Neutral Citation: [2015] IEHC 850

THE HIGH COURT

Record No. 2013/2299 S

BETWEEN:-

Allied Irish Banks Pic and AIB Finance Limited

PLAINTIFFS

-AND-

Desmond Killoran and Agnes Killoran

DEFENDANTS

JUDGMENT of Mr. Justice Michael Moriarty delivered the 24th day of July 2015

1. These proceedings were commenced by summary summons dated 19th July, 2013, whereupon following a notice of appearance being filed, the plaintiffs bring these proceedings before the court on a motion for summary judgment.

2. The plaintiffs seek judgment on foot of a number of loan facilities extended to the defendants by the plaintiffs at various times from 2002 to 2006. These facilities were extended to the defendants for diverse purposes associated with the defendants' property acquisition and development business.

3. The plaintiffs' claim is supported by the affidavits of Mr. Bernard Carroll, Manager in Allied Irish Banks plc. At paragraph 71 of his first affidavit sworn on 23rd July, 2013, he avers that each of the facilities extended to the defendants were repayable on demand. The demand nature of the facilities is contested by the defendants at paragraph 21 of Mr. Killoran's first affidavit sworn on 11th October, 2013. This issue will be revisited later in the judgment when the merits of the other defences raised in the first defendant's affidavits in contesting this application will also be examined.

4. As appears from paragraph 72 of Mr. Carroll's affidavit of 23rd July 2013, the defendants have defaulted on their repayment obligations under each of the six facility letters and have made no capital or interest repayments since 23rd June, 2011. The most recent dates of repayments as exhibited by the plaintiffs are as follows:-

Facility…… Last Repayment Date

Letter of sanction dated…6th August 2002……. 20th January 2010

Letter of sanction dated…7th August 2003…….. 7th January 2010

Letter of sanction dated….31st March 2004……..22nd December 2009

Letter of sanction dated…1st February 2005…… 4th January 2010

Letter of sanction dated…25th April 2005…… 11th December 2009

Letter of sanction dated…18th May 2006…….. 30th November 2009

Letter of sanction dated….15th September 2006…… 23rd June 2011

5. In light of this default the plaintiffs issued letters of demand to each of the said defendants on 28th September, 2012. Despite the demands, the defendants failed to discharge the monies owing and the interest on the facilities continued to accrue. Further letters of demand were issued to each defendant on 10th December, 2012 however no repayments have been made to date since the issuance of these letters of demand.

6. Subsequent to the delivery of the letters of demand, the plaintiffs exercised a right of set-off on deposit monies of €116,381 held in the name of the second named defendant, Mrs. Agnes Killoran. This right of set-off was exercised in accordance with clause 7.24 of the plaintiffs' General Terms and Conditions governing Business Lending on 16th January, 2013. The liabilities of both defendants have been reduced by €116,381 as a result of the said set-off.

7. In addition to this set-off, the defendants have been afforded a credit of €404,256.82 calculated by the defendants' own advisor to take account of an administrative error dating back to 2006 whereby the interest rate on the defendants' loan was switched from a Tracker Rate to a Standard Variable Rate. The defendants cite this as error one of the grounds which they contest this application and thus will be examined further below.

8. In light of the foregoing, the plaintiffs' claim that the sum of €15,752,822.74 is due and owing by the first named defendant and the sum of €13,545,119.83 is due and owing by the second named defendant. The amount owing by the second named defendant is less than the amount owing by the first named defendant in circumstance where she is not party to the Letter of Sanction dated 31st March 2004.

