

LEGAL UPDATE

Difficulties have arisen in recovery cases where the Plaintiff company in the proceedings were not a party to the original loan facilities in question. This update gives a summary of the Judgment *Ulster Bank Ireland Limited - v - O'Brien [2015] IESC 96* which deals with the issue.

There were a number of conflicting judgements in the High Court recently examining similar issues and it made it difficult to assess with certainty what information should be inserted into the Grounding Affidavit to show to the court before judgment could be granted. A recent decision of the Supreme Court has clarified this to a certain extent and we set out the salient points of the case for your information below.



Background to the Case:

In this case, the Defendants alleged that the bank's employee's evidence that money was due and owing was hearsay and it did not comply with the Bankers Book of Evidence Act 1879 and as such, proceedings should be struck out. The judgement in this case was delivered on the 16th December 2015 and Judge Laffoy held that there was no requirement to comply with the 1879 Act and instead the facts and details which had been adduced in the Grounding Affidavit was sufficient to enter final judgment.

This could be instrumental in forecasting the position the courts may take in cases (notwithstanding that all cases will turn on their own individual merit) where banks, or a company who has bought a loan facility are seeking to recover monies.

Judge Laffoy set out a number of points in her Judgment which convinced her to grant a judgment in the case. Although cases differ in that difficulty surrounds the plaintiff company not being a party to the original proceedings, we have examined the relevant information we would need to insert into Grounding Affidavits as follows:

1. The Deponent will confirm that he has the responsibility for the management of the loan account in question. In the above O'Brien case the Deponent was a Senior bank official with specific responsibility for managing the O'Brien account. This should probably be a Director.
2. It should also set out the position and role of the Deponent in the Plaintiff company.
3. The Grounding Affidavit for the application for summary judgment should state that it is made with the full authority and consent of the Plaintiff company.
4. The Affidavit should also state that it is made from their own knowledge and from a perusal of the banks and Plaintiff's books and records.
5. It needs to be explained how the relevant records came to be in your possession and a description of what is in the records needs to be set out under oath.
6. The facility letters listed in the Indorsement of Claim need to be exhibited with the Defendants written acceptance of the terms of the facility.

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7. Confirmation that the funds were drawdown and the date on which it occurred.
8. Confirmation of the term of the facility; the interest rates etc. should be included.
9. A print off of an electronically maintained statement of account clearly showing the Defendant's liability at the time of the transfer and an explanation as to how the records came to be in the possession of the Plaintiff. These should be printed from computer records.
10. Confirmation of the transfer of the loan together with the associated rights.
11. The instrument transferring the loan in question will need to be exhibited.

Difficulties may arise in gathering the documentation required under point 9. However, this is evidentially one of the most important items and we will need you to gather as much documentation as possible if the original statements of account cannot be obtained.

Similarly, the logistics behind the transfer of the loan in question will need to be set out in explicit detail. In the O'Brien case discussed above, much turned on the fact that there was an absence of any contradiction from the Defendant that the sum was due and owing. However, the issues of transfer and the detail in the affidavit must be looked at carefully in all cases.

For more information, please call:



JAMES SHERWIN

Partner

D: +353 1 2120450

M: +353 86 6074627

Email: jsherwin@sor.ie

[Online profile](#)

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