by the Applicant[9]. The Facility

[9] *The Applicant submitted that authorities spanning from Exp. Ward (1768) to Exp. Maggridge (1791), Exp. Dyster (1816) 1 Mer. 155, Exp. Bell (1813) 1 M & S 751, and Exp. Chavasse (1865) 34 L.J. Bank 17, establish that no judicial imprimatur - including a judgment - can transmute an illegal or void obligation into a provable debt. The Applicant submitted that In Re Savundra [1973] I W.L.R. 1147 and In Re Hurren [1983] I W.L.R. 183 confirmed that a Creditor whose claim derives from a void or unlawful transaction could not prove in a bankruptcy. The insolvency system exists to distribute the debtor's assets among those with enforceable claims; rather than to vindicate claims that the law does not recognise. As the English courts observed, to enforce through bankruptcy that which Parliament has made a criminal act would subvert the public policy which the statute was designed to protect.*

is unenforceable and the Summons is also defective because the sum claimed was not a liquidated sum provable in bankruptcy. A Summons including unlawful elements cannot be described as a claim for a provable liquidated debt.

45. The Creditor's written submissions argued that if the Applicant's position had any substance, it would have been articulated from the outset. Instead, it was framed in shifting and inconsistent terms, evolving as evidence emerged and that the Applicant mischaracterised Mr Egan's evidence (as to CD's actual use of the monies, and the Creditor's subsequent knowledge of that fact) as an admission and the subsequent utilisation as the factor determining the substance of the original transaction but; (a) any contention that the Facility was unlawful because the Creditor knew at inception that it was, in substance, consumer lending, rested on bare assertions contradicted by the documentary evidence. The Applicant had neither produced documents evidencing such awareness, nor had he identified how or when the Creditor acquired such knowledge or who, on the Creditor's side, possessed it; (c) Nor does he offer a coherent explanation as to why, if the true intention was to advance the monies to him personally as an *"individual consumer",* the transaction was structured and documented as it was, a corporate facility for a tightly defined purpose, expressly *"not…available for any other purpose,"* and implemented by way of a further documented intercompany loan by CD to Blue Whisp; (d) Any submission that the Facility became unlawful because the Creditor learnt after inception that the monies had been used for other purposes was untenable (citing *Bank of Scotland v. Hickey* [2014] IEHC 202 *(Hickey)*). The borrower's obligations arose at inception; any subsequent misapplication of the funds would not affect the Facility's validity. The Creditor's rights could not be unilaterally altered or varied by the borrower's conduct. Accordingly, the alleged misapplication cannot free the Applicant from liability under the PG; (e)The illegality argument also ignored the indemnity, which survives any alleged illegality and the illegality claim is addressed by the PG's terms. The Applicant assumed a primary liability and, under clause 7(l), agreed that his liabilities would be unaffected by, inter alia, any illegality or unenforceability issue in respect of CD's obligations. Accordingly, even if the Facility was illegal, it would not relieve him of liability; (f) The Applicant's position is also internally inconsistent, including his assertions in respect of discussions between the Creditor and CD; (g) His claim to be a consumer is unsustainable. His attempt to resile from his warranty that he was not such a consumer is unavailing, as he has not identified any consumer purpose to which the loan monies were, in fact, applied. In any event, in the absence of evidence that the Creditor advanced a personal loan to the Applicant, the issue does not arise: he was a surety in a commercial transaction; (h) Although not referenced in his written submissions, the Applicant's third affidavit suggested that the mechanics by which the loan monies were transmitted via Ingaro gives rise to a defence. He asserts that the Intra-Group Facility was *"never implemented",* and that *"the Creditor cannot rely on documentary formalities to characterise the transaction as commercial when its own evidence confirms those formalities were never implemented."* Although he asserts that the significance of the *point "cannot be overstated,"* it was not stated at all in pre-action correspondence, nor in his first two affidavits. The argument was advanced after Mr Agar explained the transaction's mechanics - matters already within the Applicant's knowledge. It is immaterial that monies were paid to Ingaro. What matters is that CD incurred the repayment obligation, irrespective of how funds were remitted. Such arrangements to advance monies at a borrower's direction are routine in banking transactions and do not alter its liability.

Section 6: The Plenary Proceedings

46. The Applicant relies on the Plenary Proceedings as evidence of an issue for trial. Their context should be noted:

a. In February 2024 the Creditor served letters of demand on the Applicant and CD, threatening winding up proceedings against the latter (inappropriate if the liability was genuinely disputed). The recipients did not dispute the validity of the demands or the Agreements. Instead, the Applicant furnished the Keillan undertaking which duly resulted in substantial, albeit partial, payments.

b. On 24 November 2025, the Creditor served the Particulars on the Applicant, notifying him of the intention to seek to issue the Summons in respect of the outstanding balance, provoking the December 2025 correspondence, apparently the first occasion on which the Applicant disputed liability, (albeit on grounds somewhat different to those now asserted) and also the Applicant's first threat of litigation. He contended that the Creditor should not pursue bankruptcy proceedings until the issues had been adjudicated. The Creditor's solicitors replied promptly and robustly, making its intentions clear.

c. There was no further correspondence until after the Summons was issued on 26 January 2026 prompting a reiteration of the Applicant's solicitors' objections which the Creditor gave short shrift. The Applicant's affidavits continued to threaten proceedings and it eventually did so, serving them after the exchange of submissions on this application.

47. At the hearing, I asked the Applicant's counsel whether the Applicant would apply to admit the Plenary Proceedings to the commercial list. He did not intend to do so but accepted that he should seek case management directions in the Chancery list. In the event, after the hearing before me, the Creditor, the defendant in the Plenary Proceedings, successfully applied for their admission to the commercial list on 13 May 2026. Sanfey J. gave case management directions with the matter next listed for mention for discovery directions on 12 October 2026. The defendant observed that it, rather than the plaintiff, was pressing to get the proceedings on.

48. The Statement of Claim landed on the morning of the hearing before me. It largely replicated the Applicant's affidavits, generally without providing further particulars of key issues (such as how and when each party learnt how the funds had been applied). It did advance assertions which differed from the Applicant's affidavits (such as the unparticularised (and unverified) suggestion in para. 8 that the Applicant was unaware of the transfer of the funds to Ingaro and their diversion from the Pinnacle development, a surprising claim in view of his pervasive role. I have ignored claims which were not made in the Applicant's four affidavits.

49. There is no need to summarise numerous pleas in the Statement of Claim which mirrors the affidavits. Its gist was as follows:

> *"8. On notice, and with the agreement of the Defendant, the funds advanced under the facility were not applied to the stated purpose of the Facility Agreement. Contrary to the terms of the Facility Agreement, the funds were not transferred to Blue Whisp. Instead the funds were transferred to in Ingaro Ltd a different company in the McKillen group, for its use and application.*
> *9. The defendant was on notice and aware at all material times of the funds advanced under the Facility had not been transferred to Cool Dust for its onlend to Blue Whisp. In his what message on or about 16 September 2024 to the plaintiff, the defendant's shareholder, Mr David Agar stated; "the reality is that the money I lent you was supposed to be used to finish the Pinnacle in a short space of time… It is very evident that the money was simply used to shore up other issues in the group.*
> *11. In circumstances where the funds advanced were not applied to the stated purpose of the Facility Agreement, the Facility Agreement does not reflect the true nature and substance of the transaction. The Guarantee was null and void ab initio.*
> *24. The legal character of a lending transaction is determined by its substance - what the transaction actually was - and not by the formal documentation or the labels used to describe it. The substance over form has specific application in the context of consumer credit legislation. The purpose of, inter alia, the Central Bank Act, 1997 would be entirely defeated if an unregistered lender could avoid its obligations under that provision by the device of routing consumer credit through a corporate vehicle controlled by the individual who is, in substance, the person to whom the credit. Is being extended.*
> *25. In advancing funds to Cool Dust for the use and benefit of the Plaintiff personally and/or for the purpose of paying the personal and group obligations of the plaintiff and/ or his associated companies, the defendant was, in substance, carrying on the business of a retail credit firm in respect of an individual consumer without the required authorisation, contrary to, inter alia, the Central Bank Act 1997.*
> *26. The funds advanced under the Facility were by agreement and notice not applied to the stated commercial purpose (the on lending to Blue Whisp for the Pinnacle development) but were, as confirmed in the sworn affidavit evidence of the defendant's own representative, instead used to pay liabilities of the Plaintiff and/or other Plaintiff companies;*
>
> > *(a) The defendant's own representative confirmed in correspondence that the monies was were "simply used to shore up other issues in the group";*

(b) The interposition of Cool Dust as nominal borrower did not alter the substance of the transaction, which was in effect the extension of credit to or for the benefit of the plaintiff, an individual;
(c) The defendant was at all material times aware, at latest by September 2024, that the monies had been applied for the benefit of the plaintiff and/or his group companies, and continued to enforce transaction notwithstanding that awareness;
*(d) On or about 11 April 2026, after he has sworn his own replying affidavit in the bankruptcy proceedings, the defence shareholder Mr David Agar sent a WhatsApp message to the plaintiff in which he stated that the plaintiff should "have a chat about making a respectable total to deal with **your loan from me"** [emphasis added] the phrase "your loan from me" is a contemporaneous admission, made after the swearing of Mr Agar's own affidavit, that the defendant's representative understood the loan to have been advanced to the plaintiff personally, and not as part of a business to business commercial transaction.*
27. The substance of the transaction was a transaction that was structured as a corporate facility that was in fact applied for the benefit of an individual, to the knowledge of the lender, within the scope of the section regardless of the form in which it was documented."

50. The Plenary Proceedings and the Statement of Claim may have been more compelling if they had been initiated (or even threatened) earlier, in response to the February 2024 letter of demand, and pursued vigorously. In that scenario the issues could have been resolved before now. Delays in pursuing a claim rarely enhance its credibility or prospects. The Creditor's suspicion that the proceedings are an attempt to stall the statutory bankruptcy process does not seem entirely fanciful; it was left to the Creditor to seek admission to the Commercial List (although perhaps the Applicant was concerned that such an application would contradict his premise that this was not a commercial transaction). Furthermore, the Creditor seems to have shown more concern than the Applicant to progress the latter's claim. For all the Applicant's protests that the statutory bankruptcy process should be halted to allow him to litigate his claim, he does not seem anxious to get on with it. That said, absent limitation or want of prosecution issues, limited delays in launching or progressing proceedings are generally not fatal (although they may, inter alia, impact on the reliefs available if the claim succeeds). In reality, until the Creditor served the Particulars in November 2025 as a precursor to bankruptcy proceedings the Applicant had little incentive for to commit resources to issuing proceedings to seek negative declarations. Accordingly, I do not attach undue weight to the Creditor's concerns about the timing of the issuing and serving of the Plenary Proceedings and the Statement of Claim.

51. I have the following conclusions on the substance of the proceedings:

a. although the Applicant's oral submissions largely focused on the Statement of Claim rather than his affidavits, its contents (which, as I have noted, sometimes went beyond the affidavits) were not verified on affidavit. Accordingly, they have scant evidential value save for showing the basis on which the Applicant now pleads his case. Unsubstantiated assertions add nothing.

b. Remarkably, the Statement of Claim raises much the same claims as those ventilated but still without providing particulars to address key lacunae in the affidavits. It thus detracts from the credibility of the Applicant's position, failing to respond to the Creditor's affidavits by offering meaningful particulars of pivotal pleas. For example:

    i. the pleading (like the Applicant's affidavits) is opaque as to how and when either party learnt of the loan monies' actual fate – para. 26(c) states that *"at all material times and at the latest by September 2024"* the Creditor knew that the monies had been applied for the benefit of the Applicant and/or his group companies and nevertheless continued to enforce the transaction. That paragraph rides two horses - the September 2024 reference suggests that the Creditor may have learnt of the monies' actual fate long after the event, contradicting the Applicant's simultaneous use of the phrase *"at all material times"*. This matters because, if the Creditor only learnt after the event, the Applicant needs to contend that belated awareness of the alleged diversion of the funds changed the nature of the Agreements executed two years earlier. The basis for any such contention is not explained.

ii. The Statement of Claim repeats the affidavits' curious practice of using the passive voice to ambiguously reference responsibility for actions as if they occurred independently of any agency on the Applicant's part; in fact, such steps must presumably have been instigated by the Applicant and his colleagues. For example, his second affidavit says that the Facility was *"prepared for the Creditor"* presenting CD as a borrower and the Applicant as guarantor. If such language was taken to suggest that the structure was at the Creditor's instigation, that contention is belied by Mr Tuite's email. The Applicant's curious phraseology sidesteps his and his colleague's responsibility for the documentation and the structure. For example, para.18 of his third affidavit acknowledged signing the Facility as CD's director, warranting the intended use of the Funds, but said:

> *"However, that warranty was as a matter of fact not honoured - the funds went to Ingaro, not Blue Whisp. The Creditor never enforced the purpose covenant. It never required Cool Dust to apply the funds to the stated purpose. It accepted the arrangement whereby the funds were transferred to Ingaro without objection. A creditor who accepts a deployment of funds entirely different from the stated purpose, without objection, cannot subsequently rely on the stated purpose in that document to characterise the true nature of the transaction."*

c. Although the Statement of Claim (like the Applicant's affidavits) repeatedly asserts that the real intention was to provide an indirect loan to him personally, he still does not clarify whether this was his intention, the Group's or the Creditor's. Nor does he satisfactorily explain the basis for any such assertion or the reason for the structure adopted.

