

## THE HIGH COURT

[2013 No. 4319 S.]

BETWEEN

EBS LIMITED

PLAINTIFF/RESPONDENT

AND

ANN DEMPSEY

DEFENDANT/APPLICANT

**JUDGMENT of Mr. Justice Eagar delivered on the 13th day of October, 2017**

1. This is a judgment on an application by the defendant for orders as follows:-

(1) An order pursuant to O. 13, r. 11 of the Rules of the Superior Courts setting aside the judgment dated the 7th of July, 2014 in the sum of €860,485.75 plus €384.00 costs.

(2) An order setting aside all consequential orders and judgments arising from the judgment of the 7th of July, 2014 obtained by the plaintiff against the defendant.

(3) Such further orders and/or directions as this Court shall deem fit.

2. The notice of motion dated the 18th of June, 2015 seeking to set aside the judgment dated the 7th of July, 2014 arises from one of the issues which must be determined by this Court, that is whether or not the plaintiff served the defendant with the High Court proceedings.

3. The second issue to be determined by this Court is whether or not the court can be satisfied that there is a defence put forward by the defendant which has a real prospect of success.

4. The plaintiffs EBS Ltd. issued a summary summons seeking the sum of €860,485.75 for monies lent by the plaintiff to the defendant at her request on foot of a mortgage account taken out by the defendant and bearing the account number 50487159 and by an amended offer in writing dated the 5th of July, 2005 under loan reference 50487159, the plaintiff offered to loan the defendant on a commercial basis the sum of €860,485.75 on specified terms and conditions and duly accepted by the defendant by silent acknowledgment dated the 7th of July, 2005.

5. Colum Smith was engaged by McKenna Durkin solicitors, the solicitors on record for the plaintiff to effect personal service of the summary summons on the defendant. By affidavits sworn on the 1st of February, 2014 Colum Smith swore that on the 27th of January, 2014 at Oasis Florists, 88 Terenure Road North, Terenure, Dublin 6W he personally served the defendant Ann Dempsey by delivering and leaving with a true copy of the summons in these proceedings marked Record No. 4319S of 2013. He said at the time of such service he showed the original of the said summons to the defendant who identified herself to him.

6. The affidavit of service in its original format was rejected by the Central Office of the High Court when the judgment set was lodged by the plaintiff's solicitors. He was advised by Peter McKenna solicitor of McKenna Durkin that the Central Office following a change in protocol would no longer be accepting affidavits of service which merely specified that the party being served had identified themselves to the party effecting service. The Central Office has indicated that they require all affidavits of service to specify that the appearance of the party being served was known to the party effecting service at the time of which such service was effected.

7. His affidavit was resworn and with the amendment that at the time of such service he showed the original of the said summons to the defendant whose appearance he was acquainted with. This affidavit was resworn on the 27th of May, 2014.

8. No appearance was entered by or on behalf of the defendant and the plaintiffs obtained judgment in default of appearance in the High Court Central Office on the 7th of July, 2014 for a sum in the amount of €860,485.75 and €384.00 costs.

9. Ann Dempsey says in her affidavit sworn the 29th of May, 2015 that she did not identify herself to Colum Smith nor was he acquainted with her appearance from the 27th of January, 2014 and that Colum Smith did not personally serve her with the summary summons at Oasis Florist, 88 Terenure Road North, Terenure, Dublin 6W on the 27th of January, 2014. She said that she was not at the premises known as Oasis Florist as she was in Wicklow at her sister's house for an annual event with her sisters and did not return home until late evening on the 27th of January, 2014. She further swore that when she was not in attendance at the Oasis Florist, Aishling Fanning an employee of Oasis Florist works alone on the premises for the entire day with the exception of busy periods such as St. Valentine's Day and Mother's Day when both Ms. Dempsey and Ms. Fanning work together at the premises. She said she believed that on the 27th of January, 2014 Aishling Fanning was working alone in Oasis Florist. She further says that she maintains a daily business diary and retains copy orders and handwriting on the business diary and she exhibits the diary for the 27th of January and says that the handwriting on the copy orders for the 27th of January, 2014 is that of Aishling Fanning.