Legal Principles Applicable to an Application for Summary Judgement

9. The principles applicable to an application for summary judgment are well settled in this jurisdiction. Denham J. (as she then was) in

her judgment in *Danske Bank v. Durkan New Homes* [20 I 0] IESC 22 set out the applicable legal principles as follows:-

> *"13. Order 37 r.7 of the Rules of the Superior Courts, 1986 provides:-*
>
> *'Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discove1y or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just'.*
>
> *14. Several cases were opened before the Court which have addressed this jurisdiction. These included Bank of Ireland v. Educational Building Society [1999} 1 JR. 220 where Murphy J emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-*
>
> *'Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had 'a real or bona fide defence', whether based on fact or on law, he was bound to afford them an opportunity of having the issue tried in the appropriate manner'.*
>
> *15. In Aer Rianta c.p.t. v. Ryanair Limited [2001} 4 JR. 607, Hardiman J*
>
> *reviewed Irish cases and concluded at p. 623:-*
>
> *'In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?'*
>
> *16. In McGrath v. 0' Driscoll [2007} 1 ILRM 203, Clarke J described the law as follows, at p. 210:-*
>
> *'So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment'. "*

10. In *Irish Bank Resolution Corporation (in special liquidation) v. Gerard McCaughey* [2014] IESC 44, Clarke J. giving the judgment of the Supreme Court said:-

> *"5.4 It is important, therefore, to reemphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J pointed out in Aer Rianta, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath, the Court may come to a final resolution of such issues.*
>
> *That the Court is not obliged to resolve such issues is also clear from Danske Bank v. Durkan New Homes.*
>
> *5.5 Insofar as facts are put forward, then, subject to a ve1y narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which 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 or other similar circumstances such as those analysed by Hardiman J in Aer Rianta. It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put fon11ard by the defendant. "*

11. It is unnecessary to set forth all of the relatively recent authorities relating to summary judgment applications, but it merits noting that McKechnie J., in *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1, set forth some 12 principles as guidelines to courts addressing applications in this regard, in the course of which he emphasised both the need for caution and the paramount importance of achieving a just outcome, when exercising this jurisdiction.

Bankers Books Evidence Act

12. The procedure by summary summons is designed for use in cases which are suitable for summary disposition upon affidavit evidence. In the present case there have been six lengthy affidavits filed on behalf of the Bank and four equally lengthy replying affidavits sworn by Mr. Killoran on behalf of the defendants. It is the arguments contained within these affidavits which form the basis of the court's determination in dismissing or granting the motion to enter judgment.

13. On the second day of hearing of this application, Counsel for the defendants sought to raise a new ground of challenge to the application which was not previously raised by the defendants on affidavit. Counsel argued that the plaintiffs have failed to make out a *prima facia* case as the evidence of the debt claimed is not in an admissible form due to non compliance with the Bankers Book Evidence Act 1879, as amended. In support of this contention counsel relies inter alia on the judgment of O'Malley J. in *Ulster Bank Ireland Limited v. Dermody* [2014] IEHC 140.

14. It must be stated that this new position adopted by Counsel for the defendants at such at late stage in the proceedings is so radically at variance with the position taken by the defendants up to this point it amounts to something of a last minute ambush. There are four affidavits by Mr. Killoran of considerable substance where the existence of the debt owed to the plaintiffs is never denied but instead matters of substance are raised which he contends amount to a defence to the current application. In light of this, raising a legal defence of this nature and at this juncture in proceedings shows marked disregard for the established procedure by summary summons and must be viewed with appreciable caution.

15. In relation to non dispute of quantum, at paragraph 5 and 6 of Mr. Canoll's first affidavit the quantum of the plaintiffs' claim is set out and is never disputed by the defendants on affidavit. At paragraph 72 he refers to a table setting out the dates of last payment by the defendants in respect of various facilities exhibited at Tab P of his affidavit. Again Mr. Killoran never disputed these facts in any of his affidavits. The only time Mr. Killoran disputes quantum is at paragraph 11 of his first affidavit in relation to the interest overcharging issue to which Mr. Canoll replied to in his second affidavit sworn on 23rd December 2013 at paragraph 15 clarifying the issue in relation to the allowance for interest overcharged. There is no further dispute on behalf of Mr. Killoran on this issue following this clarification.