52. The Applicant drew my attention to the Creditor's defence and counterclaim served in the Plenary Proceedings after the hearing before me. It does not affect my conclusion as to whether there is a real and substantial issue. I see no inconsistency between the Creditor's position on this application and its counterclaim.

53. In the circumstances, the Plenary Proceedings and the pleadings therein do not establish a real and substantial issue for trial. A different conclusion might have been warranted if meaningful particulars had been furnished and verified on affidavit. Nor, for the same reasons, do I consider that the mere existence of the Plenary Proceedings is relevant to the exercise of my statutory discretion under s8(6)(a). In their circumstances their existence does not render the bankruptcy proceedings an abuse of process.

Has the Creditor made admissions as to the illegality issue?

54. The Applicant says that statements in communications from Mr Agar and on affidavit confirm the Creditor's awareness that the loan was an indirect loan to him personally rather than a commercial loan to complete the Pinnacle development. The communications were:

a. **Mr Egan's 27 July 2023 email to the applicant**

> ***"Subject: Herbert Street Property Finance loan to Cool Dust Ltd***
> *I refer to our meeting last week wherein you advise me of the progress on your hotel deal, which is great news.*
> *You suggested you had a plan to pay back €1 million of our 3 million 3M loan to you, from the proceeds of the transaction.*
> *Having considered the matter, I'm afraid I have to advise that I cannot work without proposal and must insist on repayment in the sum of 3 AM from your proposed sale of the hotel business, which I understand is due for signing by July 31.*
> *As things stand, none of the undertakings were given at the outset and that we had relied on, have materialised and realistically I feel the completion of the hotel transaction is the only real possibility you may have of repaying this loan.*
> *Furthermore, the political development has not delivered as suggested and in current market conditions I feel it might only be in a position to repay Castle Haven.*
> *I am prepared to wait for the agreed dividend of 1 million on the loan and I'm prepared to take an apartment in lieu.*
> *I trust you appreciate my position, which is not up for negotiation and that you can confirm that you will make arrangements for this to happen on the closing the hotel transaction, which I understand is scheduled for September."*

b. **Mr Agar's 16 September 2024 Message**

Before noting the Message from Mr Agar on which the Applicant relies, it should be noted that it was sent in response to the Applicant's message at 17:33 on the same day in the following terms:

> *"Hi David, I can't believe you threatened to try and put a lean on Edel's house. We have known you all my adult life, my dad has known you for over 40 years. You have been through a very tough time yourself with Nama for years and I rooted for you the whole way, you weren't even going to take a personal guarantee on the loan at the start because you know we are good for it [confirmed]. ... We've sold the hotels. I paid you back 2m from that, we've done the deal with Cheyne which is a mega deal for everyone. Your money you lent was for Mount Merrion. it just started back on Friday with enough funds to finish it…We need your support. I told you I would never let you down. Can you please stick with the deal you did with ronnie. We will really reward you on the apartments very soon. Please don't try and kill me when im going through the final stages of having everything sorted. Please"*

Mr Agar's response at 20:03 stated:

> *"<u>The reality is the money I lent you was supposed to be used to finish the Pinnacle in a short space of time.</u>*
> *<u>It is very evident the money was simply used to shore up other issues in the group and the Pinnacle is still a long way off being finished and sold.</u>*
> *With Castlehaven having to be sorted first I can't see how you can give me any comfort from that asset in the short term*
> *My problem is I have no real security for my money and the vultures appear to be closing in on your various indebtedness and I can't afford to be left at further risk.*
> *I have consistently asked for some concrete Tangible undertakings to secure my risk, but none have yet been tabled !*
> *I don't know what other personal guarantees you have given, which puts me at strong risk of someone else getting in ahead of me*
> *Unless you can come up with a solution post haste, you are pushing me down a road I certainly don't want, but am advised that it is my only option, in the absence of an alternative!*
> *The fact that you saw the need to transfer your house to your wife's name only a short while ago, and clear the debt on it, is evidence of your desire to put it out of reach of your lenders.*
> *Can you please come back to me urgently if you feel you can propose a real solution as my solicitors are pushing for instructions!"* (emphasis added to highlight passage relied upon by the Applicant)

c. On 11 April 2026, a month before the hearing of this application, Mr Agar sent the applicant a Message to the following effect:

> *"hi Paddy, while you are away with your dad in La Coste, you might have a chat about making a respectable proposal to deal with your loan from me,*

rather than continue with your ridiculous and insulting claims, which is far from what I expected from you guys!"

55. The affidavit references relied upon by the Applicant were as follows:

a. The last sentence of para.32 of Mr Egan's affidavit (Paragraph 32). The full paragraph reads as follows:

> *"It is also surprising that Mr McKillen junior should seek to criticise the Creditor for not explaining "the purpose of such loans, and for whose benefit those loans were made." These are facts which are well known to Mr McKillen junior given that he was, and remains, the sole director of the Company. In any event, as is apparent from clause 3 of the Loan Agreement, the funds were advanced to finance the completion of a development known as the Pinnacle in Mount Merrion. However, I understand that the funds were instead utilised to pay other liabilities of Mr McKillen junior and/ or other companies of his".*
> (Emphasis added to highlight passage relied upon by the Applicant)

b. Paras 18-19 of Mr Agar's affidavit, the second (and last) affidavit on the Creditor's behalf, which stated that although the Applicant's 11 October 2022 Message had confirmed that he would use the Facility to *"finish the build"* on the Pinnacle project, he, Mr Agar subsequently discovered that the Applicant did not in fact use the moneys for that purpose, referring to his 16 September 2024 Message to the Applicant as confirming the position in that regard.

56. The Applicant's second affidavit suggested that Paragraph 32 effectively admitted the illegality and overstatement defences:

> *"… Mr Egan makes a startling and fatal admission on behalf of the Creditor: he swears that:-"I understand that the funds were instead utilised to pay other liabilities of Mr McKillen junior and/or other companies of his.*
> *This is not a new "understanding" and the Creditor knew at the time of the funding that this was the position and in fact, the Creditor never transferred the loan sums to Cool Dust Limited ("CD"). I say and believe this admission demonstrates that the Creditor knew it was advancing credit to an individual consumer (myself)."*

57. Mr Agar's affidavit responded that the Applicant mischaracterised Mr Egan's affidavit which dealt with the subsequent use of the funds and passage made the opposite point to that contended for by the Applicant, confirming that the Facility was advanced on a

> *"defined and legitimate commercial basis, namely to assist with the completion of the Pinnacle development, and it only subsequently transpired that the monies were used for other purposes".*

58. Although the Applicant relied on Mr Agar's 16 September 2024 Message as demonstrating the Creditor's awareness that the monies advanced were not used for their ostensible purpose, his own email at 17:33 that day is difficult to reconcile with his current stance. The Applicant's Message reminded Mr Agar that *"Your money you lent was for Mount Merrion, it just started back on Friday with enough funds to finish it",* contradicting the Applicant's claim as to the intentions when the Agreements were executed. When read in context, far from suggesting that the Creditor knew that the funds would be used for other purposes, the exchange of messages demonstrates Mr Agar's (predictable) concern that the funds were not used as agreed.

59. I cannot see any basis to interpret Mr Agar's 16 September 2024 email or the affidavit references as the Applicant contends. On their face, they do not endorse the ultimate use of the loan monies, nor do they suggest that the Creditor accepted that the monies would be used for other purposes. Furthermore, the 16 September 2024 email evidences the parties' then understanding that the funds were ultimately used to meet *"the Group's other funding issues"* – there is no suggestion that they were used to fund the Applicant's personal, private or consumer commitments as the Applicant now suggests. If that had been the case the parties might have been having a different conversation.

60. I see no reasonable basis to interpret the 16 September 2024 email or paras 32 and 19 as admissions. They do not support the contention that the Creditor knew when it advanced the loan monies that the funds would not be used as agreed. Nor do they suggest that the Creditor regarded the Facility as an indirect loan to the Applicant or the assertion that the transaction structure was *"an artificial device sought by the Creditor designed to suggest a sidestep mandatory consumer protections".* To the contrary, it appears from the affidavits, as from the

Messages in context, that the Creditor was unhappy that the monies had been used for a different purpose – it was presented, after the event, with a fait accompli. Far from acquiescing, Mr Agar was complaining and his complaint followed the Applicant's own acknowledgement in his earlier Message, contradicting his current position, that the Facility was intended to be used *"to finish the Pinnacle in a short space of time"*.

61. Nor is it reasonable to interpret Mr Agar's 11 April 2026 message as an admission that the loan was an indirect loan to the Applicant personally. I do not consider that the Message reasonably bears such a construction. This argument appears to hinge on Mr Agar's reference to *"your loan"*. The Applicant also highlights similar wording in a belatedly exhibited email dated 27 July 2023 evidenced the Creditor's acceptance that the loans were to the Applicant as an individual. While the text followed the closing of the affidavits, the email could have been produced earlier. The Applicant explained its belated production as resulting from a review of his emails in the light of the text but it is striking that that email was the only document identified from that review of his emails and text messages, a meagre return from a review of several years' communications.

62. In any event neither document reinforces this application. The Applicant does not explain the email's subject heading - *"Herbert Street Property Finance loan to Cool Dust Ltd"* which seems inconsistent with the applicant's contention. He hangs his hat on the use of words such as *"you"* and *"your"* in these two communications, arguing that they show that the Creditor saw the loans as a personal loan to him. I am not satisfied that that is a reasonable characterisation of either communication, when read in context. Such expressions seem more likely to refer to *"you"* plural or *"you"* as in the Group which he controlled and represented, or *"you"* as in all the principals behind the Group, the *"partners"* referenced in Mr Agar's September 2023 email. When the full text of the email is considered it simply does not support the Applicant's construction. Nor does the text advance matters. Other communications tell a different tale. For example, the parties' understanding also appears from an exchange of messages on 16 -18 September 2023 when, in response to the Applicant's invitation to meet for coffee, Mr Agar said:

> *"Hi Paddy.*
> *Happy to meet up, but not to be told of a plan that entails me waiting in the wings for some other event to cash in !*
> *I have a huge amount at stake here, which I gave you in good faith, when you needed it and now need it back.*
> *If we are meeting I want Ronnie Delaney or Liam Cunningham there to as I don't want anything lost in translation afterwards to your partners !"*

63. The Applicant's reliance on *"you"* is a strained interpretation which fails to offer a sufficient foundation for asserting awareness on the Creditor's part that the transaction was a sham. In any event, it is artificial to parse informal communications between two businesspeople (particularly the 11 April message) in the same way the Court would interpret formal contracts or lawyers' letters. Such communications must be read holistically and in context and, having done so, I could attach rather greater significance to the Applicant's own persistent (but unexplained) use of the words *"we"* and *"us"* in his own Messages to Mr Agar. To take just one example, his 1 November 2022 message to Mr Agar started as follows:

> *"We will give you €1m back from either the Dean or the Stella which ever closes first, we will give you another 500k from whatever closes next, and then we will give you another €1m from the hotel management company sale to Hyatt."*

64. Accordingly, I do not consider that the Applicant's interpretation of the two paragraphs and the communications is tenable; I do not regard them as admissions reinforcing the Applicant's case.

Issue 1 - Were the Agreements illegal?

The Context of the Illegality plea

65. The dispute concerns the disputed significance of undisputed facts (such as the pre-execution advances and the transfers to Ingaro). Actual details of advances and repayments are common ground. There is no arithmetical dispute in the affidavits; the objections are matters of principle. Nor, based on the evidence does there appear to be any real ground for controversy as to the facts that; (a) the transaction was negotiated by, on the one side, the Applicant and, on the other, by Mr Agar; (b) the Applicant and Mr Tuite proposed the loan should be from the Creditor to CD, a special purpose vehicle nominated by the Group; (c) the Creditor advanced the principal in four tranches, transferring it to Ingaro, on the Group's instructions; €1.25m was advanced, apparently at the Group's request, before the Agreements were signed and this was evident from the Agreements themselves;(d) €2.3m was repaid to the Creditor - €2m on 5 March 2024 by Keillan and €300,000 paid on 1 November 2024 either by Keillan or CD itself. Nothing turns on which company made that payment. (The Applicant objects to the fact that the Creditor first allocated these payments against interest and then against principal); (e) There was no suggestion that the Applicant was naïve, unsophisticated or subject to undue influence or that he did not understand the significance of the commitments to which he agreed to on both his own and CD's behalf; (f) The Applicant played a pervasive role. He executed the Agreements, on his own behalf, as CD's director and as Keillan's director. He directed their creation. He executed the Intra-Group Loan Agreement for both parties (CD and Blue Whisp). He signed the Keillan undertaking which resulted in substantial payments to the Creditor in respect of the amounts claimed under the Facility.

