THE HIGH COURT

[2024] IEHC 371

[2020 No. 252 S]

BETWEEN

SEAHOUND WIND DEVELOPMENTS LTD

PLAINTIFF

AND

MID CLARE RENEWABLE ENERGY DAC

DEFENDANT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 20th day of June, 2024.

INTRODUCTION

1. This is the court's judgment on the plaintiff's application for summary judgment for a liquidated amount of €32,835.13, where the sum claimed relates to a residual claim for interest which formed part of an initial larger substantive claim.

2. The application arises in proceedings commenced by a summary summons dated 11 September 2020 in which the plaintiff claimed the sum of €650,000, together with interests and costs. Following the commencement of the proceedings, the defendant discharged the sum of €650,320 into the plaintiff's bank account on or around 9 October 2020, with the amount €320 being treated by the defendant as comprising the claim for costs on the summary summons.

3. The plaintiff is now making a claim for interest pursuant to the statutory scheme of the *European Communities (Late Payment in Commercial Transactions) Regulations 2012*, S.I. No. 580/12 ("*the 2012 Regulations*"); and costs.

4. The defendant contends that the application should be refused, and the matter remitted to plenary hearing. The basis for that contention is grouped under two headings and can be summarised as follows:

    i. That the plaintiff has failed to demonstrate it has a prima facie entitlement to judgment as it has failed to adhere to procedural requirements in the Regulation in pleading its case, per *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84;

    ii. That the plaintiff's claim for statutory late payment interest is unenforceable where the plaintiff did not meet their contractual and legal obligations under the contract; and that this amounts to a real and *bona fide* defence in law and in fact, having regard to the test for summary judgment.

RELEVANT PRINCIPLES

11. The legal tests to be applied in this application are very well established. In the cases of *Aer Rianta cpt v. Ryanair Limited (No. 1)* [2001] 4 IR 607 and *Harrisgrange Limited v. Duncan* [2002] IEHC, the Supreme Court identified the test to be applied on an application for summary judgment.

12. That test was reiterated by the Court of Appeal in *Onyenmezu t/a Norlia Recruitment Service v. Firstcare Ireland Limited & Ors* [2022] IECA 11, where Murray J. made the following points at paras 23 and 24:-

- A court in exercising the jurisdiction to grant an application for summary judgment must proceed with care and caution.
- The fundamental question it must address on such an application is whether there is a fair and reasonable probability of the defendant having a real or *bona fide* defence, in law, on the facts or both. This is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable.
- If the court concludes that there is a fair and reasonable probability of the defendant having a defence thus understood, the court must refuse to enter judgment.
- Necessarily, the court must assess the credibility of the defence presented, but in doing so does not engage in any qualitative assessment of the cogency of whatever evidence may be advanced by the defendant by way of asserting a defence.
- The defendant must go further than merely asserting a defence. Thus, in *IBRC Ltd. v. McCaughey* [2014] 1 IR 749, Clarke J. (as he then was) stated that the type of factual assertions which may not provide an arguable defence are those that amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence may be available, or which comprise facts which are in and of themselves inconsistent or contradictory.

14. Where this can be done with no real risk of injustice and where the issues are relatively straightforward, the court also is entitled to resolve discrete legal issues, such as the construction of written documents, without the need to remit a matter to plenary hearing; see *McGrath v. O'Driscoll* [2007] 1 ILRM 203, as approved by the Supreme Court in *Danske Bank A.S. v. Durkan New Homes* [2010] IESC 22.

15. Finally in terms of general principles, as this is an issue raised in the case, it is important to note the requirement to have a proper breakdown of the calculation of the liquidated sum that is claimed. In *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, the Supreme Court made clear that the availability of evidence establishing a basis for understanding with precision how a liquidated sum was calculated was a basic feature of the obligation of a plaintiff to establish a prima facie case. In *Onyenmezu t/a Norlia Recruitment Service v. Firstcare Ireland Ltd & Ors* [2022] IECA 11, the defendant argued that there was uncertainty about claims for staff travel costs, nurse hourly rates, administration fees, staff orientation fees and payment terms, and that this meant that it was impossible to determine on a summary basis what sum, if any, the plaintiff was entitled to pursuant to the contract. However, the Court of Appeal clarified at para 6.7 that what the decision in *Bank of Ireland v. O'Malley* required was that the court have '*at least some straightforward account of how the amount said to be due is calculated…*' . In *Onyenmezu*, the Court of Appeal found that the relevant requirements were satisfied by the provision of detailed invoices that were specifically referred to in the summary summons.