10. Aishling Fanning swore an affidavit dated the 21st of May, 2015 indicating that she was an employee of the defendant and she said that on the 27th of January, 2014 she was working alone in Oasis Florist for the entire day as the defendant was away and she said that she works alone on the premises when the defendant is away with the exception of busy periods such as St. Valentine's Day and Mother's Day when both the defendant and she worked together at the premises. She says that the business practice of Oasis Florist is to maintain a daily business diary and retain copy orders for the purpose of employees ascertaining orders, enquiries and deliveries. She said that the handwriting on the business diary on the 27th of January, 2014 is her handwriting. She also says that she believed that Colum Smith did not attend Oasis Florist on the 27th of January, 2014.

11. The affidavit of Colum Smith identifies himself as a summons server engaged in January 2014 by McKenna Durkin solicitors. He said his affidavit of service originally sworn on the 1st of February, 2014 and subsequently resworn on the 27th of May, 2014 did not detail

the fact that extensive efforts were made by him to effect personal service of the summary summons on the defendant.

12. He said that having received instructions from the solicitors for the plaintiff to effect personal service of the summary summons on the defendant he first endeavoured to do so on or about Thursday the 5th January, 2014. For this reason, he said he attended at two separate premises at which he was advised the defendant could be located. He also said that before endeavouring to effect personal service of the summary summons on the defendant he noted various images of her from a google search of her business website and her association with Terenure Traders Association and her facebook public profile.

13. He said the first premises of which he attended was the private residence of the defendant at 22 Terenure Park, Terenure, Dublin 6W which was her place of residence. He says that on Thursday afternoon the 15th of January, 2014 he attended at this address and spoke with a young gentleman who identified himself as her son. He indicated that she was not at home and advised that Mr. Smith should return after 7:00pm that evening. He said that he duly returned to the defendant's place of residence after that time but there was no answer at the premises.

14. He further says that on the same date he also attended at the defendant's business premises specifically Oasis Florist and Garden Centre of 88 Terenure Road North, Terenure and was advised by a female member of staff that the defendant would be likely to return to the premises until about 4:00pm. He returned to the premises at that time and the defendant did not appear to be in attendance. This was on the 15th of January, 2014.

15. He said that between the 15th January, 2014 and Thursday the 23rd of January, 2014 he made a number of further attempts to effect personal service of the summary summons on the defendant at her place of residence. However, on each occasion and which he attended at the premises there was no response from any party.

16. He said that on Thursday the 23rd of January, 2014 he attended personally outside the private residence of the defendant and waited there for approximately 7:30am to 9:20am in the hope that he might encounter the defendant on her way out. He said that at around 9:20am a gentleman emerged from the premises and he enquired of this gentleman as to whether the defendant was at home, the said he was not sure and went back into the premises while leaving the front door open. He spoke with a young woman who then presented herself at the door of the property and informed him that the defendant had already left. He acquired of her at what time the defendant normally left the property but she refused to answer and he left. He took the view at that time that the defendant was deliberately evading service of the proceedings.

17. He said that on the afternoon of the 23rd of January, 2014 he attended with his wife at the defendant's building premises. They indicated that they were planning a large event and asked whether they could speak with the defendant directly to make arrangements for flowers for the event and they were advised that the defendant was not present. Subsequently, he asked his wife to contact the shop looking to speak with the defendant and his wife was told that the defendant would be present at the business premises on Monday the 27th of January if she wished to call in.

18. At about 3:00pm on Monday the 27th of January, 2014 he attended at the defendant's business premises and effected personal service of the summons on the defendant. He said he was previously acquainted with the appearance of the defendant from the google search and he further says that when he was serving the defendant she identified herself to him and stated "you have been looking for me" or words to that effect. He also says that the diary entries are not corroborated of the defendant's position in any way. He notes that the defendant did not record his visit to the defendant's business (nor his wife's attendance).