66. The following PG terms are significant; (a) In clause 2 the Applicant covenanted to pay as principal obliger, not merely as surety and to guarantee payment on demand of all sums due from CD, including interest. Clause 2.3 reiterated his commitment *"as sole or primary obligor and not merely as guarantor or surety"* and that any money which may not be recoverable from him qua guarantor should nevertheless be recoverable from him as a principal; (b) Clause 3 limited his liability under the PG, which seems inconsistent with the suggestion that the transaction was an indirect loan to him. I have disregarded that point as it was not pressed in submissions; (c) The Applicant warranted under clause 5.6 that he was not a *"consumer"* within the meaning of the various enactments; (d) The Applicant confirmed his full awareness of the nature of the PG, *"the effect of which has been explained to and understood by him",* noting that he had been advised to take legal advice.

67. The following aspects of the Facility are particularly relevant; (a) the Applicant signed in his own right, but also for CD, *"the Borrower";* (b) Clause 2 provided for the Creditor to advance €3m in tranches. The language of both Agreements reflected the fact that monies had been advanced before the documents were executed; there was no room for confusion as to the position; (c) Clause 10.3 identified the purpose as to enable CD to provide an intercompany loan to Blue Whisp to assist with building costs associated with the Property (Pinnacle), stating that the Facility should not be available for other purposes; (d) The Agreements and contemporaneous correspondence expressly refer to (and mention commitments in respect of) Group Companies and projects, including, in addition to CD and Pinnacle, Keillan, Blue Whisp, Drew Point Limited, Warlington Key Limited, Holtend Limited tied into the completion of the Pinnacle Development and the discharge of the associated Castlehaven debt and, apparently the possible realisation of other Group assets such as the Stella, Press Up Management Limited and the Dean Hotel; (e) The Facility obliged the Applicant and CD to furnish copies of governance documents, confirming their authority to enter into the transaction, including board resolutions confirming, inter alia, that entry into the Finance Documents was in CD's commercial interests.

68. For present purposes, I accept the Applicant's arguments that in principle (while each case depends on its circumstances): (i) unlawful debts may not be provable in bankruptcy; (ii) the Court will look to an Agreement's substance; and (iii) parties may not be able to contract out of mandatory Irish and EU protection if one party is in fact contracting as a consumer. Because the Applicant's case depends on maintaining that the loan expressed to be to CD was in fact an indirect personal loan to him, the case raises basic principles of company law. Since at least the 19th-century, many businesspeople have chosen to conduct their enterprises through limited liability corporations. Potential benefits include the ability to issue or sell shares to raise capital or transfer equity, tax advantages and the ability to insulate principals from personal exposure if the enterprise founders. As with most significant legal decisions, there are also downsides, one being the fact that companies generally do not benefit from statutory protections extended to natural persons contracting as consumers. In any event, the fundamental tenet of company law is that the company is an independent legal entity; its legal personality is distinct from its owners; it can engage in legal transactions on its own behalf. A limited liability company's shareholders are generally[10] not personally responsible for its debts. Those responsible for a company's management and control (its directors and managers) owe it fiduciary and statutory duties; they must regulate its affairs in accordance with law and with its constitutional documents, they must maintain proper books and records and prepare statutory financial statements which properly reflect its affairs and they must act, and ensure that the company's assets are employed, in its own interests (as defined in s228 of the Companies Act 2014) rather than treating the company as their own alter ego or that of the principals. Although such uncontroversial principles were not the subject of submissions, it is as well to highlight key points emerging from legal texts and authorities. As *Keane on Company Law* (6th ed., 2024) observes:

> *"[11.01] A company registered under the Companies Act 2014 is an artificial legal entity separate and distinct from the members of which it is composed. This central principle of company law has several important consequences, not least that where the liability of the members is limited, they cannot, save in exceptional circumstances, be required to pay the company's debts."*

69. Keane cites Lord McMacNaghten's seminal judgment in *Salomon v Salomon & Company Ltd [1897] AC 22* at para. 51 that *"the company is at law a different person altogether from the subscribers to the memorandum"*. The principle was more recently applied by the

[10] *There are exceptions, including when, as in this case, they have provided a personal guarantee or indemnity.*

Supreme Court in *Allied Irish Bank v Aqua Fresh Fish Ltd* [2018] IESC 49. Finlay Geoghegan J described the company as *"an artificial person with separate legal personality distinct from its shareholders and directors"* and by the UK Supreme Court in *VTB Capital Plc v Nuritek International Corp & Ors* [2013] UKSC 5, in which it declined to hold a controller liable as a co-contracting party to contracts entered into by companies under his ownership and control because it would be inconsistent with *Salomon* to do so. *Keane* concludes, rightly in my view, that *"the rule in Salomon's case is still the law",* and that recent caselaw from Ireland and the United Kingdom reveals *"a decided concern from the judiciary"* that exceptions *"must remain limited and rare".* There are statutory exceptions[11] but none appear applicable.

70. Under common law, the courts will not allow the corporate veil to be used for fraudulent, improper or illegal purpose, and have, for example, inferred relationships of agency or trust between group companies to avoid injustice. Furthermore, while the separate legal personality of companies is a long-established tenet of Irish company law, on rare occasions the Courts have concluded that their deployment was a sham. Such challenges to the corporate veil were generally at the behest of parties who were strangers to the structure adopted, which is not the case in this instance. *Harlequin Property (SVG) Ltd v. O'Halloran* [2013] IEHC 362 is one example of such a case.

71. The Applicant has not produced credible evidence which could justify piercing the veil or declaring the Agreements a sham. Although the nature of his interest was not disclosed, it appears that he is or was a key stakeholder in the Group and a director, if not the sole director of the Group companies which were most involved in the events giving rise to these proceedings. In that sense he might well have stood to suffer from the Agreements, just as he and other shareholders would have benefitted from other successful transactions in which

[11] *In particular, the Companies Act 2014 empowers the courts to impose responsibility for company debts on directors and others where; (a) proper accounting records have not been kept (s609); (b) an opinion as to insolvency has been stated in a declaration of solvency without reasonable grounds (s210); (c) a company makes an improper purchase of shares in a holding company (s115); (d) an arrangement between the company and a director has contributed materially to the company's insolvency or has impeded an orderly winding up (s247); (e) a company is wound up having carried on business in breach of a restriction order (s836).*

Group companies engaged. However, that alone cannot suffice to change the substance of the transaction or render the use of an SPV a sham. It might equally be true to say that Mr Bezos would be an indirect beneficiary of a significant refinancing of Amazon but that would not render its corporate refinancing a consumer credit transaction or a personal loan to Mr Bezos.

72. Although the Applicant queries the use of CD, a newly established shell company, as the borrower, it seems difficult to fathom the basis for the objection. On their face, the arrangements reflected in the Agreements appear unremarkable and I expect that the Group would have adopted many similar structures over the years. The structure of the transaction was at its instigation, and I have seen no tangible evidence suggesting any basis to regard such arrangements as anything other than a commercial property finance transaction. Anyone with a basic familiarity with commercial lending transactions will find it unsurprising that the Group employed a SPV to raise funds to be deployed by other group companies. Such structures are not uncommon, presumably driven by tax and liability concerns. Nor is it surprising that the Group volunteered the Applicant's PG. Such a substantial loan would have been required some form of security. The rationale underpinning such a PG is typically twofold. Firstly, it provides security, although, in this case, not for the entire debt. Secondly, it shows good faith, demonstrating the guarantor's confidence in the borrower's ability to repay and the guarantor's personal commitment to ensure that that happens, his commitment by putting his or her own wealth on the line rather than sheltering behind the corporate veil. To that extent the structure adopted is the antithesis of the indirect loan posited by the Applicant; the creditor agreed to provide a loan to an SPV at his behest but only on the basis of the Applicant's (limited) personal guarantee to protect the Creditor if CD defaulted.

The Purpose of the loans

73. The Applicant must establish a real and substantial issue to the effect that the parties intended when executing the Agreement that the loan should, in substance, be a personal loan to him as a consumer. However, the contemporaneous communications and, more importantly, the Agreements themselves, contradict any such assertion; they suggest that the loan was an attempt to secure bridging finance to complete the Pinnacle development so as to allow the Group to trade out of its difficulties. The Applicant's own communications when the Agreements were negotiated and executed and, indeed, thereafter, assured the Creditor that the monies would be used *"on the Pinnacle", "in Mount Merrion"* or *"to finish the build"*.

74. The Applicant's third affidavit explains such communications on the basis that in 2022/2023 (i.e. before and after the execution of the Agreements and the advance of the funds) he believed the funds would be used to complete Pinnacle. Accordingly, his contemporaneous understanding mirrored the December 2022 Agreements, making it difficult to understand why they were a sham and why the Creditor should have anticipated a different use of the funds. If the Applicant expect that he and his colleagues would use the monies for Pinnacle it is hard to see why the Creditor should have anticipated their subsequent, unexplained change of tack. Accordingly, the Applicant's justification for his own Messages undercuts his assertion *"that the true, personal nature of this loan to an individual was at all times discussed and known"*.

The actual utilisation of the loan monies

75. The Applicant's submissions characterise *"the actual utilisation of the funds - namely the discharge of the Applicant's personal liabilities"* as conclusive. However, the evidence does not establish that the funds were used to discharge his personal liabilities and in any event the actual utilisation would not retrospectively change the legal nature of the transaction. Any argument which relied on the Petitioner's subsequent knowledge of the utilisation of the funds is untenable. If a bank advances funds for house extension which the borrower employs to travel to the world cup, the borrower's unilateral actions cannot alter the basis for which the loan was tendered. *Hickey* confirms that the use of loan monies for purposes other than those specified in loan documents can not alter the parties' obligations.

76. The repayment obligation arose from the Facility; the subsequent diversion of the funds may be a breach of covenant by the borrower, but it does not affect the existence or enforceability of the underlying debt. Nor does the Creditor's ex post facto awareness of the actual fate of the loan monies alter the position unless it agreed to vary the contractual position - the evidence does not support any such proposition; the Creditor objected to the *fait accompli*.

Responsibility for the Transaction Structure

77. The Applicant's illegality submissions stray beyond the evidence and beg many questions, with para.38(c) stating that *"CD's interposition as the nominal borrower was a mere artifice designed to disguise the true nature of the transaction"*. The submissions do not say who was responsible for the *"mere artifice"* or why they resorted to it, a striking omission as the transaction documents were prepared by the Group on the Applicant's instructions and CD's introduction was his initiative according to Mr Tuite's 16 October 2022 email.

78. I do not agree with the criticism of Mr Egan's affidavit for not explaining the Facility's purpose or for whose benefit the loans were made. The Agreements are clear as are the contemporaneous communications and the Creditor has made its position clear on affidavit. It is the Applicant who failed to offer a coherent explanation of the basis on which he impugns the Agreements. He asserts that the loan constituted an indirect loan to him as a consumer without satisfactorily explaining how the position was other than represented in the Agreements (and his contemporaneous communications), the basis for that assertion or the responsibility for the false representation of the transaction in the documents prepared on his instructions and in his own communications. The evidential value of broad, unparticularised and unsubstantiated allegations is not enhanced by reiteration alone.

79. For example, the Applicant's second affidavit did not effectively engage with Mr Egan's challenge to explain his position, simply reiterating that the transaction

> *"was solely due to the fact the alleged loan being advanced by the Creditor was intended to be an indirect loan to me. While the structure of the Facility Agreement refers to the sums passing from the Creditor to CD, the alleged loan was effectively made directly or indirectly to me".*

80. Such averments do not sit well with the fact that the Applicant executed the Agreements on 22 December 2022 on his own behalf (and, in the case of the Facility, on CD's behalf as its sole director) and that, in response to the February 2024 letters of demand, he executed the undertaking on behalf of Keillan in favour of the Creditor. Nor, as I have noted, can they be easily reconciled with his third affidavit's averment as to his own state of mind when the Facility was being negotiated.

Would the Facility have represented the advance of consumer credit in any event?

81. The Applicant also assumes that, if the Facility was, in substance, an indirect loan to him as an individual, then it necessarily represented the advance of consumer credit. However, he did not substantiate that assumption. As his own submissions acknowledged, the Facility's stated purpose according to the Agreements would not constitute consumer lending. Furthermore, despite the Creditor repeatedly raising the issue, the Applicant failed to explain the purposes for which the monies were actually used. It was not suggested that all loans to individuals necessarily constituted unauthorised consumer lending. Nor was it explained why, even if the loan was to the Applicant as an individual, it fell within the various enactments' definitions concerning the advance of credit to consumer. Even if in substance the loan was an indirect loan to the Applicant (and I do not consider that the Applicant has established that premise), he has not established a real and substantial issue to the effect that it would be a consumer loan having regard to the statutory definitions.