THE BACKGROUND TO THE DISPUTE

16. As noted, in this case the substantive debt claimed in the summary summons was discharged by the defendant at an early stage in the proceedings despite the fact that before that stage there was a considerable level of dispute between the parties.

17. The following seems to be undisputed. The parties were engaged in the development of an extension to an electricity substation in County Clare ("*the Booltiagh substation*"). The substation was to serve the plaintiff's windfarm and those of four other parties, including the defendant. The plaintiff was the "*lead developer*". The agreements relating to the development involved the defendant, who was described as '*Cahermurphy*' for the purposes of the project, agreeing to pay a contribution fee to the project which was capped at €650,000. As will be seen, the overall works included a separate smaller element, and there was a discrete contractual provision for that element.

18. It was common case that the contract that provided for the parties' primary obligations was set out in a letter dated 25 August 2016 on the plaintiff's letterhead and that was signed by representatives of both parties. There was no suggestion that the agreement was later altered or varied, so the parties can be taken as agreeing that the letter was intended to express the full agreement of the parties on the issues addressed.

THE STRUCTURE OF THE AGREEMENT

19. The agreement set out in the letter is not particularly clearly described, however for the purposes of this application the relevant obligations can be ascertained with relative

clarity. The 25 August 2016 letter noted that the plaintiff, defendant and the three other entities were to sign a "*Contestability Agreement*" regarding cost sharing for the Booltiagh substation. The purpose of the letter was to set out, among other matters, the payment obligations. The overall payment/contribution obligations were addressed to (a) the broader contribution to the overall works, and (b) there was a separate element addressed to a discrete element concerning the defendant for what were described as the "*Cahermurphy Transformer works*", which in turn related to what was described within the context of the overall works as the "*Cahermurphy Kiltumper Transformer*" works.

20. The parties agreed in the initial part of the letter that the defendant's liability for the costs of the overall Contestable Works would be capped at the lesser of (a) €650,000 or (b) 5.82% of the costs of the Contestable Works, described as the "*Maximum Payment*". Hence, subject to which of the figures emerged to be lower, the ultimate exposure of the defendant was clear; but, logically, the quantification of the final figures could only be finalised when a clear overall figure for the Contestable Works emerged.

21. It was also clear that in respect to the subset of the overall Contestable Works, described as the "*Cahermurphy Transformer*" works, there were distinct payment obligations which could result in a requirement for those costs to be paid before the balance of the overall contribution was calculated and fell due. In that regard, the defendant covenanted to:

> "*(ii) discharging the <u>vouched</u> Cahermurphy Transformer costs (as defined below) <u>as and when they fall due</u> as part of the construction of the Contestable Works and (iii) subject always to the Maximum Payment, pay its portion of the*

Contestable Works costs associated with the Cahermurphy project on the earlier of a) connection of the Cahermurphy project to the Booltiagh substation or b) once the Cahermurphy project reaches Financial close." [emphasis added]

22. The overall payment obligations were agreed as follows, and I have underlined for emphasis terms that are particularly relevant to this dispute:

"*We hereby agree and contract that the Contestable Works costs associated with the Cahermurphy project will become due and payable on the earlier of a) connection of the Cahermurphy project to the Booltiagh substation or b) once the Cahermurphy project reaches Financial close save for the sum of €257,311 ('Cahermurphy Transformer Costs'), being the Cahermurphy portion of the cost associated with the Cahermurphy Kiltumper Transformer, which forms part of the Contestable Works. For the avoidance of doubt however, it is hereby agreed that the Cahermurphy Transformer Costs shall form part of the Maximum Payment and shall not be in addition to the Maximum Payment.*

The Cahermurphy Transformer Costs shall fall due and shall be payable by Cahermurphy once such payment obligations crystalise for the Lead Developer to the main contractor relating directly to the Cahermurphy Kiltumper Transformer, subject to the delivery of documentation vouching the payment obligations which have been triggered relating to the Cahermurphy Kiltumper Transformer and subject to Construction works commencing and progressing on the Substation site by the Contractor."