16. The non dispute of quantum is significant when viewed in the light of the recent Court of Appeal decision *Ulster Bank v. Egan* [2015] IECA 85 where the Court cited with approval the observations of Ryan J. in the High Court in *Bank of Ireland v. Keehan* (Unreported High Court, 16th September 2013) where he stated

> *"If a matter is not disputed, there is no need of proof Where a party chooses to stay silent in the face of a claim, a prima facia proof is sufficient....*
>
> *Although the evidence of the contents of the Bank's records does not conform to the formal specifications in the 1879 Act as amended in a number of respects, it is nevertheless apparent as a matter of legitimate inference that the evidence of the defendant's liability emanates from the Bank's books and records and that the statements are printed from its computer records. The point in common, however, is that the case is not about the 1879 Act and a copy of a Bank Book, but about a liability arising out of a contract entered into by written agreement signed by him and witnessed by his solicitor and an overdrawn current account. The Bank is (sic) proven its case that the defendant defaulted on a loan. "*

The Court of Appeal decision in *Ulster Bank v. Egan* at paragraph 21 also declines to follow the decision of O'Malley J. in *Ulster Bank v Dermody* [2014] IEHC 140 which in the defendants' submission was on all fours with the present case in relation to the Bankers' Books Evidence Act.

17. Like the case in *Bank of Ireland v. Keehan*, the current case is not about the Bankers' Books Evidence Act, but about a liability arising out of a series of loan facilities entered into by the defendants who do not deny the fact that they borrowed the sums in question. As the defendants have not disputed this fact there is no requirement on the plaintiff Bank to put before the Court any additional information or expand on its existing evidence in relation to default as per *Bank of Ireland v. Keehan.*

18. As previously stated, Mr. Killoran raised a number of issues throughout the exchange of affidavits which he puts forward as providing an arguable defence. The Court will now tum to asses those issues in order to determine whether the defendants have met the standard of an 'arguable defence' and thus be granted leave to defend.

Demand nature of the Facilities

19. It is contended by the plaintiffs that the loan facilities at issue in these proceedings are all repayable on demand. Each of the facilities the subject matter of this application, with exception of the facility extended pursuant to the Letter of Sanction of 15th September 2006, was specified to be repayable *"At the pleasure of the Bank".* They also expressly provided that the loans would, *"at the discretion of the Bank",* become immediately repayable without prior notice on the happening of a number of specified events, including default by the borrowers in complying with any of the terms and conditions of the relevant Letter of Sanction. The September 2006 facility was repayable on demand pursuant to clause 3.1.1 and 3.1.2 of the plaintiffs' General Terms and Conditions Governing Business Lending.

20. At paragraph 17 of his first affidavit, Mr. Killoran argues that the facilities were not repayable on demand. The defendants argue that the meanings of *"at the pleasure of the Bank"* and *"at the discretion of the Bank"* are ambiguous terms and in the absence of clarity the facilities cannot be construed as repayable on demand. In support of this contention they cite various authorities which deal with the construction of commercial documentation at paragraphs 29-39 of their written submissions.

21. It seems to me that whether the facilities may be properly deemed 'demand' facilities is entirely academic in the context of this application for summary judgment where there has been a clear failure by the defendants to make payments on the said facilities for over four years. In those circumstances the plaintiffs were entitled to call in the loans and therefore it is unnecessary to consider the question as to whether the facilities were, even in the absence of default, repayable on demand. In any event it is difficult to contend for a construction that the phrases *"at the pleasure of the bank"* and *"at the discretion of the bank"* are generically distinguishable.

Terms and conditions governing the Letter of Sanction of 15 September 2006.

22. Mr. Killoran at paragraph 3 of his first affidavit claims that the defendants never received the plaintiffs' Terms and Conditions as referred to in the Letter of Sanction dated 15th September 2006. The defendants also claim that the signature page to the said Letter of Sanction demonstrates no connection to the terms and conditions it supposedly incorporates and also makes no specific reference to the facility in question.