82. The situation could be different if, for example, there was evidence that the Facility was intended to finance the Applicant's acquisition of a dwelling or a yacht for his personal use or for some other domestic or private purpose, and that both sides knew that that was the reality of the transaction but disguised it as a company expense. Such evidence might well assist his illegality claim (while spawning significant tax and governance issues). However, the contemporaneous evidence shows that the objective of the loans was to complete Pinnacle and other developments to enable the Group to meet commitments to its creditors. On their face the Agreements reveal the interrelationship between the loan and the Group's ability to meet its various projects and commitments. The evidence does not establish a real and substantial case that the transaction's substance differed from the terms of the Agreements, still less that it was a disguised consumer loan. Contemporaneous documents such as, for example, Mr Tuite's 16 October 2022 email and the Applicant's 11 October email were consistent with the Agreements in respect of the purpose of the loan. The Applicant's fundamental proposition, that the loans constituted unlawful indirect personal loans to him as a consumer, hinges on broad assertions and strained interpretations, contradicted by overwhelming countervailing evidence. The credibility of his position is also undermined by deafening silence in respect of obvious questions arising not only from the contemporaneous documents and the terms of the Agreements but also from his own evidence.

83. The inconsistencies in the Applicant's position include:

a. the evolution of his position as to the validity and purpose of the loan and the way the loan monies were paid. His explanation that he only learnt of such points from the replying affidavits is hard to credit. Given his pervasive role and statutory responsibilities, he should have been aware that the loan monies were furnished to Ingaro and deployed at the Group's direction. Secondly, I disagree with the suggestion that the development of the Applicant's position could have been the result of *"the startling factual admissions"* in Mr. Egan's affidavit. I do not consider that there were any such admissions nor any information which would not already have been within the Applicant's own knowledge. Thirdly, his reliance on the replying affidavits as first alerting him to such matters begs the question as to the basis for previous assertions that the loans were unlawful. If the Applicant was unaware of such details until Mr Egan's affidavit was served it is hard to understand the basis for the suggestion in the Applicant's solicitors' 9 December 2024 letter and his own grounding affidavit that the loan was illegal.

b. The real explanation of the evolution of the Applicant's position may lie in his averment that *"the fundamental regulatory and legal defects in the Creditor's claim"* only became *"fully apparent"* following *"a more comprehensive review of the documentation with my legal advisors".* That might imply a belated attempt to shore up the perceived weakness of the application. The evolution of the Applicant's position does not enhance its credibility. One would expect a genuine dispute to be articulated from the outset. However, I discount this issue because issues do crystallise as a case develops and I would not regard such evolution as determinative if the Applicant did ultimately identify a real and substantial issue supported by credible evidence.

c. The Applicant repeatedly criticises the Creditor for having *"papered"* the transaction as a loan to CD and suggests that the documented transaction was never implemented. Likewise para. 15 of his third affidavit states that:

> *"The Creditor now relies upon the Facility Agreement documentation, the Brian Tuite email, and the purpose warranty in Clause 3 as contemporaneous evidence that the transaction was a bona fide commercial lending arrangement for the Pinnacle development. But those documents describe a structure - Creditor → Cool Dust → Blue Whisp → Pinnacle - that was never put into effect. On the Creditor's own evidence, the money went to Ingaro, not Blue Whisp. The Creditor cannot rely on documentary formalities to characterise the transaction as commercial when its own evidence confirms those formalities were not implemented".*

He also asserts that the transfers to Ingaro made it obvious that the loan was for his benefit without explaining the basis for that assertion. Such submissions sidestep the evidence that the transaction structure and the allocation of the Funds were consequences of decisions taken by the Applicant and his colleagues for the Group's benefit.

d. The Applicant's affidavits do not satisfactorily explain his basis for asserting that the Creditor knew that the sums were not for CD's benefit or when and how it learnt the true position, a position contradicted by, inter alia, his own communications. I cannot see how the Creditor could have been expected to deduce the position from the information supplied by the Applicant.

e. Nor has the Applicant satisfactorily explained why - as director of CD - he signed the Facility warranting at clause 3 that the funds would be used in the provision of an intercompany loan to assist with the completion of the Pinnacle development and for no other purpose or his rationale for signing the Keillan undertaking following service of the letters of demand threatening liquidation.

84. The Applicant's solicitor's letters and his averments in relation to Mr Delany contradict his suggestion that the Facility was, in substance, an indirect personal loan to the Applicant himself, referring to CD as *"the principal borrower (CD)".*

85. Although the Applicant emphasises that Ingaro received the funds, he fails to say what happened to them or at whose behest or to explain his own role in, knowledge of and responsibility for those events. If the monies were, in substance, loaned to the Applicant personally, it appears difficult to understand how Keillan could legitimately have offered the February 2024 undertaking or how the Applicant could properly have signed it as its director or on which Keillan could have used its resources to repay €2m - 2.3m to be applied against CD's debt to the Creditor. Furthermore, the undertakings to be furnished by other companies in respect of other landmark assets which the Facility envisaged would be difficult to understand in the context of a personal consumer loan.

86. In summary, I have seen no credible evidence to support an allegation that the Creditor knew when it entered the Facility and advanced the funds that they would be used for other purposes. It seems unlikely that the Creditor would have advanced the funds if that was the intention – it would have been more likely to have insisted on modifying the Agreements to secure its legal position. There would be no logic in limiting the Applicant's exposure in the PG if he was, in reality, the borrower. The contemporaneous documents, including the terms of the Agreements themselves, the Intra-group loan agreement and the messages from the Applicant and the Group Financial Officer are inconsistent with the assertion that the Creditor advanced the monies as an indirect loan to the Applicant. The bare assertion that the Petitioner knew, at inception, that the Facility was, in substance, consumer lending, falls far short of the threshold required to raise a real and substantial issue.

87. The Applicant's affidavits and submissions largely ignore the factual foundation for the Summons offered by the terms of the Agreements the Applicant executed and the facts averred to in the affidavit grounding the application for the Summons. They ignore the fact that he gave an indemnity, committing as principal obligor to meet CD's obligations and fail to satisfactorily address contemporaneous evidence, including the following:

a. messages suggesting that the Applicant and the McKillen Group were soliciting finance from the Creditor in late 2022 to enable the Group to complete the Pinnacle development. They were offering a lucrative return and pressing in October 2022 for it to be *"agreed and done"* within a week:

> *"we really need to push on the construction on site and get it finished, this will really help us out David and we will seriously owe you one, it will be a Maximum loan of 2 years. But expect to pay you back before that".*

b. It was the Applicant and his colleagues within the McKillen Group who proposed the structure for the transaction, including the use of a newly established Special Purpose Vehicle (SPV), i.e. CD.

c. His 1 November 2022 email explaining how *"We"* proposed to repay the Creditor from anticipated disposals evidently referred to the Group and the reference to the PG shows his clear differentiation – before entering into the Agreements - between the corporate commitment and his personal commitment - *"I'm giving you a pg. I would pay you back no matter what happens even without a pg"*. That differentiation was of course underscored by the transaction documents themselves since his PG was capped and less than CD's exposure.

d. The Applicant's Christmas Eve 2022 Message, sent days after executing the Agreements, contradicts his current stance – *"Thanks so much for doing the deal with us in Mount Merrion…"*. The Applicant's repeated reference to the borrower side as *"us"* is notable, as in his 19 May 2023 message referring to delays realising the proceeds of the Dean refinancing (which were to have partially repaid the Creditor). The Applicant's affidavits do not reconcile such Messages with his current stance.

e. The 16 February 2024 letters of demand sent to CD and the Applicant did not provoke a response that the loan was illegal. Instead, the recipients scrambled to address CD's failure to meet its payment commitments. Keillan, another McKillen subsidiary, provided an undertaking to pay €2m to the Creditor in part payment of CDs liability under the Facility. That payment was to be made on the anticipated receipt of the proceeds of another transaction. It was the Applicant who signed the 22 February 2024 undertaking as Keillan's director, again acknowledging the Facility agreed between the Creditor, CD (Borrower) and the Applicant (Guarantor).

f. The Applicant effusively expressed gratitude for the Creditor's forbearance in his 6 March 2024 Message.

g. Even by 16 September 2024 as relations soured, there was no suggestion that the loan was to him personally. Instead, he stated that *"we"* had sold the hotels, that *"we"* need support and *"we"* will reward you on the apartments soon.

88. CD's solicitors' 1 November 2024 electronic transfer of €300,000 to the Creditor evidences their understanding that the payment as relating to CD. The payment message simply stated *"Cool Dust Limited"*. Solicitors effecting such substantial transfers are scrupulous about such details. They must check the provenance and description of funds (including for anti-money laundering compliance) and satisfy themselves that any such transfer of funds belonging to or on behalf of a corporate entity was made with its authority. Such a transfer and its description, or indeed the payments by Keillan, would be misleading if, as the Applicant now contends, they were intended to pay down an indirect loan to him personally. The Applicant has not addressed this issue. Nor has he explained how the loans, transfers or payments were reflected in the books and records and statutory financial statements of CD, Keillan and Ingaro. Nor has Mr Tuite offered any support for the Applicant's averments. Nor has Mr Delany furnished an affidavit on CD's behalf or corroborated the Applicant's claim that the documents he executed and the transaction he implemented on CD's and Keillan's behalf were a sham.

89. I am surprised the Applicant's dismissive explanation of his commitments as *"boilerplate corporate warranties"*. An experienced businessperson such as the Applicant should have appreciated the significance of covenants to which he committed. A cavalier attitude to personal contractual commitments does not enhance his credibility. The provision identifying the intended use of particular funds is, by definition, tailored to the circumstances of a particular loan and an important part of a commercial (or consumer) lending transaction. It cannot be described as boilerplate (any more than pricing provisions) and an experienced businessperson should have understood this. The Applicant covenanted commitments as to the intended use of the funds. If they were not true it behoved him, both as the Guarantor and as CD’s sole director, to advise the lender accordingly.

90. I have noted that the Applicant's explanation for signing the Agreements is unsatisfactory, as is his opacity about how the funds were subsequently diverted and as to the relationships between him and the relevant companies and the Group itself. Where a party possessing relevant evidence chooses not to adduce it the Court may draw inferences (as Sanfey J did in *Green D*). In the absence of evidence to the contrary, it is reasonable to assume that, as CD’s sole director, the Applicant was privy to (if not ultimately responsible for) the decision to use the borrowed funds for other purposes. However, he fails to address that issue and instead blames the creditor for CD’s apparent breach of covenant.

91. While the Applicant need only establish a real and substantial issue, his evidence falls short of doing so, particularly given the terms of the Agreements and the contemporaneous communications. Furthermore, there are notable gaps and inconsistencies in his evidence. There is no explanation for the rationale for the convoluted structure adopted, nor any evidence from Mr Tuite or Mr Delany, nor has the Applicant exhibited documentary evidence or particulars to confirm how and when the Creditor learnt that the funds would be or had been used for personal purposes or for any purposes other than as agreed.

92. The Applicant’s points about the debt not being provable in bankruptcy depend on whether he has established a real and substantial issue as to the legality or otherwise of the Agreements. I accept that the Court may look beyond a transaction’s form and that, if in substance a party was contracting as a consumer then a warranty to the opposite effect might not serve to deprive him of his entitlement to statutory protections. However, as matters stand, he has not established a real and substantial issue as to the legality of the Facility and PG on the basis that the transaction was unlawful because the credit was, in substance being advanced to or for the benefit of the Applicant, an individual and a consumer.

93. For completeness, I should note that I do not find it necessary to rule on the Applicant's assumption that, if, in substance, the Facility represented the unauthorised provision of credit to a consumer, it would be unlawful, void or voidable and the debt would be unenforceable. It has yet to be determined whether that consequence would necessarily follow nor am I persuaded that the gaming authorities cited were analogous. Such a transaction might be a regulatory issue for the Creditor without affecting the validity of the underlying transaction or the enforceability of the debt.