19. The affidavit of Peter McKenna solicitor said that the affidavit of service of Colum Smith was rejected by the Central Office of the High Court on the basis that it did not conform with the requirements of O. 40, r. 9 of the Rules of the Superior Court 1986 and he said that he believed that a policy decision was made to the effect that affidavits of service would not be acceptable where they merely specify that the party being served had identified themselves to the party effecting service, that instead an order to mark judgment in default of appearance the Central Office of the High Court indicated they require all affidavits of service to specify that the appearance of the party being served was known to the party effecting service at the time in which such service was effected. He rejects any improper motive to the fact that the affidavit of service was resworn.

20. He also said that on the 3rd of December, 2013 his firm sent a letter to the defendant demanding payment of the amount outstanding on foot of the loan facility forming the subject matter of the proceedings. This is clearly addressed to the defendant at her place of residence 22 Terenure Park, Terenure and the letter includes a warning that:-

"Unless payment of the said loan is received in full within seven days from the date hereof, our client will be left with no alternative but to institute proceedings in the High Court seeking repayment of the loans in full."

It is quite clear that this indicated that in default of payment proceedings were likely to issue.

21. He also referred to a letter which his office had sent to the defendant at her home address dated the 13th of March, 2014 noting that as follows:-

"We note you were served with our client's summary summons on the 27th of January, 2014 and that you have not entered an appearance to date"

and strongly suggesting that she bring this correspondence to the attention of her solicitor. He also noted that no explanation was offered by the defendant for her failure to respond to the correspondence.

22. By supplemental affidavit of Ann Dempsey sworn she queries the averments in relation of the affidavit of service of Colum Smith in relation to his reswearing of the affidavit and describes this "as an extraordinary series of events in circumstances where she denied that she was served with the summary summons". She insists that she was not present on the business premises on the 27th of January, 2014 and denied that she identified herself to Colum Smith. She also denies receiving the plaintiff's letter dated the 13th of March, 2014. The letter was addressed to the defendant's home address and it seems to this Court that her businesswomen of her experience of the defendant would have immediately contacted the Bank on foot of receiving this letter but she failed to do so.

23. The second affidavit of Colum Smith which was sworn on the 4th of February, 2016 says that despite the trenchant terms in which the second affidavit of Ann Dempsey's phased all the averments contained in his previous affidavit remain true and accurate. He confirmed that he had conducted a variety of online searches with a view to establishing her appearance and says that he has no doubt that the individual who he served was the defendant and he confirmed that he called to the premises of the Oasis Florist Garden at 88 Terenure Road, Terenure on approximately eight occasions prior to the 27th of January, 2014 and whilst he would

ordinary attempt personal service on perhaps three or four occasions before reporting back to the solicitor who had engaged him greater lengths in the particular circumstances of this case and he says while he would ordinarily attend personal service on perhaps three or four occasions before going back to the solicitor, he took greater lengths in the particular circumstances of this case:-

(1) He happened to find himself in the Terenure area on a regular basis during January 2014 on a number of other matters in which he was involved and it was convenient for him to attend the Oasis Florist quite regularly.

(2) He is a native of Terenure Road and is very familiar with the area and he believes that prior to being taken over by the defendant the premises were operated as "Ennis Fruit and Vegetable Shop incorporating Ennis Florist". He had no difficulty in locating the premises or in travelling to Terenure area on a regular basis during January 2014.

(3) He recalled being surprised at the fact it was not possible to effect personal service on a large number of occasions at the business premises of the defendant given the active role in which she evidently adopted there. He said that he was informed by other members of staff that he had just missed the defendant or that she had departed for an unspecified period of time and he formed a clear view that she was evading service of the proceedings. He also said that the premises would present the opportunity for the defendant to easily avoid third parties where she minded to do so, that while the main entrance of the premises is situated on the Terenure Road there is a rear entrance onto a laneway situated just off Eaton Road, Terenure and he exhibits a map and a photograph of the rear entrance.