23. Mr. Carroll in his second affidavit at paragraph 3 avers that the relevant booklet containing the applicable Terms and Conditions would have been furnished to the defendants under cover of the Letter of Sanction. Also on its face the letter records that a copy of the Terms and Conditions are attached. Also the top of the signature page contains the following sentence - *"The terms and conditions applicable to the facility in this letter of sanction are accepted by me/us".*

24. The plaintiffs further submit that the first named defendant does not deny receipt of the facility letter itself which refers to the applicability of the Terms and Conditions, therefore they have been validly incorporated into the Loan Agreement between the parties on foot of the Letter of Sanction of 15th September 2006. It is submitted by the plaintiffs that the defendants' conduct in drawing down the funds operated as an acceptance of the Letter of Sanction on the terms upon which it was offered, with the said Letter of Sanction putting the defendants on inquiry as to the contents of the Terms and Conditions. The plaintiffs rely on the Supreme Court judgement in *Leo Laboratories Ltd. v. Crompton* [2005] 2 I.R. 225 which addressed incorporation by reference of standard terms.

25. There is therefore a conflict of evidence on this point, however, it seems to be that this conflict can be resolved without the need for plenary hearing. In this regard I adopt the dicta of Finlay Geoghegan J. in *AIB pic v. Galvin Developments* [2011] IEHC 314 where the defendants also had sought to rely on the failure of the bank to furnish its general Terms and Conditions. The learned Judge held as follows:-

> *"It is a well-established principle of contract law that terms may be incorporated into a written agreement signed by the*

parties by express reference. The failure to enclose a copy of the conditions does not preclude their incorporation by express reference. See, inter alia, Sweeney v. Mulcahy [1993] ILRM 289, and Leo Laboratories Ltd. v. Crompton B.V. [2005] 2 JR. 225. In my judgment, the agreement between AIB and GDK and the Galvin Brothers, respectively, in September 2008, in relation to all the facilities the subject matter of these proceedings, included, by express reference, AIB's General Terms and Conditions Governing Business Lending. "

26. Although the defendants deny that the signature page is related to the Letter of Sanction in question it seems to me that this is a *"mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available"* as per Clarke J. Irish Bank Resolution Corporation (in special liquidation) v. Gerard McCaughey and as a result does not provide an arguable defence. The General Terms and Conditions were therefore, in my view, incorporated by express reference in the Letter of Sanction of 15th September 2006.

Entitlement to exercise rights of set-off
27. As previously stated the plaintiffs exercised a right of set-off on deposit monies of €116,381 held in the name of the second named defendant, Mrs. Agnes Killoran. This right of set-off was exercised in accordance with clause 7.24 of the plaintiffs' General Terms and Conditions governing Business Lending on 16th January2013. The liabilities of both defendants have been reduced by €116,381 as a result of the said set-off.

28. It is the defendants' assertion that the entitlement to exercise a right of set-off in the sum of €116,381 over the second defendant's savings has no lawful basis as the plaintiffs have failed to demonstrate incorporation of the contractual terms. As I have found above that the plaintiffs' Terms and Conditions have been incorporated by express reference, the plaintiffs therefore lawfully exercised their right of set-off over deposit monies and thus cannot amount to a defence to the plaintiffs' motion.

Interest Rate applied in relation to the Letter of Sanction of 15th September 2006
29. At paragraph 5 and 6 of his first affidavit, Mr. Killoran questions the interest rate applied to the facility drawn down by the defendants on foot of the aforementioned Letter of Sanction. He suggests that the appropriate rate which should have applied was the ECB tracker rate plus 1.5%.

30. The facility Letter on its face sets the interest to be the "Market Related Rate" plus 1.5%. Mr. Carroll avers to this in his second affidavit at paragraphs 6 and 7 where he sets out the definition of "Market Related Rate" in the plaintiffs' Terms and Conditions and confirms the rate used in conjunction with this facility was the Euribor Rate set 15th September 2006, which was 3.381%.