23. Again, while the manner for the calculation and dates for payment are not well expressed in the August 2016 letter, as they are not all addressed in a clear sequence, it

seems reasonably clear from the agreement that a number of factors needed to be clear before the payment obligations fell due:

a. The Cahermurphy Transformer costs obligation on the defendant was fixed at €257,311.

b. That element of the costs fell due and payable when two matters were finalised:

    i. Once the payment obligations of the lead developer to the main contractor relating directly to the Cahermurphy Kiltumper Transformer crystallised; and

    ii. When the costs were vouched.

c. The amount of the Cahermurphy Transformer costs were to be included in the calculation of overall costs contribution to be made in respect of the Contestable Works.

d. The amount of that overall contribution was to be calculated by ascertaining whether 5.82% of the overall costs of the Contestable Works would be higher or lower than the sum of €392,689 (being €650,000 minus €257,311).

e. The timing of that aspect of the payment was triggered on the earlier of

    i. the connection of the Cahermurphy project to the Booltiagh substation or

    ii. once the Cahermurphy project reaches financial close.

24. The letter goes on to set out an indicative schedule of anticipated payment milestones for the Cahermurphy Kiltumper Transformer works. It bears repeating that the Cahermurphy Kiltumper Transformer works was the separate piece of work that gave rise to the Cahermurphy Transformer costs element of the overall obligations of the defendant. The costs were fixed at €257,311 and specific events were identified that

triggered the obligation to pay. After addressing issues relating to property issues, the letter goes on to provide that:

> "*The Lead Developer shall make available to Cahermurphy the actual milestone payments profile for the Cahermurphy Kiltumper Transformer within 7 days of entering into a contract relating to the Cahermurphy Kiltumper Transformer and shall furthermore in so far as it is a party to or has access to such supporting documents/agreements relating to the Contestable Works as Cahermurphy may be obliged or requested to provide to its bank/funders during the course of this project or for due diligence, the Lead Developer will likewise make such documentation available to Cahermurphy*."

25. The clause referred to immediately above is not numbered, but for the purposes of this judgment I will refer to it as the "*documents clause*". It appears clear to the court that the documents clause provided, first, for a mandatory requirement to provide information/documentation related to the Cahermurphy Kiltumper Transformer part of the works, but not to the overall Contestable Works. That requirement clearly relates back to the requirement that the Cahermurphy Transformer costs should be vouched before they became due and payable. Second, in relation to the overall Contestable Works, the plaintiff agreed to provide supporting documents/agreements to the defendant. That agreement was qualified by (a) the extent to which the plaintiff had access to those documents, and (b) that the documents were of a type that the defendant's bankers required, or (c) the documents were of a type that were required by the defendant for due diligence.

26. The defendant argued that the effect and meaning of the documents clause was that not only was there a requirement on the plaintiff to provide vouching for the Cahermurphy Transformer costs before the defendant was required to pay the €257,311 contribution – which seems to be clear on the face of the agreement – but also that the obligation to pay the balance of the contribution to the Contestable Works was subject to the plaintiff providing the documentation identified in the documents clause. There is no express linkage between the payment obligation clauses and the documents clause, and the clauses appear effectively at opposite ends of the overall August 2016 letter; hence the defendant's interpretation is not immediately obvious. However, it is not necessarily illogical or fully unwarranted. It is possible to approach the interpretation on the basis that some documentation would be necessary for the defendant's bankers to release the balance owed on the Contestable Works given the alternative mechanisms provided for in the agreement for calculating the ultimate contribution to be made. Put another way, the bankers may want to know what figure emerged when one ascertained 5.82% of the final figure.

THE EVIDENCE

27. The plaintiff's evidence was in the form of an affidavit sworn by Mr. David McNamara on 23 November 2020. Mr. McNamara averred that the plaintiff's contribution (save as to the Cahermurphy Transformer cost) fell due and payable when the Cahermurphy project reached financial close in October 2019. The balance, relating to the Cahermurphy Transformer cost, fell due in August 2020. That crystallisation was said to have occurred when the documentation vouching the payment obligations was sent to the defendant's solicitors on 19 August 2020. The payment of €650,00 was made on

12 October 2020. The interest claim is made up of interest on the first element in the debt running from 1 November 2019 to 11 October 2020, and interest on the second element of the debt running from 20 August 2020 to 11 October 2020.