94. In summary;

a. The Applicant has not established a basis for his equivocal assertions as to the Creditor's alleged awareness at inception that the Facility was in substance advanced for the Applicant's own purposes as a consumer – the necessary premise for his contention that the Facility was unlawful. His case in that regard rests on his own bare assertions which are not credible, because they conflict with contemporaneous evidence. Nor has he particularised that allegation in the Statement of Claim or elsewhere. He does not say when the Creditor acquired such knowledge; how it was acquired, or who possessed it on the Creditor's side. Nor does he satisfactorily explain why, if the true intention was to advance monies to him personally it was necessary for him to execute a personal guarantee and indemnity of a loan to himself. Nor was any explanation is provided as to why the transaction was structured and documented as a corporate facility for a tightly defined purpose, expressly *"not…available for any other purpose,"* and implemented by way of a further documented intercompany loan by CD to Blue Whisp;

b. There is no basis for a submission that the Facility was rendered unlawful because the Creditor subsequently learnt that the monies were used for other purposes. The Creditor's rights were defined by the Agreements. Any subsequent misapplication of the funds can neither affect the Facility's enforceability, nor the Applicant's liability;

c. While the Applicant's warranty that he was not a consumer might not avail the Creditor if the transaction was actually a consumer loan, the Applicant's claims are impossible to credit since, inter alia, he has failed to identify any consumer purpose to which the loan monies were applied; the evidence confirms that the substance of the transaction was as appeared form the Agreements (and from his own Messages). He volunteered to act as a surety in respect of a commercial transaction to secure substantial finance in order to enable the Group to complete major projects and property disposals. On the evidence, it is impossible to characterise that as a consumer transaction.

d. I am less convinced by the Creditor's reliance on clause 7.1(l) of the PG, under which the Applicant agreed that his liabilities would not be affected by any illegality in respect of CD's obligation. If the loan was a sham, there could be an issue as to the validity of that provision. However, since no credible evidential basis has been advanced as to the sham, the point does not arise.

e. Nothing turns on the fact that the loan monies were paid to Ingaro. The Applicant only advanced this argument after Mr Agar explained the mechanics of the transactions, but those matters were always within the Applicant's knowledge. It was the Applicant who was personally impressing on the Creditor the urgent need for the advance of the loan monies, as demonstrated by, for example, his 1 November 2022 Message to Mr Agar, which presumably prompted the transfer of the second tranche by the Creditor on 10 November 2022. There appears no basis to doubt that the obligation to repay was incurred by CD under the Facility irrespective of the route by which the funds were transmitted at its request. Such arrangements for loan monies to be advanced at the direction of a borrower are not unusual in commercial transactions and do not alter the borrower's liability. Monies lent to a borrower may be transmitted at its direction; they need not be paid into its bank account– indeed the Facility envisaged that possibility in respect of the monies yet to be advanced.

f. I do not accept the Applicant's assertion that *"the Creditor cannot rely on documentary formalities to characterise the transaction as commercial when its own evidence confirms those formalities were never implemented"* because this claim mischaracterises the Creditor's evidence. Nor has the Applicant fleshed out his assertion that the Intra-Group Facility was *"never implemented",* by explaining the circumstances – its implementation would scarcely be the Creditor's responsibility in any event.

95. The Applicant has not established a real and substantial issue in respect of the illegality issue. The reference to supposed admissions do not withstand scrutiny, leaving his contentions resting on bare assertions refuted by the contemporaneous record. He has not established a credible basis to retrospectively characterise the transaction as an unlawful consumer loan.

Issue 2 - Incorrect Quantum

96. An overstatement of the debt is fatal to a summons. There is no suggestion of any numerical or arithmetical error,[12] but the Applicant claims that the interest elements were overstated. There were two interest components, the interest pursuant to the Facility terms which I will call contractual interest and ongoing interest claimed under the Late Payment Regulations. The Applicant says that the Regulations did not apply because the loan was a

[12] *Although paras 14 and 17of the Statement of Claim did raise an issue with the calculation of interest pursuant to the Regulations this was not raised in the affidavits and the statement of claim is not verified on affidavit and that point was not raised in the submissions on this application so I have disregarded it.*

consumer transaction and also that the contractual interest provisions were an unlawful penalty. If either ground is correct, it would follow that the debt was overstated and the Summons would be dismissed. I will deal with the Late Payment issue first because it was the point taken in the grounding affidavit and most emphasised in submissions. The penalty clause point was developed in the course of the application.

Late Payment Issue

97. It is common ground that this point is a rearticulation of the illegality argument. The Applicant says that: (i) the Late Payment Regulations (and the associated Directive) only apply to transactions between commercial undertakings/public authorities, not to transactions involving natural persons in their personal capacity; (ii) since the Facility was advanced and the funds were used to discharge his personal liabilities, the transaction is, in substance, a consumer transaction and the inclusion of a claim for circa €300,000 by way of late payment interest under the Regulations is untenable; (iii) the sum claimed is therefore inflated and the Summons must be dismissed.

98. The Creditor submitted, and I agree, that this argument fails for the same reasons as the illegality argument. Indeed, its difficulties are revealed by regulation 3 (5) of the Late Payment Regulations which confirms that *"in this regulation "consumer" means a natural person acting outside his or her trade, business or profession"*. No real and substantial issue has been established to suggest the Agreements were an unlawful, indirect, consumer loan. There has been no evidence to suggest that the Applicant was at any time acting outside his trade, business or profession, nor any submission as to whether he fell within this definition. The argument also founders because the Applicant assumed a primary and independent obligation, covenanting as principal obligor and committing to discharge CD's liabilities. This encompassed any interest due under the Regulations. It follows that, where those Regulations apply to the underlying transaction (and I consider that they do here), the Applicant is contractually bound to satisfy the liability.

99. I am satisfied that: (i) the Regulations did apply to the Facility; (ii) the Applicant is contractually bound to satisfy CD's liability, including interest; (iii) having assumed a primary and independent obligation to discharge all CD's liabilities under the Facility to the Lender, the Applicant is liable for all amounts owed by CD (subject to the stipulated limitation), including interest under the Regulations. His obligations encompassed any interest due under the Regulations. The Applicant has accordingly failed to establish a real and substantial issue in respect of the late payment component of the figure in the Summons.

Was the Contractual Interest Provision a Penalty Clause?

100. The Applicant also claims that the contractual interest provisions are an unlawful penalty clause. Under Irish law, a contractual provision is unenforceable if it imposes a penalty for breach of contract that is out of all proportion to the promisee's legitimate interests and does not represent a genuine pre-estimate of loss. The Applicant says that the provision for €1m contractual interest on a €3m Facility principal is such a clause.

101. Paras 15 and 33 of the applicant's second affidavit first raised the penalty clause argument. Para. 15 suggested that the Facility's minimum interest provisions required payment of €700,000 interest even if the €3m was repaid within 12 months, an interest rate of 23.33% per annum, at a time when the ECB rate was 1.25%. In the event no such early repayment occurred so that provision does not affect the figure claimed in the Summons. Para. 33 focused on the €1m contractual interest payable if the Facility ran full term, which does form part of the figure claimed in the Summons, stating that it represented an unenforceable penalty clause rather than a genuine pre-estimate of loss. Para. 27 of Mr Agar's affidavit disagreed, explaining the operation of the contractual provisions.

102. Paras 22 and 23 of the Applicant's third affidavit developed the argument, stating that; (i) interest was effectively set at €1m (or €700,000 if the Facility was repaid within 12 months), a fixed sum rather than a rate, so the Company would be liable for the full €1m unless it was repaid within the initial period; (ii) based on a €3m principal, those figures represented annual rates of approximately 33.3% per annum or 23.3% in the event of repayment within 12 months); (iii) neither figure represented a prevailing commercial lending rate; and (iv) a contractual provision which imposed a fixed payment obligation which was not correlated to the actual duration of the loan or the actual loss suffered was structurally a penalty rather than a genuine pre-estimate of loss, irrespective of the label attached to it. (The Applicant's calculation of the annual rate seems to overstate the full-term interest rate).

103. Citing *Flynn v. Breccia* [2018] IECA 286 and *Sheehan v. Breccia* [2018] IECA 273, the Applicant's written submissions argued that the provision was a penalty clause disguised as contractual interest. Paras 68 – 73 reiterate that the provision for €1m contractual interest on a €3m commercial facility - one-third of the principal - was not a genuine pre-estimate of loss. The Creditor responded that the Applicant's argument depended on a misconception that charging interest on a loan constituted a penalty clause, explaining the contractual provisions and arguing that the penalty clause doctrine was unapplicable because it only applies where there has been a breach of contract. It noted that the interest provisions were not triggered by a breach. No additional sum is payable on default, nor any increase linked to non-performance. The €1m interest was simply the agreed return for the use of the Facility over its full term. The €700,000 represented a reduced amount payable if the Company elected to repay early. It distinguished *Flynn* and *Sheehan* as cases concerning default surcharge provisions which operated upon non-payment of sums due (i.e. upon breach) and which the Court of Appeal held were not genuine liquidated damages provisions but unenforceable penalties, concluding:

> "*The present clause is of an entirely different character: it is not triggered by breach, it does not impose any additional liability, and it does not purport to*

compensate the Creditor for loss. It simply represents the commercial bargain agreed between the parties, and for which the Debtor agreed to be liable under the Guarantee and Indemnity".

104. It is appropriate to note the key interest provisions, as follows:

a. Clause 1.1 defined, inter alia:

"Commitment" *as "means €3,000,000.00 (three million euro) to the extent not cancelled, reduced or transferred by it under this Agreement"*
"Interest" *and the* ***"Minimum Interest Amount"*** *as €1,000,000 and €700,000 respectively.*
"Loan(s)" *as "a loan made or to be made by the Lender to the Borrower under this Agreement or (as the context requires) the principal amount outstanding for the time being of that loan(s)";*
The **"*Initial Repayment Date*"** and the **"*Repayment Date"*** were respectively defined as 12 and 18 months after the date of the Facility, i.e. on 22 December 2023 and 22 June 2024.

105. Clause 8 was in the following terms:

a. Clause 8 provided as follows:

"8. REPAYMENT AND PREPAYMENT
8.1 The Borrower shall repay €1,500,000 (One Million Five Hundred Thousand Euro) of the Loan on the Initial Repayment Date.
8.2 The Borrower shall repay the balance of the Loan and all Interest together with any other amounts due and owing to the Lender under this Agreement on the Repayment Date.
8.3 In the event that the Borrower prepays the whole of the Loan on or prior to the Initial Repayment Date, the amount due to the Lender will be the entire of the Loan plus the Minimum Interest Amount and any applicable and unpaid fees set out in clause 7.
8.4 On the payment by the Borrower of the €1,500,000 pursuant to clause 8.1, the Borrower will be afforded a €150,000 (One Hundred and Fifty Thousand Euro) deduction from the Interest (the "€1,500,000 Payment Reduced Interest Amount"). The Borrower shall then repay the balance of the Loan and the €1,500,000 Payment Reduced Interest Amount together with any other amounts due and owing to the Lender under this Agreement on the Repayment Date.
8.5 In the event that the Borrower repays the sum of €2,500,000 (Two Million Five Hundred Thousand Euro) on or prior to the Initial Repayment Date, then and in that event, the Borrower will be afforded a €250,000 (Two Hundred and Fifty Thousand Euro) deduction from the Interest (the" €2,500,000 Payment Reduced Interest Amount"). The Borrower shall then repay the balance of the Loan and the €2,500,000 Payment Reduced Interest Amount together with any other amounts due and owing to the lender under this Agreement on the Repayment Date".

106. The intended effect of these provisions seems to have been to require CD to repay €1.5m on the Initial Repayment Date (22 December 2023) and the balance by the Repayment Date (22 June 2023). The Facility Interest was fixed at €1m, a non-compounding lump sum payable in arrears, rather than a percentage rate periodically applied to the outstanding balance. There were provisions for reductions if; (i) the entire Facility, or (ii) at least €2.5m, or (iii) the required €1.5m minimum was repaid by the earlier date, 22 December 2023. No such payments were made by that date.

107. The decision of Roberts J. in *Ethafil Ltd (in voluntary liquidation) v Express Bus Ltd* [2023] IEHC 506 *(Ethafil)* summarised the penalty clause doctrine. It concerned a settlement agreement. Clause 2 imposed an obligation to surrender vacant possession of a property unlawfully occupied by the defendant, EBL, and other parties; clause 9 required the defendant to make a €50,000 contribution to the plaintiff's litigation costs unless possession was surrendered. EBL duly vacated but other parties did not and the plaintiff sued EBL to recover the costs due pursuant to clause 9. The initial construction issue concerned the construction of clause 2. The Court concluded that it only required EBL itself (and related parties) to vacate. The question then arose whether clause 9 costs a penalty for noncompliance with clause was 2. Roberts J. summarised the authorities, referring at para. 48 to the Supreme Court decision in *Pat O'Donnell & Co Limited v. Truck & Machinery Sales Ltd* [1998] 4 IR 191 *(Pat O'Donnell)*, which concluded that an interest surcharge on overdue accounts was an unenforceable penalty and endorsed the principles set out in *Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company Limited*, [1915] A.C. 79 at pp. 86-87, including that:

> *"1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages…*
> *2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage…*

3. The question whether a sum stipulated and penalty or liquidated damages is a question of construction to be decided on the terms and inherent circumstances of each particular contract judged as at the time of the making of the contract, not as at the time of the breach…".

108. Roberts J. added

"49. Dealing with the circumstances in which an agreed sum might be held to be a penalty the court noted (at p 214, quoting from p. 87 of Dunlop) that:(a) "it will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach…
(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid".