31. The defendants primary argument against this is that the "Market Related Rate" does not apply as the plaintiffs' Terms and Conditions do not form part of the agreement between the parties due to lack of incorporation. As I have found that the Terms and Conditions have been incorporated, it therefore follows that the applicable interest rate was the Euribor Rate set 15th September 2006, which was 3.381%.

32. Without prejudice to this contention, the defendants in their written submissions argue that the plaintiffs have abandoned their contractual conditions by purporting to seek judgment based on a Market Related Rate which was permanently frozen in time by reference to the Euribor Rate which applied at the time of draw down.

33. Counsel for the plaintiffs, in reply, stated in relation to the interest rate being permanently frozen that this is simply not the position. He stated that Mr. Carroll at paragraph 8 of his affidavit simply identifies that 4.88% was the rate at the point in time that the monies were drawn down. He stated that had this accusation been made by Mr. Killoran at any point in his affidavits, the relevant statements of account would have been furnished exhibiting the fluctuation in the interest rate over a period of years.

34. Again the defendants seek to rely on an accusation raised at a late point in the proceedings. At no point in his affidavits did Mr. Killoran state that the interest rate remained frozen, had he done so the relevant statements of account could have been furnished. I am not satisfied as a result that the defendants have raised a bona fide defence in relation to the interest rate applicable to the Letter of Sanction of 15th September 2006.

Interest Overcharging
35. The plaintiffs accept that an administrative error occurred dating back to 2006 whereby the interest rate on the defendants' loan was switched from a Tracker Rate to a Standard Variable Rate. The defendants have been afforded a credit of €404,256.82 calculated by the defendants own advisor to take account of the said error.

36. It seems that this therefore cannot amount to a real or bona fides defence to the present claim in circumstances where the sum now sought by the plaintiffs has been reduced by the credit afforded to the defendants for an administrate error while also having regard to the level of the defendants' debts at the relevant time.

Valuation of Secured Properties
37. At paragraph 24 of his first affidavit, Mr. Killoran claims that the Letters of Sanction of 6th August 2002, 17th August 2003 and 31st March 2004 provide that:-

"A satisfactory valuation of the properties offered as security will be required before any monies are drawn down".

38. The defendants argue that no such satisfactory valuation was sought or obtained by the plaintiffs. At paragraph 28 of his first replying affidavit the first defendant acknowledged that the requirement for a valuation of the properties which secured the offers of loan facilities dated 6th August 2002, 17th August 2003 and 31st March 2004 did not imply a warranty to him that those properties constituted adequate security. Notwithstanding this, the first defendant understood that the existence of such valuations to be a mutually beneficial aspect of the contractual arrangements and the apparent absence of such valuations have potentially prejudiced the defendants.

39. The plaintiffs on the other hand argue that the valuation provisions contained in the letters of sanction were for the exclusive benefit of the plaintiffs, and it was open to the plaintiffs to waive compliance without creating any liability towards the defendants. For this contention they rely on the test articulated by Charlton J. for ascertaining if a term is for the sole benefit of one party in *Irish Bank Resolution Corp Ltd. v. Cambourne Investments Inc & Curistan* [2012] IEHC 262.

40. The defendants argue that even if this is the case, in order for a waiver to exist, the requirements for security valuations must have, in fact, been waived. The defendants say they proceeded on the basis that no such waiver had taken place and were never advised to the contrary. They submit that the requirement for valuations was a conditions precedent to their contract with the Bank

which could not have been waived ex post facto.

41. This argument regarding valuations being a condition precedent was not addressed by Mr. Killoran in his affidavits however it does appear in the defendants' written submissions. Counsel for the Bank stated that this was a point which could have been addressed on affidavit and could have been dealt with as the Bank had previously placed extensive evidence before Ryan J., as he then was, in the interpleader proceedings which also related to this matter. In particular counsel referenced the fact that Mr. Killoran's solicitors, on his irrevocable instructions, had undertaken to put a mortgage in place which was for the benefit of the defendants to allow drawdown to take place prior to all the legal documents being put in place.