28. Mr. Padraig Howard swore an affidavit on behalf of the defendant on the 22 April 2021. Mr. Howard did not dispute that the project reached financial close in October 2019. As noted above, financial close was one of the matters that was expressly agreed to trigger the payment obligation in respect of the contribution, other than the Cahermurphy Transformer costs. Instead, the defendant's position is that it has paid all the money that it was supposed to pay. Mr. Howard asserts that the plaintiff failed to provide information and documentation that the defendant had requested repeatedly since February 2018. The defendant asserts (a) that the provision of documentation and information was a contractual obligation undertaken by the plaintiff and that the payment obligation was conditional on that provision, and (b) that the information was necessary because it was "*required by the defendant's bank and was critical to the financing of the defendant's development*." (para. 7 of Mr. Howard's affidavit).

29. Insofar as the defendant in fact paid the principal sum claimed by the plaintiff, Mr. Howard explained that the defendant had been within its rights to withhold payment and effectively it took a pragmatic view when it came to making the payment.

30. Before considering whether it is possible to construe the agreement in relation to payment obligations in a way that allows for a clear determination of the issues, it is worth noting that there is some inconsistency in the account given by the defendant.

a. First, there is the fact that the defendant actually paid the principal sum demanded. While the defendant, like any litigant, is fully entitled to take pragmatic or commercial decisions, that course of action is somewhat inconsistent with its persistent assertion that the payment obligation was not properly triggered.

b. Second, while Mr. Howard asserts the payment obligation was dependent on the provision of documents and that those documents were required by the defendant's bank, there was no evidence beyond bare assertion that the bank requested or required the documents. It would have been a relatively simple matter to obtain some material from the defendant's bank so that there was evidence that the bank requested the information. This was not done, as such it is difficult to treat Mr. Howard's averment as extending beyond mere assertion.

c. Third, as appears from the correspondence, on 13 December 2019 (after the uncontested financial close date) the defendants' solicitor wrote to the plaintiff stating that the defendant was "*making arrangements with its bank to make the payment due in accordance with the Agreement*". The letter goes on to request documents, but it does not clearly assert that the provision of documentation either was contractually required to trigger the payment obligation, or that the bank had requested those documents. It can be recalled that even if the documents clause renders the payment obligation conditional on the provision of documents that condition was qualified by the requirement that the documents were requested by the bankers.

d. Fourth, in a letter dated 4 March 2020, the solicitors for the defendant stated that the defendant had in fact drawn down the funds from its bank and was in a position to make the payment. Again, there was no indication that the bank had

requested the documents, and it would be extremely difficult to envisage how a bank would release funds if it considered that a prerequisite to payment had not been fulfilled.

31. A considerable volume of heated and somewhat circular correspondence passed between the parties and their respective solicitors between February 2018 and the commencement of the proceedings. The full set of correspondence has been exhibited in an affidavit sworn by the plaintiff's solicitor on 27 May 2021. The correspondence does not need to be rehearsed in detail. Insofar as it is relevant to the matters at issue in this case it is sufficient to note that the earlier portion of the correspondence involved the defendant seeking documents that it said were required for its bankers, and the plaintiff requesting confirmation as to the identity of the bankers and details of the documentation that the bankers requested.

32. On 28 January 2019 the newly appointed solicitors for the defendant requested an update as to whether payment contributions were required and repeating the earlier requests for the "*supporting documentation/agreements relating to the contestable works*". That letter did not in terms connect the payment obligation to the request for documents. There was no reply to that letter, and the solicitor followed it up on two occasions that month. Those letters were addressed to a desire to regularise the €257,311 payment for the Cahermurphy Transformer works, which were the works where vouching was expressly required.

33. The plaintiff replied on 17 April 2019 indicating that they were not in a position to issue any invoices at that point, indicating certain other works that needed to be completed,

and repeating the request that the defendant confirm that Bank of Ireland was mandated on behalf of the defendant. The plaintiff noted that they had been in direct communication with an identified manager in Bank of Ireland. On 14 May 2019 the defendant replied asserting that their banking matters were a private matter and that they are not obliged to provide banking details to the plaintiff.

34. The letter of 14 May 2019 is unusual because, albeit after quite a delay, the plaintiff simply was seeking confirmation as to the identity of the bankers and not any further private details. It was clear from the preceding correspondence that the plaintiff was asking whether the defendant's bank required any specific documents or information.