109. Roberts J. also noted other Irish decisions concluding that Irish courts should not depart from the existing jurisprudence in favour of diverging UK jurisprudence without appellate guidance in that regard and noted that the language of a clause is not determinative. The Court would determine what is the correct nature of the payment in all the circumstances - the exercise in construction was one of substance and not form. She concluded that clause 9 was not a pre-estimate of loss arising or likely to arise from any breach by EBL, being a flat figure payable whether one or more of the Occupants overheld by one day or by a longer period. Although described as a contribution towards previous litigation costs, it was in fact an unenforceable penalty for a subsequent breach.

110. The Court's analysis of the need for a breach is particularly relevant. Roberts J. noted Barron J.'s observation at p.217 of *Pat O'Donnell* that the penalty clause doctrine only applies where there has been a breach of contract, observing that on one construction, clause 9 could be triggered in circumstances where there was no breach, raising the question as to whether it could be treated as a penalty in such circumstances, since a breach of contract is "*the necessary pre-requisite".* Three occupiers had not delivered vacant possession but, on the proper construction of clause 2, that scenario did not arise from any breach by EBL because clause 2 did not require it to procure them to do so.

111. Roberts J. ultimately interpreted clause 9, as requiring the payment if EBL and related entities to vacate; it was not triggered by the other occupiers' failure to vacate. She concluded that if EBL had failed to vacate then clause 9 would have been an unenforceable penalty responding to that breach. Significantly, however, she also held that if on its proper construction clause 9 had required the payment other than in response to EBL's breach (i.e. in response to the failure to vacate by parties for whom EBL was not responsible) then it would not have been a penalty. However, she did not accept that construction of clause 9 so the point did not arise.

112. Applying the principles set out in the foregoing authorities, I am not satisfied that the Applicant has established a real and substantial issue that the contractual interest provisions (which reflected his offer to the Creditor) constitute a penalty. They were essential elements of the bargain, the Lender's reward for offering the Facility where others may have feared to tread, the agreed consideration for the operation of the contract as intended. They did not represent a penalty for breach of contractual obligations and thus cannot trigger the penalty clause doctrine. As *Pat O'Donnell & Co* and *Ethafil* confirm, the doctrine only applies to provisions responding to breaches. The fact that the €1m was the agreed return for the availability of the Facility over its full term, appears both from the contractual documents and the Applicant's own Messages. It is unusual that the interest provision was a fixed sum rather than a percentage rate, as might be the case in more orthodox lending contexts. It also provided for interest to be paid in arrears in a lump sum rather than on a compounding basis on an outstanding balance. However, no authority was cited to suggest that interest may not be charged as a fixed sum. The figure was higher than might have been expected in a commercial loan from an institutional lender. However, this was not such a loan. The lender presumably required an inducement commensurate with the perceived risk. The provisions would have a commercial logic if they offered the Creditor a share of the Pinnacle profits as the transaction could not have been completed without its aid. This is consistent with contemporaneous communications such as the Applicant's 11 October 2022 message to Mr Agar discussing the proposed division of the Pinnacle spoils, cited at para. 42. Other messages from the Applicant to Mr Agar, such as his 1 November 2022 Message, were in similar terms, characterising the €1m as the Creditor's *"profit"*. While the Applicant might have views as to whether it was a good deal or a bad one, there is no obvious basis to characterise the provision as a penalty. On their face, the interest provisions reflect the deal which the Applicant offered to induce the Creditor to advance substantial funds notwithstanding the Group's difficulties. The Applicant's own messages reveal his desperation when the Agreements were negotiated, due to difficulties which were not of the Creditor's making. The Creditor may have been the lender of last resort. The terms presumably reflected the risk; the provision for a reduction for early repayment appears consistent with the evident commercial rationale. I see no real or substantial basis to argue that the provisions were penalties rather than essential elements of the bargain struck at the Applicant's instigation. The Applicant's reference to normal commercial lending rates ignore the reality that such loans were not available to the Group. I agree that cases such as *Flynn* are inapplicable because they concern default surcharges following a breach whereas, the Facility's interest provisions were not triggered by - and did not impose any additional liability for - a breach. They do not compensate the Creditor for loss. It is not obvious to me that the provisions were unreasonable but nor was it suggested that unreasonableness would itself be a basis to impugn such provisions in a non-consumer context.

113. For completeness, I should note that, I have considered the substance as well as the form of the interest provisions, including the provision for reduced interest if the Facility was repaid six months early. I considered whether the provisions might be an unenforceable penalty on the basis that, in substance, the early repayment discount was a disguised penalty, by imposing more onerous terms unless the Facility was repaid by the initial repayment date. The

Applicant's averments as to a 33.3% full term interest rate as opposed to 23.3% for early repayment could have lent weight to such a concern. However, when allowance is made for the fact that the full term was 18 months, there was no material difference in the "annual" rates once the early repayment discount was applied – in fact the full-term rate was slightly cheaper expressed as an annual percentage rate, even ignoring the non-compounding nature of the interest. This may imply an unscientific, back of the envelope approach to the negotiations, but in any event, I can see no basis to regard it as an attempt to engineer a penalty given the essential equivalence of the two rates. Accordingly, the Applicant has not established a real and substantial basis to suggest that the provisions represented a penalty for breach as opposed to reflecting the commercial bargain, which he proposed and accepted on CD's behalf and for which he personally agreed to be liable up to a €3m limit.

114. For completeness, I should note that the Applicant's affidavits and submissions raised a subsidiary argument as to interest, which appeared parasitic upon his two main arguments about interest (which I have rejected). He criticised the Creditor's application of payments, accusing it of unilaterally applying receipts against the *"alleged penalty interest"* and the *"unlawful 2012 Regulations interest",* leaving the principal broadly intact and continuing to accrue further charges. If the Applicant's primary objections to the interest had succeeded, it would have followed that the payments received would have been set against the principal, extinguishing the debt unless interest was recoverable on some other basis. However, he has not established a real and substantial basis to impugn the inclusion of the contractual interest or the interest under the Regulations. In the circumstances the argument about allocation of the payments falls away. To the extent that the Applicant advances an independent submission in respect of the payment allocation he has not established a real and substantial issue. The Particulars set out how payments were treated; the Applicant does not dispute the calculation.

He did not cite any contractual stipulation or authority to support the contention that the Creditor was required to apply payments in discharge of the principal rather than interest.

Issue 3 - Discharge

115. The Applicant submits that his liability has (or may have) been discharged by the Creditor's dealings with CD, including by virtue of its receipt of substantial payments. This argument is advanced on the basis of the well-established principle that a guarantor’s liability is accessory to and co-extensive with the principal borrower’s liability. He submits that any material dealing with CD or variation of the Facility which altered the nature or extent of his own potential liability as guarantor, and which occurred without his knowledge and consent, or which his subrogation rights would operate in equity to discharge his obligations as guarantor. He contended that the Creditor engaged in material dealings with CD, receiving substantial payments and he assumed that there had or must have been an accommodation or settlement in respect of its liability, without his knowledge or consent. He cited an approach to the Creditor on CD’s behalf by Mr Delany which was referred to in his solicitors’ 9 December 2025 letter, claiming that the Creditor's response failed to engage with that point. He also stated that the Creditor’s pursuit of him rather than CD raised a bona fide and substantial argument that such conduct amounted to an election to treat the obligation as extinguished as against CD, or to an implied release and that such issues require plenary examination with full discovery.

116. The Creditor denied that there had been any settlement, variation or discharge. Mr Egan’s affidavit noted that the PG terms addressed the Applicant’s contentions: (i) the Applicant is a primary obligor, an indemnifier as well as a guarantor; (ii) his obligations under the PG are independent; (iii) he waived the requirement for demand to be made of CD - the Creditor need not take action against CD before pursuing him. The Creditor submitted that; (a) the Applicant had not provided details of the alleged “variation” or discharge, or of how it arose, nor had he identified any particular agreement, communication, or conduct giving rise thereto. Mr Agar's affidavit confirmed that no such discharge, settlement or variation had occurred. Accordingly, the Applicant's case was a bare assertion contradicted by the evidence; (b) in any event, the Applicant's liability under clause 2.1 of the PG *"as principal obligor"* would not be discharged by variations in CD's obligations. Furthermore, in clause 7 he agreed that his liabilities would not be discharged by any variation or release of any right or remedy which the Creditor might have against CD or by any indulgence, waiver or concession granted to, or arrangement with, CD. Any variation of CD's obligations could not avail the Applicant.

117. I agree with the Applicant's submission that a creditor's dealings with the borrower or a variation of the contract which alters the nature or extent of a guarantor's potential liability, which occurs without the guarantor's knowledge or consent, may operate to discharge the guarantor. However, the Applicant's submissions overstate these principles (such as the suggestion that even inconclusive discussions or the receipt of *payments* on CD's behalf would discharge the Applicant's liability). More significantly, the Applicant has not established a factual premise for the application on the basis of these principles. His affidavits and the Statement of Claim advance unparticularised assertions but, despite his central role in and knowledge of the affairs of CD and the Group, he has failed to identify any variation to CD's obligations to his detriment or without his knowledge. The Creditor's uncontroverted evidence confirms that no agreement was reached with or accommodation extended to CD.

118. The contemporaneous communications appear difficult to reconcile with the suggestion that the €2.3m was paid without the Applicant's knowledge but in any event such payments *reduced* the Applicant's exposure. Furthermore, it is difficult to see how there could have been meaningful interaction with CD without the Applicant's knowledge or consent. He was presumably aware and supportive of Mr Delany's intervention on CD's behalf but there is no evidence that anything came of that initiative, so nothing turns on it. The evidence (undisputed except on the basis of speculation) confirms that the Creditor has not compromised or varied its claim against CD. The Messages cited by the Applicant do not establish any basis for a discharge plea. Nor does the Statement of Claim advance matters because, even leaving aside the fact that it is unverified, it fails to address the lack of meaningful details of the respects in which CD's liability was fully or partially discharged.

119. I am satisfied that the Applicant has not established a real and substantial issue. He has not provided meaningful details of any interaction in terms likely to have given rise to his discharge, including as to any actual accord with CD. His discharge and variation claims depend on assertions, speculation and non sequitur comments, such as the suggestion at para.32 of the grounding affidavit that Mr Agar's 17 September 2023 Message confirmed that Mr Agar was negotiating directly with CD's representatives, excluding the Applicant and ensuring that the discussions were not directly communicated to him. The Message does no such thing, particularly once read in context as responding to the Applicant's request for a meeting. The Creditor was willing to meet but wanted the Applicant to be accompanied by his *"partners"*. The Message does not convey the meaning that the Applicant attributes to it, that he was excluded from private meetings (and it also undercuts any suggestion that the parties believed the loan was to the Applicant alone). Such negotiations could scarcely have concealed from the Applicant in any event in view of his role. The comment simply reflected Mr Agar's concern that the Applicant bring his partners to any meeting, presumably to ensure that any agreed commitments would be honoured by all involved. The reference to a partnership is also inconsistent with the Applicant's suggestion that the entire transaction was an indirect consumer loan to the Applicant - I have seen no evidence of a "partnership" in the legal sense. It presumably refers to the Applicant's fellow investors or shareholders rather than to "partners" in the formal sense, but if there was any such partnership, an association with a view to profit, then it would take the transaction outside the consumer loan sphere.

120. I disagree with the Applicant's summary of the December 2025 solicitors' correspondence and note the Applicant's equivocation as to whether an arrangement was actually agreed with Mr Delaney or the basis for any such belief or the nature of any such arrangements. His solicitors' 9 December 2025 letter certainly did not advance such an assertion. It stated that Mr Delany had approached the Creditor on CD's behalf to address its liability (a position inconsistent with the Applicant's claim that the loan was, in substance, an indirect loan to him) enquiring whether the Creditor's solicitors had contacted Mr Delany, and, if so what steps had been taken. In other words, it was exhorting the Creditor to engage with CD, the converse of the Applicant's point. In any event, the 16 December 2025 response dismissed the overture, noting that the Applicant was CD's sole director, unlike Mr Delaney who was neither director or shareholder. Furthermore, there is no evidence that anything came of the overture and the exchange's chief significance is the fact that the language employed by the Applicant's solicitors and his own affidavits seems inconsistent with his suggestion that the loan was, in substance, a personal loan to him. The Applicant does speculate in para. 33 of his Third Affidavit that arrangements *"had been reached or at least substantially advanced with Mr Delaney on behalf of CD*" but there is a fundamental difference between these possibilities. It is difficult to understand why the Applicant could not give more concrete testimony rather than simultaneously suggesting that agreement was either reached or merely substantially advanced. Mr Delaney could have sworn an affidavit but no such evidence was forthcoming. Nor did the documentary evidence suggest that any arrangement was reached. Presumably if it had been then both CD and the applicant would have relied upon it in subsequent correspondence and affidavits. In any event, in the light of the Creditor's denials, there is no basis to suggest that Mr Delaney's overtures discharged the Applicant from liability as guarantor, let alone from his liability as principal obligor.