42. The plaintiffs finally submit that were the court to find that some cause of action lies on foot of the matters complained of under this heading, such a claim could not operate as a defence against a summary judgement, but would require to be articulated by way of a distinct counterclaim. This is due to the contents of clause 7.13 of the 2012 Terms and Conditions which provides that all sums payable by the defendants are to be paid *"in full without any deduction, set-off, counterclaim or withholding whatsoever".*

43. The proper construction and application of clause 7.13 is a matter that has occasioned me some concern in the light of the totality of material dealings between the parties, and I will return to this aspect in the concluding stages of this judgment.

Other claims raised on affidavit
44. Mr. Killoran in his affidavits raised a number of ancillary issues namely - the alleged practise of signing blank forms, issues relating to the appointment of a receiver, and alleged representations in relation to reduced interest rates. Although these claims were not canvassed by counsel in any great detail in written or oral submissions the substance of such claims must also be determined in this application for summary judgment.

Alleged practice of signing blank forms
45. Mr. Killoran alleges at paragraph 4 of his third affidavit of 5th December 2014, that he has in the past been presented with blank documents for signature by Mr. Eugene Duggan on behalf of the plaintiffs. Mr. Killoran avers that in light of this alleged practise it is not inconceivable that documents which have been signed by him in the course of his business dealings have been used other than for their intended purpose. This allegation is made by the defendant in the context of the disputed signature page of the Letter of Sanction dated 15th September 2006.

46. Mr. Eugene Duggan swore an affidavit on 17th March 2015 in response to the allegation made by Mr. Killoran rejecting the claims and indicated that what Mr. Killoran refers to as "blank documents' can only be a reference to application forms which Mr. Duggan furnished to Mr. Killoran under cover of a letter dated 21st September 2010 for the purposes of reinstating interest free repayments on certain loans regarding his Hungarian investments.

47. It is clear from the content of the letter that these application forms were solely for the purpose of reinstating interest only repayments in respect of the Hungarian loan portfolio and were not intended in some sinister way whereby the defendants were asked to sign blank documents which could be used by the bank for its own purposes at some later stage. It seems to me that this is a *"mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available*" as per Clarke J. *Irish Bank Resolution Corporation (in special liquidation) v. Gerard McCaughey* and as a result does not provide an arguable defence to the current application.

Appointment of a Receiver
48. The defendants have sought to rely upon the circumstances in which the plaintiffs appointed a receiver over secured property at 1 and 1A Upper Leeson Street, Dublin 2. The rents associated with this property have been placed in escrow by order of Ryan J. (as he then was) pending the determination of certain interpleader proceedings, which have, themselves, been adjourned pending the hearing of rectification proceedings which the first named plaintiff has been obliged to bring in relation to one of the mortgages executed by the defendants over part of the property at Upper Leeson Street.

49. Even if the defendants were in a position to demonstrate that they suffered a loss or prejudice by the appointment of a receiver over their secured property this is a matter which should properly be dealt with by the Court hearing the substantive proceedings relating to the security granted to the bank by the defendants. The plaintiffs' entitlement to summary judgment in relation to the facilities the subject matter of these proceedings is therefore unaffected by the issues surrounding the appointment of a receiver of the property at Upper Leason Street.

Alleged representations in relation to reduced interest rate
50. At paragraph 21 of his first affidavit, Mr. Killoran asserts that Mr. Glenn Bradley, Senior Lending Manager of the plaintiffs, represented to him verbally that the applicable interest rate on the defendants' facilities would be reduced to the ECB tracker rate plus 1.5%. He states that if this tracker rate had, in fact, been applied to his various loan accounts it would have had a material impact upon the question of whether those loan accounts were in arrears. The defendant expands on this contention in paragraph 9 of his second affidavit where he states that he can "clearly recall Mr. Glen Bradley" telling him "in or about 2005" that bank would reduce his tracker interest rate on all his accounts if he borrowed more money. He stated that he believed that the reason for this promise was to ensure that he would not "shop around" among other rival banks who were aggressively lending at that time.