35. Thereafter the plaintiff seems to have issued an invoice – no cover letter was ever exhibited – which was dated 15 November 2019, and which was in the amount of €650,000. Strikingly, the invoice was for the maximum amount that could be due and payable by the defendant in respect of the two sets of works under the terms of the August 2016 agreement. No breakdown was provided and there was no way that the defendant could be put on notice or understand whether it owed the maximum sum of €650,000 or an amount calculated by the alternative methodology in the agreement of 5.82% of the costs of the Contestable Works. Despite this, at no point in the affidavits or correspondence was there any suggestion from the defendant that the works had not reached financial close.

36. A letter was sent by the defendant's solicitor on 13 December 2019 noting the invoice and stating that the defendant was "*making arrangements with its bank to make the payment due*". No issue was taken with the form or contents of the invoice. The letter

noted that the documentation that had been sought had not been provided and called on the plaintiff to provide the documents. Once again while the two matters - payment and the provision of documentation – were dealt with in the same paragraph - there was no express contention that one was dependent on the other.

37. Matters took on a slightly different complexion in early 2020. The solicitor for the defendant was then aware that solicitors were acting for the plaintiff, and a letter was sent to them on behalf of the defendant on 13 January 2020. Significantly, the letter noted that the substation was then "*fully constructed, has been energised and now under the contractual control of the ESB.*" Again, this supports the uncontested proposition that the project had been completed.

38. For the first time there appears to be an express connection made between the provision of documents and the regularisation of payments. The defendant sought five categories of documents relating to the Contestable Works. One of the categories was a spreadsheet and vouching documentation regarding the total costs. In that regard, the letter asserted that as the liability to contribution was the lesser of two sums, 5.82% of the total costs or €650,000, the defendant needed confirmation by vouching documentation as to which was applicable.

39. The plaintiff's solicitors replied on the 12 February 2020. The letter commenced by asserting that the agreement between the parties did not make the obligation to pay dependent on the furnishing of documentation. The solicitors confirmed that the project was complete. The letter addressed the two elements of the payment obligations. In relation to the Cahermurphy Transformer costs – the €257,311 payment – it was

asserted that the defendant's obligation to pay was conditional on the main contractor being paid by the plaintiff and the delivery of documents vouching that liability. The letter explained that while the main contractor had been paid in full there were no invoices or payment claims referring to the Cahermurphy Transformer costs. Nevertheless, an analysis was provided of the costs, and a formal demand was made for payment. In relation to the overall Contestable Works, the letter demanded the payment of €392,689 (being €650,000 minus €257,311). It was stated that the works had reached financial close and that the overall costs were such that 5.82% of those costs were greater than €650,000. According to the analysis document, 5.82% of the costs was €656,640.63. In relation to the defendant's request for five categories of documents, the letter attached two of the categories of documents sought by the defendant, one category was said not to have been finalised yet, an analysis was sent setting out the costs of the Contestable Works (but no vouching documentation), and it was asserted that the defendant was not entitled to the final category.

40. On 4 March 2020 the defendant's solicitor replied again asserting that further documentation was required before the payment could be made. However, at that point the letter asserted that the defendant had drawn down funds from its bank and was in a position to make the payment.

41. There was a further exchange of correspondence arguing the positions of each party between 2 April and 8 May 2020 that did not lead to any resolution. On 19 August 2020, the solicitors for the plaintiff wrote to the defendants attaching links to documents that were said to vouch the Cahermurphy Transformer elements of the claim. The letter noted that interest under the Late Payment Regulations would be claimed on that sum

from 19 August 2020. In relation to the remainder of the payment on the overall Contestable Works, it was stated that that sum became due on the earlier connection of the Cahermurphy project to the Booltiagh substation extension or once the Cahermurphy project reaches financial close. The letter asserted that the plaintiff believed the project reached financial close in October 2019 but did not have a precise date. Hence the plaintiff was claiming late interest from the 1 November 2019.

DISCUSSION

42. As the principal sum claimed in this action has been paid, the primary issues are now largely moot. It has been necessary to trace the course of the dispute in order to determine whether the defendant has a credible defence to the late interest payment claims, because those interest payments if they arise will be calculated from the date when the principal payments ought to have been made. Briefly put, the court needs to ascertain if there is a fair and reasonable probability of the defendant having a real or *bona fide* defence in law or on the facts, or both. Where that defence is argued in relation to factual matters there must be more than mere assertion.

43. I am satisfied with certainty that the element of the interest claim in relation to the defendant's contribution to the Cahermurphy Transformer costs must succeed and that no defence has been made out to the standard required.