121. The grounding affidavit's speculation that *"it appears that there has been a full settlement with the principal (where they are not being pursued)"* was refuted by the Creditor's unchallenged evidence. The pursuit of the Applicant rather than CD does not offer a basis to infer a discharge or election not to pursue or implied release of CD, particularly in the light of the evidence that it was not a mark for damages. No authority was cited for any such proposition. Given the evidence as to CD's financial position, the Creditor's strategy probably simply reflects a realistic assessment of the most effective option. There is no reason to doubt that it followed the course most likely to achieve its legitimate goal. The Creditor could pursue either obligor or both.

122. While the Applicant's submissions did not address the point, I agree with the Creditor's submission as to the significance of his contractual obligation to indemnify the Creditor as principal obligor rather than solely as surety. The position was helpfully summarised by the leading Irish banking law text, *Breslin and Corcoran, Banking Law* (4th ed., 2019) at para. 14-06 which characterised the principal differentiation as being the dependent nature of the guarantor's obligation as opposed to the independent nature of an indemnitor's obligation:

> *"A guarantor assumes an obligation to answer for the debt of another; this is a secondary obligation, dependent on the existence—and validity—of the underlying (principal) debt. Accordingly, the guarantor is liable under the guarantee only if the principal Applicant is liable. ...By contrast, an indemnitor owes an obligation to make good the primary liability but this does not depend on the validity of the obligation to which the indemnity is referable. ... A guarantor may be able to resist liability if it can demonstrate a legal infirmity in the obligation to which the contract of suretyship is referable. An indemnitor may be liable notwithstanding that the particular liability could not be assumed by the Applicant".*

Accordingly, the Applicant has not established any basis to assert an actual or implied discharge of CD's liability but nor has he established that it would extinguish his own obligation as principal obligor in any event. Even leaving aside the lack of substantiation or even particulars of the claim that the Creditor extended *"informal but material accommodation"* to CD, those points would not go to the Applicant's liability as indemnifier.

123. The Statement of Claim, traversing the same ground, also fails to establish a real and substantial issue, stating:

> *"41. The plaintiff was discharged in full from his obligation under the guarantee by reason of material alterations and variations of Facility Agreement and the obligations of Cool Dust thereunder, made by the defendant without the knowledge or consent of the Plaintiff".*

124. The particulars of para 41 sought to infer a discharge of CD by reference to the transfers of the loan monies to Ingaro (rather than CD/Blue Whisp) and/or their application to other Group obligations, negotiations between the Creditor and CD's representatives as to the outstanding liabilities under the Facility, the Creditor's assumed granting of forbearance and/or indulgences to CD and its allocation of the Payments to the disputed interest charges without the Applicant's knowledge or consent, varying the Applicant's exposure under the PG, asserting that each such alteration operated to discharge the Plaintiff's obligations as guarantor). These points are speculative and inconclusive. Furthermore, clause 7 of the PG precludes the Applicant's current submission.

125. For completeness I should note that, although the Applicant accuses the Creditor of reaching an agreement with CD this is no more than a bare assertion. In any event the provisions of the Agreements undermine the Applicant's discharge argument. In the circumstances the Applicant has failed to satisfy me that there is a real and substantial issue for trial in respect of the possible discharge of his liability due to any engagement between the Creditor and CD.

Issue 4 - Abuse of Process

126. The Applicant says that the Summons was issued for an ulterior and collateral purpose - the lack of bona fides being demonstrated by the failure to proceed against CD and by the premature launch of these proceedings. It submitted that; (a) the Applicant's evidence was that the Summons was not issued for the bona fide purpose of recovering a genuine and enforceable commercial debt; (b) The Creditor was placed on formal notice by the 9 December 2025 letter but failed to engage substantively, or commence civil proceedings to determine them, instead issuing the Summons without any adjudication of the dispute, dismissing the Applicant's concerns without reasoned engagement. Issuing the Summons was disproportionate; (c) no proceedings have been commenced against CD, the actual borrower. The exclusive enforcement on the guarantor, to the exclusion of the corporate principal, was commercially inexplicable if the true purpose was debt recovery and is consistent only with a collateral purpose directed at the Applicant personally; (d) The Applicant believed that the Summons was designed to exert pressure upon him in the context of related commercial disputes between the parties; (e) his position was supported by *Rakbank,* whereas *Phelan* should be distinguished - in *Phelan* there was no independent evidence of a collateral purpose, whereas in this case, the collateral purpose was evidenced by the Creditor's conduct as outlined above and by the irrationality of its appropriation of €2.3 million in receipts against alleged interest rather than principal. Furthermore, the Creditor in *Phelan* had an obvious commercial reason for enforcement: a judgment debt. In this case, the Creditor has never established its claim and cannot point to any adjudicated liability. Recourse to bankruptcy proceedings without prior adjudication is itself evidence of a purpose other than legitimate debt recovery; (f) The Applicant relied on the judgment of Charleton J in *Re Charles Kelly Limited* [2026] IEHC 140.

127. I agree that the Court has an inherent jurisdiction, recognised since at least *McGinn v Beagan* [1962] IR 364, to dismiss or stay bankruptcy proceedings which are an abuse of process, oppressive, or brought for an improper or collateral purpose. That jurisdiction, originally an illustration of the inherent jurisdiction to restrain the abuse of process, is now codified in the s8(6)(a) discretionary dismissal power which supersedes the inherent jurisdiction (but the same principles apply). While debtors frequently seek to invoke the statutory discretion, such applications rarely succeed. As Humphreys J noted in *Re Roseann McLaughlin* [2021] IEHC 296 at para. 14:

> *"A creditor is entitled to enforce their rights and it is only in relatively unusual circumstances that a bankruptcy petition could be held to have been brought for a collateral purpose."*

Humphreys J. found no analogy with *McGinn* in that case and I am of the same mind here.

128. Leading examples of applications succeeding on this ground involve unusual facts where the Creditor's behaviour was a manifest abuse. In *McGinn* the creditor acquired the debt so as to bring bankruptcy proceedings to disqualify an electoral candidate. In *Rakbank,* the Creditor's unconscionable enforcement justified the dismissal of the summons. I have seen no evidence of such here. I do not consider that the email exchange in relation to the transfer of the Applicant's family home into his wife's name constitutes *"compelling evidence"* of an ulterior motive or an abuse of process. There may be a dispute between the parties as to the legitimacy of that transfer. I need not resolve that issue. All that I need to determine is whether there was an ulterior purpose in initiating these proceedings. I am not satisfied that there was.

129. The suggestion that other enforcement procedures should be exhausted before resorting to bankruptcy overstates the law. Such a submission has been repeatedly rejected. In *Ennis,* Costello J. held that it is *"well settled law"* that the existence of alternative means of recovering the debt does not render the bankruptcy process improper or otherwise justify dismissal of the summons. Costello J. further stated that:

> *"A judgment creditor is free to pursue whichever remedies are available to it (or none) as it sees fit. Specifically, it is not required to exhaust a particular mode of execution before pursuing another method of recovery on foot of the judgment debt. Whether or not the debts of the debtor may be dealt with other than by way of bankruptcy is a matter which the court is required to consider pursuant to the provisions of s. 14 (2) of the Act of 1988 prior to adjudicating a debtor bankrupt. The fact that there exist alternative means of seeking to recover the debt which have not been pursued does not mean that the bankruptcy summons procedure has been improperly invoked or that the bankruptcy summons therefore should be dismissed. No issue on this point would arise for trial as this is well settled law".*

130. At para.48 of the Court of Appeal decision in *Ennis*, Irvine J. held that while the creditor might have elected to pursue alternative options, it was not obliged to do so. She also described the argument that other avenues should have been pursued as contrived and without merit given that it was clearly inconsistent with the debtor's repeated insistence that he had no assets:

> *"How then would availing of these alternative execution procedures assist Ennis? If what Mr. Carney states concerning his assets is true, bankruptcy would appear to be the only execution procedure likely to benefit Ennis given that the only assets he admits to owning are those chattels which he claims the receiver has wrongfully withheld. And, bankruptcy will allow the official assignee the possibility of taking over those proceedings to ensure that any such valuable assets are captured and ultimately made available to creditors in the bankruptcy".*

I consider that the suggestion that the Creditor should have sought recourse against CD is equally contrived in the absence of any reason to believe that it was a *"mark"* for damages.

131. I also note the absence of any evident basis for the grounding affidavit's assertion at para. 21 that *"it was always the position"* that the creditor should exhaust its potential recourse against CD, which the Applicant described as the creditor's *"first port of call"*. The Agreements' say otherwise and the Applicant is bound by them.

132. For completeness I should note my rejection of any suggestion that, absent a genuine dispute, the Creditor must issue proceedings before resorting to bankruptcy. Any such submission would ignore the terms of the Act and the authorities such as *Leonard & Woods Developments v. AA & SH* [2022] IEHC 215 *(Leonard & Woods)* reviving a heresy which the Supreme Court buried in *Harahill v. Cuddy* (Supreme Court, ex tempore, 20th February 2009). At para.14 of *Leonard & Woods*, O'Moore J. cited *Sanfey and Holohan:*

> *"As a result of the Supreme Court decision it is now open to apply for the issue of a Bankruptcy Summons, even where one did not have a judgment. However, it is necessary that the debt be undisputed if one is certain to keep the summons free from challenge"*

which aligns with s. 8(1) of the Act. O'Moore J also cited *Sanfey and Holohan,* para. 2-46, as follows:

> *"The conclusion therefore is that there must be no question but that the sum claimed in the bankruptcy summons, in the event that one does not hold a judgment, is beyond dispute. This presumably would only arise in the case of a debt which has been acknowledged by the debtor or, or (sic) where evidence of acknowledgment is forthcoming, for example, by means of a countermanded cheque." Harrahill v. Cuddy (Supreme Court, ex tempore, 20th February, 2009)."*

133. The learned authors' recognition that a petitioning creditor does not require a judgment where a debt has been acknowledged is beyond dispute, consistent with *Harrahill*, but it remains to be seen whether that is the only circumstance in which a debt may be deemed to be beyond dispute. In *Leonard & Woods,* O'Moore J. was satisfied that a settlement agreement (which contained agreement by the respondents to consent to summary judgment in event of default) entered into by the parties was sufficient to grant the summons, noting at para. 18 that:

> "*the agreement to pay specific amounts of money on specific dates, and an acceptance on the part of both [respondents] that (insofar as these monies are not paid) there would be consent to summary judgment for the outstanding sums due. Short of an actual judgment, it is difficult to imagine clearer evidence of an acceptance of obligations on the part of both [respondents].*"

134. It seems to me that where, for example, sums have fallen due pursuant to unequivocal contractual commitments which the parties entered into then the Creditor is entitled to invoke the statutory procedure unless, of course, a real and substantial dispute arises. As para. 63 of my judgment in *Phelan* noted, it may be appropriate to suspend bankruptcy proceedings pending the resolution of substantive litigation but I also adverted to the risk

> *"that 'paper will not refuse ink' and the mere issuing of poorly pleaded proceedings making broad allegations and demanding substantial unparticularised figures does not suffice to establish a real or substantial issue or to prevent enforcement, including bankruptcy proceedings. Otherwise, a plenary summons could effectively paralyse the statutory bankruptcy regime (and any other step to enforce a Court order)."*

135. This case is analogous to *Phelan*, notwithstanding the absence of a judgment, which while making it harder for a debtor to resist bankruptcy, is not a mandatory pre-condition for the issuing of such proceedings. The statutory test is whether there is evidence of a real and substantial issue – the issuing of proceedings is not determinative.

136. There is no credible evidence that the summons has been brought for an ulterior motive or improper purpose and ought to be dismissed. The Applicant contended that the bankruptcy proceedings were an attempt to frustrate the Plenary Proceedings but that assumes that the issues in those proceedings were real and substantial. I have dealt with that issue above. Such references to plenary proceedings as rendering abusive bankruptcy proceedings (grounded on a court order) received short shrift in *Ennis* where the debtor contended that the creditor sought to frustrate litigation he had launched. Costello J. noted that there was no reason for the court to draw such an inference and also observed that (as in this case), the creditor commenced the steps leading to a petition for bankruptcy before the defendant instituted proceedings against the plaintiff. In such circumstances, bankruptcy proceedings can hardly be portrayed as a covert attack on the plenary proceedings. The same is true here.

137. I agree with the decision of Charleton J. in *Charles Kelly* and accept the Applicant's submissions that some analogies may be drawn between the principles governing individual and corporate insolvency, (although there are also differences and the jurisprudence will not always dovetail). I also agree that bankruptcy courts might exercise their discretion to refuse insolvency petitions where such an order is unnecessary. However, the facts of this case differ from *Charles Kelly.* The evidence does not suggest that proceedings against CD would be fruitful. This contrasts with *Charles Kelly* where the creditor had judgment mortgages over significant assets, rendering the liquidation of the entire company unnecessary and disproportionate. In this case there is no evidence that other enforcement routes would be effective. To the extent that it applies to bankruptcy as well as corporate insolvency, *Charles Kelly* does not go as far as the Applicant contends.