51. Despite these alleged promises the facts are that the defendants did borrow subsequent to 2005, and there was no material placed before the court which shows that the defendants sought to rely on this alleged representation by the plaintiffs. The Letter of Sanction of 15th September 2006 expressly states that the applicable interest rate to be *"Market Related rate plus 1.5% per annum"*. Furthermore, on draw down of the said facility, a letter was sent to the defendants on 19th September, 2006 which sets out the base rate of interest as 3.381% and the margin to be 1.5% per annum. In addition clause 1.1.2 of the plaintiffs' 2006 Terms and Conditions provides that *"unless a facility is sanctioned to renew, replace, or restructure existing facilities, the existing facilities will continue to be subject to the terms and conditions on which they were sanctioned"*. No such new facility was sanctioned at a reduced interest rate. In light of the foregoing the defendants have failed to raise an arguable defence against summary judgment on this ground.

Conclusion
52. I have carefully considered all the pleadings, documentation and arguments advanced by both parties. It is far from satisfactory, to put matters no more robustly than that, that after engaging in a detailed process of exchanging affidavits, replete with factual and legal contentions as to how the Court should rule on this matter, this seems to have been largely superseded by the provision of a brief and hastily prepared written submission by the defendants at lunchtime on the second day of the hearing. This substantially switched the focus of the defendants' contentions, from all that had been raised before, to the argument based on the Bankers' Books Evidence Acts, which I have found to be unsustainable. It is, I think, unnecessary for me to rule on whether, as the plaintiffs

contend, a form of estoppel by conduct or representation arises, and I am content to say that, as a minimum, what is warranted is a significant diminution in the weight and creditability of the case advanced by the defendants as a whole. I see no reason to revise my description at the hearing of the defendants' *volte face*, in its immediate aftermath, as "breath-taking".

53. Nevertheless, what is in its totality advanced on behalf of the defendants must in justice be fairly considered. In interpreting the plaintiffs' Terms and Conditions, the portion that caused me a measure of unease was that which purported to debar the defendants from raising any grievance or ground of discontent by way of set off or counterclaim. In relation to this Mr. McDonald S.C. could scarcely argue that the defendants were precluded from any form of potential redress in the event of breaches on the part of his clients, and he argues that this provision did not preclude the defendant from instituting separate proceedings to enforce possible entitlements. It seems to me that the relevant provision, if not draconian, was one of particular rigour, and was demonstrably one sided, since the plaintiffs as aforesaid had been quick to deploy a set-off in its own favour in relation to deposit moneys held by it for the second named defendant, and was one the impact of which should have been explicitly conveyed and explained to the defendants. I can find no reference to such effect in voluminous correspondence and other documentation recording dealings between the parties. Indeed the tenor of much that was conveyed to the defendants by the plaintiffs, particularly in early days before the stom1 clouds gathered, was markedly different. Further the Courts should as a matter of policy lean against needless duplication or proliferation of legal process. I am aware that this is an aspect that was not raised at the hearing of the application, and that it would have been open to me tore-list the matter, but in the light of the scale of the ultimate view I have formed on the application as a whole, I have not considered this essential.

54. During the comparatively extended hearing for what is in substance an interlocutory motion tried on affidavit, I referred to the appreciable volume of prior case law dating back to *Crawford v. Gillmor* (1891) 30 LR Ir 238 through *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220 and up to *Aer Rianta v. Ryanair Ltd* [2001] 4 I.R. 607 to the general affect that the length of time and volume of paper expended was of such dimensions as to suggest that the matter was not one of requisite clarity to be viewed as appropriate for summary judgment. On behalf of the plaintiff, Mr. McDonald S.C. responded that the protraction and relevant setting forth of material dealings between the parties unavoidably necessitated a considerable measure of detail, but the conclusions to be drawn were clearly in favour of his clients, and fell within the scope of the relevant jurisdiction.