44. While the sum was first demanded by the plaintiff on 12 February 2020, it was clear from the terms of the agreement that the trigger for payment was the crystallisation of the payment obligation by the lead developer to the main contractor "*relating directly*"

to the Cahermurphy transformer "*subject to delivery of documentation vouching the payment obligations which have been triggered relating to the Cahermurphy Kiltumper Transformer ...*". The attachment of a single page analysis does not constitute "*vouching*" in any meaningful sense. Properly understood, "*vouching*" must involve the presentation of some form of documentary evidence for a transaction, such as invoices or receipts. However, the letter from the plaintiff's solicitor on 19 August 2020 did include proper vouching, and that is the date from which the plaintiff is claiming Late Payment Interest for that element of the defendant's contribution.

45. On the defendant's own case the Late Payment Regulations condition the entitlement to that form of interest on the supplier fulfilling their own contractual obligations. In this case the plaintiff accompanied the demand for payment of the Cahermurphy Transformer payment with the vouching documentation identified in the August 2016 agreement, and thus it cannot be said that those contractual obligations were not fulfilled. I am likewise satisfied that the plaintiff complied with obligations, explained in *Oneyenmezu v. Firstcare Ireland Ltd,* to provide a straightforward account of how the amount of interest claimed was calculated. That is clearly set out in this case. Hence, I am satisfied that the plaintiff has proved its claim for interest on that element of the claim, which amounts to €2,943.64.

46. The question of the entitlement to judgment on the remainder of the Late Payment Interest is less straightforward. As noted by Clarke C.J. in *Bank of Ireland Mortgage Bank v. O'Malley,* at para 5.3, the first question in a summary judgment application is whether the plaintiff has put sufficient evidence before the court to establish a prima facie debt.

47. The plaintiff's claim is predicated on the assertion that the only available interpretation of the payment obligation is that the principal sum automatically became due and owing by the defendant when the earlier of the two following events occurred: (a) the connection of the Cahermurphy project to the Booltiagh substation, or (b) once the Cahermurphy project reaches financial close, save for the sum of €257,311 being the Cahermurphy portion of the cost associated with the Cahermurphy Kiltumper Transformer, which forms part of the Contestable Works. It was contended for that there was no contractual obligation to make a demand before that sum became due and owing. On the contractual interpretation point, the defendant contends that the payment obligation was conditional on the plaintiff, as lead developer, complying with conditions relating to the provision of documentation.

48. The question, having regard to the *McGrath v. O'Driscoll* line of authority is whether the interpretation of the contractual documents is straightforward enough of an exercise that it can be resolved at this point in the proceedings.

49. In the first instance the plaintiff is correct in its contention that there is a well-established principle that a contractual breach by a promisee does not permit the promisor to suspend performance of the contract. In this case, it is not enough for the defendant to assert that the obligation to pay the contract sum did not arise unless or until the plaintiff complied with another contractual provision, unless as a matter of contractual interpretation the payment obligation is found to be contingent on the provision of information or documentation. As found above, this is the case with the

Cahermurphy Transformer costs; payment was expressly subject to the provision of vouching.

50. Here, it seems to me that even if the plaintiff is not correct that the contract divorces the conditions providing for payment obligations from the conditions in the documents clause, it does not mean that the defendant is correct in its arguments. As explained above, even if the documents clause operates to make the payment obligation conditional, the documents clause itself qualifies that condition by restricting the provision of documents by the plaintiff to documents required by the defendant's bankers. I have already noted that the affidavit evidence on behalf of the defendant merely asserts that the documents were required by its bankers but goes no further. The effect of the absence of evidence from the defendant's bank is compounded by the fact that the defendant accepted in correspondence that it had drawn down funds by 4 March 2020. There is no explanation provided by the defendant for the obvious inconsistency between insisting on the provision of documents for its bank and the fact that the bank allowed funds to be drawn down without those documents. Hence, I am satisfied that in this case the payment obligation was triggered by the project reaching financial close, and the defendant has not established a fair or reasonable probability that it has a *bona fide* defence to this aspect of the claim.

51. As the defendant's argument related to the interpretation of the contract and did not contest by way of evidence or argument the contention that the project reached financial close in October 2019, I consider that it was open to the plaintiff to fix that date as the 1 November 2019, which gave the defendant the benefit of any doubt.