24. The third affidavit of Ann Dempsey was sworn on the 24th of February, 2016 and she responded to the affidavit of Colum Smith sworn on the 4th of February, 2016. She takes issue with the averment of Mr. Smith with regard to him calling on the premises on eight occasions prior to the 27th of January, 2014 in circumstances where the opening hours of her business premises are from 9:30am to 5:30pm with the business at all times opened during lunchtime closing for no greater than five minutes with the sign on the door starting "back in five minutes". She says that she was in attendance on the shop premises 85% of the time with Ms. Fanning working the remainder of the time and ordinarily it is rare other than the busy periods that both her and Ms. Fanning would be in attendance at the shop. She states there was only one member of staff and that was Ms. Fanning and that Mr. Smith could not possibly have been informed by other members of staff as there is no such persons.

25. The next affidavit and the first affidavit evidence in relation to the possibly defence which might be raised is sworn on the 18th day of November, 2016 five months after the issuing of the notice of motion on the 18th of June, 2015.

### **The Decision of the Court with Regard to the Service of the Summons**

26. It is of course impossible for a court to seek to determine in a situation where affidavits contradict each other where the truth lies. The court notes that as this is the application by the defendant it is surprising that no application was made to cross-examine Colum Smith or Peter McKenna on their affidavits where they are so trenchantly opposed. It appears to the court that this failure to seek to cross-examine the summons server and the solicitor who engaged him and who had carriage of the proceedings places the defendant in the position that the court is satisfied that she was served as claimed by Mr. Smith.

27. Further, despite Mr. Smith's evidence on affidavit evidence that he had called to her residence on a number of occasions there is no affidavit from either her son who answered the door or any other person who resides with the defendant in relation to these events. It is also clear that the solicitors on behalf of the plaintiffs wrote prior to the issue of the summons and also subsequently to the service of the summons and at no stage did the defendant seek to raise an issue with these solicitors as one would expect to say that she had not got the summons.

28. Whilst it might also have been helpful for Mr. Smith's wife to have sworn an affidavit nevertheless the defendant does not dispute that some event was suggested to her by Mr. and Mrs. Smith when they called to the business premises on the 27th of January, 2014 nor does Ms. Fanning make any reference to same. In all the circumstances the court is satisfied in the absence of a motion to cross-examine Mr. Smith by the defendant that the defendant was served with the summons.

### **Is a Real Defence Suggested by the Defendant?**

29. Order 13, rule 11 provides:-

"Where final judgement is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the court to set aside or vary such judgement upon such terms as may be just."

30. Rule 11 does not give any indication of the grounds upon which this discretion may be exercised but the authorities disclose two distinct categories of case:-

(1) where there was some irregularity in the proceedings or the procedure by which the judgment is sought to set aside and vary was obtained; and

(2) where the judgment was obtained in a regular manner but the defendant may have a good defence to the claim and the interest of justice require that he should be given the opportunity to defend the proceedings.

This Court has already decided that there was nothing irregular in the service of the proceedings.

31. The discretion of the court to set aside a regular judgment obtained in default of his appearance is based on principles identified by Lord Akins in *Evans v. Bartlam* [1937] A.C. 473:-

"Unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its course of power where that has been obtained only by a failure to follow any rules of procedure".

While surprise and mistake are the most common grounds for seeking to set aside a judgment, the court enjoys an untrammelled discretion which can be exercised in any case where the interests of justice require a defendant be allowed to defend proceedings.