138. The Applicant has not established any matters which might constitute an abuse of process. In particular, I am not convinced that litigation against CD or against the Applicant personally can be regarded as an *"adequate enforcement route"* to borrow Charleton J.'s phrase. It could be different if effective and expeditious enforcement routes were likely to result in payment in full without the need for bankruptcy proceedings.

139. A creditor cannot be accused of being motivated by an ulterior motive purely because they exercise their right to invoke a statutory process specifically designed to deal with debtors who fail to pay undisputed debts. The existence of alternative enforcement avenues is generally immaterial, unless as in *Charles Kelly*, the evidence establishes that such alternative routes offered an effective and proportionate enforcement route in the particular circumstances, rendering bankruptcy proceedings unnecessary.

140. I reject the submission that the Creditor was guilty of *"tactical"* use of insolvency proceedings based on the issuance of the Summons within six weeks of the 9 December 2025 letter and without pursuit of CD. There are many difficulties with that assertion. Any suggestion that the bankruptcy proceedings were a reaction or a tactical device to prevent the Applicant litigating a genuine dispute does not mesh with the chronology – the Creditor could equally contend that the dispute was raised tactically to frustrate its invocation of the statutory bankruptcy process. Secondly, the accusation of a lack of engagement ignores the facts appearing from the correspondence and the Creditor's past forbearance (the Facility having fallen due in February 2024) and also the fact that many points raised in the 9 December letter were ill-advised and never subsequently saw the light of day. Rejection of unsubstantiated assertions is not an abuse of process. A Creditor is entitled to invoke the statutory bankruptcy procedure to recover an unpaid debt. It is also significant that the grounds principally relied upon by the Applicant on this application were not raised in his solicitors' correspondence (or at least not in their current form). The Creditor concluded, not unreasonably, that no real and substantial issue was identified in that letter. Accordingly, it did not prevent them proceeding as intimated in the Particulars – there was no need for further engagement, particularly given the Applicant's solicitors' failure to respond to the Creditor's 16 December 2025 reply.

141. As for the reiteration of the criticism of the Creditor's focus on the Applicant rather than CD, the Creditor was entitled to pursue whichever route it deemed most likely to be legally and commercially effective. There is no basis to infer an ulterior purpose or abuse of process.

142. The allegations of an ulterior or collateral purpose or an abuse of process are bare assertions and unparticularised. To the extent particulars are provided they appear to rest once again on the assertion of a real and substantial issue for trial or on the suggestion that the Creditor should have enforced against CD before seeking recourse against the Applicant and that it should have issued civil proceedings before bankruptcy proceedings. However, I do not accept those premises. Where a creditor has served Particulars of Demand and applied for the issue of a summons on foot of the Applicant's failure to pay the debt, the bringing of bankruptcy proceedings is, on its face, the very purpose for which the bankruptcy process exists. None of the matters relied upon by the Applicant provide a basis to infer an improper, ulterior or collateral purpose in this case.

143. For completeness I should note that I have disregarded the assertion in the submissions that the Summons was motivated by a desire to exert pressure in *"related commercial disputes"* because it is unsubstantiated and unparticularised. The Applicant does not identify the alleged dispute(s), the nature of the alleged pressure or, indeed, any basis to infer an improper motive.

144. The Applicant has not established that the issuing of the Summons was an abuse or that it was issued for an ulterior and collateral purpose or any other basis on which I should exercise the discretion to dismiss it at this stage. His submission rested on evidently false premises such the suggestion that the Creditor's should have proceeded against CD or issued civil proceedings against him before launching bankruptcy proceedings or that the bankruptcy proceedings would be to prevent the Applicant litigating the plenary proceedings. Such submissions are not well founded for, inter alia, the following reasons:

a. although his written submissions stated that *"the Applicant's evidence"* was that the Summons was issued without bona fides and for an ulterior and collateral purpose, it is for the Court to determine the Creditor's bona fides or motivation. The Applicant's assertions do not offer a sufficient basis to make such findings.

b. Issues would arise if a party prematurely commenced bankruptcy proceedings while ignoring real and substantial issues raised by the Applicant or unreasonably ignoring other enforcement routes which would appear likely to result in the discharge of the debt without undue difficulty, delay or expense. The Applicant has not established that that is the case here. No such issue emerged from the pre-litigation correspondence nor, as I explain below, do I consider that the Applicant has established such an issue in the proceedings before me to date. In circumstances in which the Facility fell due in February 2024, the Creditor cannot fairly be accused of having acted precipitously in respect of the time taken to commence the current proceedings. I see no basis to criticise the Creditor's engagement before or after the issuing of the Summons. I have reservations as to points raised in the correspondence on the Applicant's behalf and later abandoned, but I have ignored those points for present purposes.

145. I agree that the Creditor's 16 December 2025 response dismissed the Applicant's concerns, but I would not agree that it did so *"without reasoned engagement"*. The response gave the 9 December letter short shrift, but it was entitled to do so particularly since the letter advanced various points which did not withstand scrutiny.

146. The suggestion that it was an abuse of process to seek leave to issue a bankruptcy summons depends on whether there was a real and substantial issue which required to be adjudicated or a collateral or ulterior purpose. The Applicant has not established a real or substantial case in either regard. There was no obligation to commence civil proceedings in the absence of a real and substantial dispute with some credibility.

147. I agree that if there was a significantly more suitable enforcement route (from the Creditor's perspective) which was likely to be effective without undue difficulty, delay or expense, then the failure to avail of that route before resorting to bankruptcy proceedings might suggest a collateral or ulterior purpose and the Court might be disinclined to entertain the draconian remedy of bankruptcy (although it would also need to have regard to the statutory objectives underpinning the Act). The issue does not arise in this case because there is no suggestion of any commercial reality to pursuing CD. The Applicant has not suggested that either it or CD has the resources required to meet its liabilities. Unlike *Charles Kelly*, there is no basis to suggest that the bankruptcy process is being used tactically and unnecessarily. The Creditor was entitled to invoke it.

Section 7: Miscellaneous Issues

148. For completeness, I will address other issues raised by the Applicant.

149. *Past Consideration:* Although ventilated on affidavit and in the Statement of Claim this point was not pressed in oral or written submissions. I do not consider that the fact that funds were advanced before the execution of the facility matters, nor save for vague references to past consideration, was any authority advanced for the proposition that this would affect the enforceability of either Agreement. To the contrary, the messages suggest that such transfers were at his urging. The Applicant could have been under no illusions. The Agreements repeatedly acknowledge that funds had been, were being and would be advanced. The recitals to the PG acknowledge that credit had already been extended. The PG's clause 2 definition of consideration is fatal to the past consideration argument. Other provisions in the Agreements likewise confirm the awareness that some, but not all, of the monies referenced in the Facility had already been advanced. There was consideration for both Agreements.

150. *Liquidated Sum provable in bankruptcy:* This argument appeared to depend on the Applicant's objections to the interest claimed and the validity of the Facility. In the light of my conclusions on such principal grounds I see no basis for the contention that the debt grounding the Summons was other than a liquidated sum or a debt provable in bankruptcy and capable of grounding the Summons.

151. *"Asymmetry of Inter-company loan agreement";* Although the applicant's third affidavit objected that the asymmetry between the terms of the intracompany loan agreement and those of the Facility implied that the intra-company loan agreement was not a bona fide transaction, the point was not pressed in submissions. The Applicant has not established that there is no obvious commercial rationale for the wording of the intra-company loan agreement but in any event, any such issue would be a matter for the parties to that agreement, which did not include the Creditor. If they were not consistent with a genuine commercially rationale, then that would reflect poorly on the Group and the Applicant but it would not affect the Agreements' enforceability. In any event, while symmetrical wording might be desirable in third party arrangements where attainable, more fluid provisions are unsurprising in intra-company agreements where there may have been a concern to maximise flexibility in dealing with the proceeds of developments. Issues might perhaps arise as to whether the clauses amounted to an *"agreement to agree"* or as to their tax implications but they are not concerns for the current application. I make no determination in respect of the intra-company agreement's rationale save to observe that the Applicant's observations as to *"asymmetry"* do not address possible commercial rationale for such arrangements or, more significantly, the fact that any issue with that agreement was the responsibility of the parties thereto and their directors. The issue does not afford a basis to impugn the Agreements.

152. *The Transfer of the loan monies to Ingaro on the Group's instructions:* It is undisputed that - at the Group's behest - the monies advanced were transferred to Ingaro. The Group CFO had informed the Creditor that Blue Whisp was entering into an Intra-Group Loan Agreement with CD. The Chief Finance Officer's 16 October 2022 email can scarcely be regarded as unusual in the context of such corporate refinancings. The Creditor subsequently received a copy of the executed agreement. The internal dispersal of the funding within the group was clearly envisaged by the parties and indeed by provisions of the Facility. It is not clear how or why the monies were transmitted to Ingaro but there is no dispute as to its having been on the Group's instructions nor was there any suggestion that the Creditor failed to comply with the Facility's provisions for the disbursement of the loan monies. There is no evidence that CD or its Director (the Applicant) were unaware that the monies were transferred to Ingaro or that they objected at the time. No authority has been advanced to suggest that such mechanics affect the Borrower's liability (or the Applicant's).

153. *Money Lenders Act:* The Applicant referred to s16(2) of the Moneylenders Act 1933 and the particular requirements imposed on creditors in bankruptcy proceedings, but the relevance of that argument in the immediate context of the dismissal application was obscure. I did not understand the Applicant to be asserting a breach of the 1933 Act so much as to be arguing by analogy to demonstrate the significance of the leading regulation and the restrictions imposed in bankruptcy proceedings on inappropriate interest rates. In any event, I am not satisfied that he has established a real and substantial issue for trial in that respect.

154. *Averment in affidavit grounding application for Summons;* Nor, although the point was not pressed in submissions in any event, do I consider that any issue arises in respect of the Creditor's averment in the affidavit grounding the application for liberty to issue the Summons that it held *"no security or bills or notes"* for the alleged debt. I regard that averment in the affidavit grounding applications for liberty to issue a summons as confirming whether the creditor holds security over the debtor's assets rather than its right of recourse against other legal entities who are also liable to the creditor in respect of the same debt.

155. *Holistic View:* The Applicant invited the Court to take a holistic view of the circumstances - the absence of a judgment or of proceedings against CD or the Applicant, the failure to engage with disputed issues, the inflated and unlawful demand and the haste with which the Summons was issued notwithstanding the disputes, submitting that such circumstances support the conclusion that the Summons was issued for an ulterior and collateral purpose and constituted an abuse of process. The individual points have not been shown to be any substance, nor do they gain such substance when viewed en masse. In the absence of any issue of substance or credibility, there is no basis for the mandatory dismissal of the Summons, nor have grounds for the discretionary dismissal been established.

Conclusion

156. The Creditor was not obliged to obtain a judgment against the Applicant or to pursue CD before initiating these bankruptcy proceedings. In the absence of an issue for trial the Creditor is entitled to use the bankruptcy process to enforce an undisputed debt. The Applicant has not met the low bar of establishing a real and substantial issue to be tried. Nor has he established that the proceedings represent an abuse of process or are pursued for an improper or collateral purpose. Accordingly, I will dismiss the application. However, he can contest the petition at its hearing and he is of course also pursuing the Plenary Proceedings. Normally, following the rejection of an application to dismiss a bankruptcy summons, I would set the petition down the hearing if all affidavits and submissions had been exchanged. However, the bankruptcy proceedings may overlap with the Plenary Proceedings. The statutory framework envisages that summary bankruptcy proceedings should be expeditiously conducted and it would be wrong to assume that the existence of plenary proceedings, in the Commercial List or otherwise, would impact on such proceedings in the absence of real and substantial issue being established. That said, in the particular circumstances it would be inefficient use of judicial resources and an unnecessary imposition on both parties if both bankruptcy and plenary proceedings were to proceed simultaneously. Parallel proceedings might also lead to inconsistent findings. Depending on their outcome, the resolution of the Plenary Proceedings may (if the Applicant is wholly or partially successful) either eliminate the need for the bankruptcy proceedings or require the issuance of a fresh summons or (if the Creditor is successful) reduce the scope of the issues to be ventilated at the hearing of the Petition. In the circumstances, and subject to any submissions that may be received, I am minded to dismiss the current application and to adjourn the petition for six months to allow the parties an opportunity to progress the Plenary Proceedings. However, any such stay cannot be open-ended. I will review the position in December, following which, depending on intervening developments, I may, inter alia, either continue the stay for a further short period or lift it to allow the petition to progress to a hearing without further delay. However, I will hear the parties on Monday 2 November 2026 before finalising my directions (and to determine whether any steps can usefully be taken concurrently with the Plenary Proceedings) and also to deal with the costs of this application.

Representation

Bernard Dunleavy SC and Niall Ó hUiginn instructed by AMOSS LLP for the Creditor

Gary McCarthy SC and Keith Farry, instructed by Kane Tuohy Solicitors for the Debtor.