52. In all the circumstances, I am satisfied that the plaintiff has established its case in relation to the payment obligations and that the defendant cannot succeed on its argument in respect of that element of the claim as it relates to the balance of the Contestable Works contribution. It is therefore necessary to consider the remaining arguments made by the defendant.

THE LATE PAYMENT INTEREST ARGUMENT

53. Under this heading the defendant sought to argue that under Regulation 4(3) of the 2012 Regulations the plaintiff must demonstrate that it fulfilled its contractual obligations as a precondition to its entitlement to statutory late payment interest. The plaintiff submits that the defendant's contention that the plaintiff is only entitled to interest to the extent that it has 'fulfilled [its] contractual and legal obligations' involves a '*misreading of the 2012 Regulations, which operate by reference to creditor's obligations relating to the payment obligation, so that when the contractual requirements for the making of the payment concerned were met, the entitlement to interest was engaged. Thus, even if the secondary obligation to furnish documentation had not been fulfilled, that was plainly not relevant to the payment obligation and so was not relevant to the entitlement to interest.*' [emphasis added] (para. 18 of the plaintiff's submissions)

54. Regulation 4 of the European Communities (Late Payment in Commercial Transactions) Regulations 2012 provides:-

> "*4. (1) It shall be an implied term of every commercial transaction that where the purchaser does not pay for the goods or services concerned by the relevant payment date, the supplier shall, subject to paragraph (4), be entitled to interest, (in these Regulations referred to as "statutory late payment interest") without*

the necessity of a reminder, on the amount outstanding under the contract concerned at the rate specified in Regulation 5.

(2) The supplier shall be entitled to statutory late payment interest on the said amount outstanding for the period beginning on the day after the relevant payment date and ending on the date on which the payment of the amount due is made.

(3) A supplier shall be entitled to statutory late payment interest to the extent that the supplier –

(a) has fulfilled his or her contractual and legal obligations,

and

(b) has not received the payment due by the relevant payment date, unless the purchaser is not responsible for the late payment."

55. It is apparent that the 2012 Regulations do not purport to reorganise the contractual arrangements of parties or to change the approach to be adopted to the interpretation of commercial contracts, save in a very limited respect. The purpose of the Regulations is to promote the prompt payment of sums due and owing under commercial agreements, and that purpose is achieved by the statutory implication of the contractual term set out in Regulation 4.

56. At its narrowest, the defendant's argument is that the terms of the contract itself, as expressed in the August 2016 letter, makes the payment obligation contingent on the provision of documents in accordance with the documents clause. This is the same

argument that is addressed in the earlier part of this judgment. I have concluded that, even in this summary procedure, it is possible to interpret that aspect of the contract. I have concluded that, properly interpreted and giving the defendant some considerable benefit of the doubt, the documents clause only altered the payment obligation if the documents sought were requested by the defendant's bank. There is no evidence that the defendant's bank requested the information, and, as such, the potential effect of the documents clause was not triggered; there was no default on the part of the plaintiff such that would allow the defendant to postpone payment.

57. At its broadest, if the defendant's approach was correct, it would mean that a failure to comply with any contractual provision would result in the unavailability of the statutorily implied term – whether or not under the terms of the contract it had any bearing on payment obligations. I disagree that this is the proper interpretation of the contract. Commercial contracts will range from the simple and straightforward to the enormously complex. While all contracts must be read as a whole and in their proper context, more complex contracts often will envisage a series of matters that may be overlapping and interdependent or have individual or standalone characteristics. The contract at issue in this case is an example of how a contract addressing a reasonably straightforward arrangement can have different components. Regulation 4(3) of the 2012 Regulations provides that the supplier should be entitled to the statutory interest to the extent that it *has fulfilled his or her contractual and legal obligations*. I am satisfied that this provision relates to compliance by the supplier with the contractual or legal obligations relating to its entitlement to payment and not to other unconnected payments.