32. The jurisdiction to set aside a judgment seeks to avoid the injustice that might otherwise result if a defendant with a good defence on the merits was precluded from contesting a claim made against him. The courts can only exercise its discretion in favour of setting aside the default judgment where it is satisfied that the defendant may have a good defence and for this reason an affidavit of merit setting out that defence is essential. The judgment of Peart J. in *AIB plc v. Robert Lyons and Josephine Lyons* underlines the jurisprudence:-

"Clearly a wide discretion is given to the Court in its task of achieving justice between the parties, but the interests of both parties must be taken into account in the weighing exercise undertaken by the Court in considering the interest of each party, and not simply the hardship and distress pleaded on behalf of the applicant in this case. In some cases where judgment has been obtained in default of appearance, there has later been found to have been some irregularity in the manner in which judgment was obtained, such as where service was not properly effected on the defendant. In such a case of an irregular judgment, it has been held that it is not necessary for the defendant to make out a good defence to the plaintiff's claim in order to seek to have it set aside. In the present case such a situation does not exist. The plaintiff's judgment is not irregular in any way, and in fact the application is not moved on that basis. It is accepted that the plaintiff was entitled to obtain the judgment in question.

In the present case where it is simply being asserted that the judgment was obtained by surprise or perhaps more correctly, by mistake on the part of the applicant's solicitor, it is necessary that the court be satisfied, before it will order that the judgment be set aside, that there is at the least a possible defence to the claim which has a reasonable prospect of success. In my view the court does not need to be satisfied that the defendant will succeed, but that there is a point which has a real prospect of success. Counsel for the plaintiff has referred the court to the decision in *the Saudi Eagle* [1986] 2 Lloyd's Rep 221 where it was held that in an application to set aside a judgment, the standard to be applied to a defendant's alleged defence is that it should be more than an 'arguable case', and that it is necessary to show that the alleged defence has "a real chance of success". I adopt that standard for the purpose of this case."

**The First Affidavit Dealing with any Possible Defence on Behalf of the Defendant Contained in the Affidavit of Ms. Dempsey sworn on the 18th of November, 2016.**

33. The affidavit of Ann Dempsey sworn on the 18th of November, 2016 was the fourth affidavit of the defendant in these proceedings. It is the first indication by the defendant that she seeks to demonstrate to the court that she has a defence to the plaintiff's claim on the merits.

34. She refers to the plaintiff's special indorsement of claim in the summary summons dated the 18th of December where the plaintiff claims by way of amended loan offer in writing dated the 5th of July under loan reference 50487159 that the plaintiff offered to loan the defendant on a commercial basis the sum of €860,485.75 on specified terms and conditions duly accepted by a signed acknowledgment dated the 7th of July, 2005.

35. She says that in fact the amended loan offer dated the 5th of July, 2005 the plaintiff offered to loan to her on a commercial basis the sum of €840,00.00 and not €860,485.75 as claimed. She says there a clear error in the sum claimed in the amount of €20,485.75. She says by reason of the plaintiff securing judgment in the sum of €860,485.75 she has been denied an opportunity to dispute the sum allegedly due and owing to the plaintiff.

36. She said that in April 2005 at the height of the so called Celtic Tiger economy she was leasing a commercial premise at 90 Terenure Road, Dublin 6W for the purpose of operating a business known as Oasis Florist. She said that she approached the plaintiff for the purpose of seeking a commercial loan facility for a sum in the amount of approximately €1 million to facilitate the purchase of the commercial premises at 90 Terenure Road, Dublin 6W for a sum of €800,000.00 plus acquisition costs of approximately €80,000.00 and a further €120,000.00 for the purpose of paying off short term debts. The plaintiff expressly advised the deponent that in the circumstances where the maximum loan to value (LTV) for a commercial property was in the amount of 75% LTV, the plaintiff would not provide a LTV greater than 75% and offered to provide the defendant with a commercial loan facility for a sum in the amount of €860,000.00 secured on the commercial property that is 90 Terenure Road, Dublin 6W to include further security by way of three lockup units/garages to the rear of 7A Eaton Road, Terenure, Dublin 6W with the balance of €140,000.00 to purchase the commercial property to be secured against the defendant's family home by way of a top up mortgage. She said that in April she received a further loan offer which expired on the 15th of May, 2005 and she received an amended loan offer dated the 17th of May for a sum in the amount of €860,000.00.