55. It is now I think clear and fully set forth in Delany & McGrath, *Civil Procedure in the Civil Courts*, 3rd Ed., (Dublin, 2012), that not every application for summary judgment before the High Court will generate the diametrically opposite outcomes of an order for judgment in the entire amount sought, on one hand, or a dismissal of the application, with the entire sum in issue remitted to plenary hearing, on the other. I again briefly raised possible contentions in this regard during the hearing. A significant decision in this regard was that of Clarke J. in *ADM Landis Plc v. Arman Retail Ltd.* [2006] IEHC 309. In that case a counterclaim had been raised by the defendants, who had been sued on a guarantee. Very little evidence had been adduced at the hearing as to the quantum of the counterclaim. In his judgment Clarke J. held that the justice of the case would best be met by making an approximate estimation of the quantum of the counterclaim; this, he found, must even on an optimistic view be no more than 50% of the sum claimed, and he entered judgment on that basis. A broadly similar approach was taken by Hogan J. in *Albion Properties Ltd v. Moonblast Ltd*. [2011] IEHC 107, and Clarke J. adopted similar reasoning in *Chadwicks Ltd. v. P. Byrne Roofing Ltd*. [2005] IEHC 47, and in *Clarke v. Stephens* [2008] IEHC 203.

56. It goes without saying that the merits established by the plaintiff were not overwhelmingly one-way only, and that the Court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. Courts must be alert to defendants who seek merely to defer the evil day on a basis of arguments that do not pass muster, and must remain mindful of the *de minimis* rule in assessing summary judgement applications.

57. In the present instance I have indicated the view that I have taken on the specific term precluding recourse to set-off or counter claim. Also in relation to the interest overcharging by the plaintiffs, although due to the fact that the defendants received a full refund and having regard to their level of indebtedness this contention could not amount to a resistance to a judgment, the fact remains the Bank inadvertently charged the defendants a higher interest rate on loans for a period of approximately 5 years resulting in the sum of €404,256.82 being reimbursed to the defendants. This at the very lest amounts to a significant oversight by the Bank and leaves a limited but real issue outstanding as to that sum adequately recompensed the defendants, or whether some further potential amount in this regard may be due to the defendants. In addition the plaintiff Bank failed to procure valuations of the properties offered as security relating to the Letters of Sanction of 6th August 2002, 17th August 2003 and 31st March 2004.

Although I have found that this is not sufficient to defeat a claim for summary judgment it is still far from the required standard of practise expected and required of a lending institution of such stature, and merits some limited consideration as to whether some appropriate financial allowance should be made.

58. Having reflected carefully on all these matters, whilst no balanced evaluation could in my view give rise to the 50% discounting of the aggregate claim found by Clarke J. in *ADM Landis*, it seems to me that, however unhappy the recent conduct of the case on the part of the defendants, they cannot be held to have forfeited all entitlements to contest portions of the substantive claim against them that cannot be viewed as derisory or *de minimis*. There is no magic formula for assessing an exact percentage, but having considered the matter as carefully as I can in an exercise that inevitably has some element of the arbitrary, I am of the view that a proportion of 20% of the respective claims against both defendants should be remitted to plenary hearing, and leave to enter final judgment allowed for the 80% balance. Referring again to the ADM Landis judgment of Clarke J., it was further then held that, as was frequently the case, judgment would be granted jointly and severally against two named individuals, but the full sum could obviously not be recovered against both, which would be tantamount to double recovery.

59. Accordingly judgment will be granted against both defendants for 80% of the amounts respectively claimed, that is €12,602,258.19 against Mr. Desmond Killoran and €10,836,095.86 against Mrs. Agnes Killoran.