58. This view is supported to some extent by the observations of the CJEU in *BFF Finance Iberia S.A.U v. Gerencia Regional de Salud de la Junta de Castilla y León* (Case C-585/20). In that case, the CJEU held:-

> *"31. Under paragraph 1 of Article 4, Member States are to ensure that, in such commercial transactions, a creditor who has met his or her obligations, and who has not received the amount owed on time, has the right to obtain, upon expiry of the period laid down in paragraphs 3, 4 and 6 of that article, statutory interest for late payment, without the necessity of a reminder, unless the debtor is not responsible for the delay (judgment of 16 February 2017, IOS Finance EFC, C-555/14, EU:C:2017:121, paragraph 27).*
>
> *...*
>
> *33 There is nothing in the wording of Article 4(1) of Directive 2011/7 to suggest that the creditor's decision to submit to the same debtor a single claim covering several overdue invoices is liable to alter the conditions for entitlement to statutory interest for late payment laid down in that provision, or the conditions for entitlement to the fixed minimum sum of EUR 40 provided for in Article 6(1) of that directive. On the contrary, the fact that that statutory interest and that fixed sum are payable automatically, 'without the necessity of a reminder', presupposes that the creditor's decisions as to how to recover unpaid debts are irrelevant for the purposes of his or her entitlement to both statutory interest and the fixed sum.*
>
> *34 Accordingly, it follows from a literal and contextual interpretation of that provision that the fixed minimum sum of EUR 40 as compensation for recovery costs is payable to a creditor who has fulfilled his or her obligations in respect of each overdue payment corresponding to remuneration for a commercial*

transaction certified in an invoice or equivalent request for payment, unless the debtor is not responsible for the delay."

59. While the case from the CJEU is not on all fours with the issue in these proceedings, the reference to a creditor who fulfilled their "*obligations in respect of each overdue payment*" seems to me to be addressed to a consideration of the payment obligations rather than requiring a broader survey of whether the creditor or supplier has or has not defaulted in any of its contractual obligations.

THE *BANK OF IRELAND MORTGAGE BANK V. O'MALLEY* POINT

60. The question to be addressed here is whether there is sufficient evidence to explain how the liquidated sum claimed for Late Payment Interest on the balance of the Contestable Works contribution of €392,689 has been calculated. I have already found that the calculation of the Late Payment Interest on the Cahermurphy Transformer costs has been explained in an adequate manner.

61. In that regard the grounding affidavit of Mr. McNamara explains the relevant calculation by referring to the summary summons itself and to a exhibited schedule particularising the basis for the calculation, as follows:

"**Interest on the Defendant's Contribution other than for the Cahermurphy Transformer Cost:**

Amount of debt: €392,689

Number of days late: 346 days from 1 November 2019 to 11 October 2020

Late Payment Interest rate in operation on the date the payment became overdue: 8.00%

Daily interest rate in operation on payment date: 0.022%

Calculation as follows: 392,689 x 346 x 0.022 = €29,891.49 (2,989,148.67 divided by 100)

Interest due: €29,891.49"

62. In the first instance it is clear that the basis for calculation has been set out in a perfectly adequate manner and as such there is no basis for the argument that the plaintiff has failed in its proofs in terms of the breakdown of the liquidated sum claimed.

63. The defendant made one final point in this regard. The defendant submits, correctly, the 2012 Regulations provide that the default rate of statutory late payment interest is ascertained by adding 8% to the interest rate figure applied by the European Central Bank in its most recent refinancing operation (carried out before 1 January and 1 July each year) and published in the Official Journal ("*OJEU"*). The defendant asserted that the plaintiff miscalculated the interest claim by combining the 8% figure with a figure of 0.022%, which it was stated was not the applicable ECB base rate at the time. This was not a matter that was raised on affidavit and only was made for the first time in written submissions. The argument is based on a misapprehension of the figures provided by the plaintiff, and a misunderstanding of the calculation exercise.

64. The court is entitled to take judicial notice of the OJEU, see S.I. 341/1972. The plaintiff provided the relevant extracts from the OJEU. This shows that for the period that included the 1 November 2019 the applicable base rate was 0%. The 0.022% figure was

not added to the 8% rate. Instead, the plaintiff's calculations show that the interest rate applied was 8%. The 0.022% figure emerges from identifying a *daily rate* from the 8% *annual rate*, i.e., by dividing 8 by 365.

65. In the premises the argument by reference to the *Bank of Ireland Mortgage Bank v. O'Malley* principles and the additional argument about actual rate of interest applied cannot succeed.

66. In the circumstances, the court finds that the plaintiff has succeeded in the application for judgment, and the court will enter judgment in favour of the plaintiff in the amount of €32,835.13. My provisional view is that the plaintiff is entitled to its costs having been fully successful in this application. I will list this matter for mention before me on 26 June 2024 at 10.30am to finalise the orders and in case any further argument on the form of final orders, including costs, is required by either party.