37. She said the property of 90 Terenure Road comprised of a ground floor retail unit with an overhead residential apartment and at the time of the transaction to purchase the property it was agreed that the vendor could continue to rent the overhead apartment for €800.00 per month. She said that the plaintiff amended their loan offer to include a right of residence at Clause 9 of a second amended loan offer dated the 5th of July for a sum in the sum of €840,000.00 to purchase the commercial property. Clause 7 of the loan offer dated the 5th of July indicated that subject to EBS being satisfied, and its absolute discretion with an independent valuation and appraisal of the above property being offered as security for this loan with a maximum loan to the value of 75%. In her affidavit she says that this was a condition precedent which provided that the plaintiff must be satisfied with an independent valuation and appraisal of the property being offered as security for this loan with a maximum LTV of 75%.

38. She said the plaintiff was at all material times aware that the right of residence had clear implications by way of significantly reducing the value of the commercial property with the plaintiff, getting a far greater risk with regards to the security, potential sale value of the property with knock on implications for the recovery of the entirety of the loan facility dated the 5th of July, 2005. She said that no satisfactory independent valuation and appraisal of the commercial property was sought or obtained by the plaintiff.

39. She said that she believed the requirement for an independent valuation was a condition precedent to the contract with the plaintiff and that the failure to carry out independent valuations might operate as a defence against summary judgment.

40. She said that the amended loan facility was drawn down in April 2007 and up to 2009 she made full repayments on all of the loan facilities, that is the commercial facility, the top up loan and the home loan. However, by reason of the economic collapse in 2009 her business suffered a significant down turn in turnover and immediately she made contact with the plaintiff for the purpose of seeking to negotiate an alternative repayment arrangement on all loan facilities and said that they agreed an alternative repayment arrangement with regard to all loan facilities by way of interest only repayments and subsequently on the 3rd of August, 2010 further agreed an extension of the interest only period for six months.

41. The defendant said that she became aware that notwithstanding her making substantial and significant repayments EBS were in fact allocating the majority of such repayments made by her to the commercial loan facility giving preference to the commercial loan facility to the detriment of the home loan and top up loan facilities thereby causing extreme prejudice to her and EBS deliberately, knowingly and intentionally placing her family home at risk of repossession by failing to allocate repayments to the home loan and top up loan facilities. She said that by reason of this she was charged significant penalties and/or surcharge interest by the plaintiff of approximately 6% per annum which she said was unconscionable, arbitrary, capricious and in breach of contract and therefore unenforceable.

42. She further said that the plaintiff's affidavit of debt forwarded to the judgment section of the High Court Central Office on the

14th of June, 2014 and the letter to the judgment section confirming that no further payments had been received by the plaintiff as of the 4th of June, 2014 since the affidavit of debt was sworn fails to take into account the repayment of €1,250.00 made on the 29th of April, 2014 and therefore the affidavit of debt and the letter on behalf of the plaintiff was inaccurate and the judgment obtained in the sum of €860,485.75 was not a sum that was due and owing to the plaintiff.

43. In response the affidavit of Philip Butler sworn on the 12th of January, 2017 responds to the fourth affidavit of the defendant. He says that he holds the position of senior manager with the plaintiff and he is an official, an officer of the plaintiff for the purpose of s. 4 of the Bankers Books Evidence Act 1879 (as amended). He says the facts which he swears have been gathered from a diligent examination of the banker's books of the plaintiff and refers to the fourth affidavit of the defendant's affidavit. He makes the following points:-

(1) The defendant attempts for the first time since the present application issued on the 2nd of July, 1915 to articulate a substantive defence to the within proceedings.

(2) The defendant correctly notes at para. 4 of the indorsement of claim in the summary summons specifies that the plaintiff offered to lend to the defendant by means of a loan offer the sum of €860,485.75 as opposed to €840,000.00. He says that the inclusion of the higher figure is a typographical error which appears only once in the indorsement of claim in the summary summons. He says that it forms part of the narrative of the background to the claim of the plaintiff and has no bearing whatsoever on the amount claimed by the defendant on the 17th of December, 2013 which was entirely accurate and he says that the issue raised by the defendant does not constitute a substantive defence to the proceedings. He says that had the defendant elected to enter an appearance and contest the claim to the plaintiff by reference to this point he believes that the inevitable consequence would have been routine amendment of para. 4 of the indorsement of claim in the summary summons.

(3) In relation to valuations he says that the defendant contends that the aforesaid Clause 7 of the loan offer letter required the plaintiff to obtain an independent valuation ensuring a loan value ratio of not more than 75% and the plaintiff failed to do so. He says that there are fundamental and insurmountable difficulties with her argument. He refers to Clause 7 headed "valuation" and then subject to EBS being satisfied, at its absolute discretion with an independent valuation and appraisal of the above property being offered as a security for this loan with a maximum loan to value of 75% (emphasis added). He says that it is neither in the clause nor indeed in the loan offer letter is it suggested that the foregoing requirement is a condition precedent in default of which the balance of the provisions of the loan offer letter would not take effect. He also says that it is manifestly clear that it was designed to operate for the benefit of the plaintiff alone and in these circumstances he believes that Clause 7 of the loan offer letter is incapable of offering a defence to the claim of the plaintiff. However, he also says that the plaintiff did obtain independent valuations for both of the properties in relation to 90 Terenure Road North on the 16th of June, 2005 prior to the issue of the offer letter of the 5th of July. He also notes that this argument was never canvassed by the defendant at any time between the execution of the loan offer letter on the 7th of July, 2005 and swearing of a fourth affidavit more than an eleven years later. On the contrary the defendant had repeatedly engaged with the plaintiff by reference to the terms of the loan offer letter and acted in such a way as to affirm the validity of those terms and in her fourth affidavit the defendant detailed various occasions upon which she agreed to vary or extend the terms of the loan offer letter.

(4) He also notes that in her fourth affidavit the defendant seeks to contend that the plaintiff had acted in breach of a purported arrangement reached with the defendant regarding the appropriate allocation of payments made by her between the three separate loan facilities with the plaintiff. He says that it is important to record that the loan facilities described by the defendant as her top up loan and home loan are not in any way at issue in the within proceedings. He says that the gravamen of the complaint made by the defendant is that the plaintiff incorrectly allocated payments made by her to the loan facility for in the subject matter of the proceedings as opposed to other loan facilities and he believes that this does not amount to a defence to the proceedings for a number of reasons:-

(a) it is entirely unclear as to the manner in which the plaintiff allegedly agreed to allocate the payments made by her (in her fourth affidavit);

(b) even if the argument of the defendant were correct the effect is that the claim of the plaintiff in the within proceedings ought to have been for an even greater sum;

(c) the argument of the defendant is promised upon the suggestions of the payments made to the loan facility forming the subject matter of the within proceedings were allocated by the plaintiff. He says that this is entirely incorrect. He says that it is apparent from the account statements that the payments to the relevant loan account were made by means of direct credit transfer. Such payments were made electronically by the defendant and were not matters over which the plaintiff exercised any degree of discretion or control and that this issue cannot and does not amount to a substantive defence to the within proceedings.

(5) In relation to the affidavit of debt Mr. Butler indicates that when submitting its claim for judgment in default of appearance the plaintiff elected not to claim additional contractual interest for the period between the 17th of December, 2013 and the 4th of June, 2014. As such the claim of the plaintiff was confined to the sum of €860,485.75 being the amount claimed in the summary summons.

#### **Decision of the Court**

44. The court notes that the first defence sought to be established by the defendant was in her fourth affidavit. The court agrees with Mr. Butler in his assessment of the mistake in the sum mentioned in the indorsement of claim. The court agrees with Mr. Butler in respect of his description of the valuation clause and the court notes that it was by way of direct debit from the defendant's account that the payments were made to the commercial loan account rather than being chosen by the plaintiff.

45. The court is satisfied that in the words of Peart J. in *AIB v. Lyons* (previously cited) the defendant's defence does not have a real chance of success.