Neutral Citation: [2014] IEHC 272

THE HIGH COURT

[2010 No. 5800 S.]

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

SEAN FORTUNE AND PAULINE FORTUNE

DEFENDANTS

JUDGMENT of Ms. Justice Barton delivered on the 16th day of May, 2014

1. This is an action brought by the plaintiff bank against the defendants by way of summary summons to recover the sum of €1,130,652.99, on foot of two joint and several mortgage loan accounts and a joint and several current account. The plaintiff seeks liberty to enter summary judgment for this sum together with costs.

2. The plaintiff claims to be entitled to judgment against the defendants on the basis that money was lent by it to the defendants by way of two term loan facilities and also on foot of a joint and several current account.

3. By a facility letter dated 27th April, 2004, the plaintiff bank offered to advance to the defendants the sum of €190,000 subject to the bank's usual terms and conditions and which were summarised and stated to be enclosed with that letter together with a default schedule. The purpose of the loan was to enable the defendants to purchase and renovate property at Rathdowney at an interest rate of 3.9% per annum variable over a term of 24 months with repayments commencing on 30th May, 2004, in the sum of €609.04 per month and with a review date of 10th March, 2005.

4. There were a number of special conditions set out in the letter of offer including a provision that in the first year repayments to the plaintiff bank would be by way of interest only with a further year of interest only payments subject to satisfactory review at the end of the first year and that thereafter, repayments would be of capital and interest over a term of 15 years. The loan was to be secured in the manner set out in that letter.

5. The summary of the terms and conditions enclosed with the letter of offer provided, by clause 3, that the plaintiff reserved the right to require repayment on demand in the event of the occurrence of any of the events specified in an accompanying schedule, described as a default schedule, and which included the following:-

> *"1. If any of the repayment instalments are not provided for by the due date;*
>
> *2. If any interest is not provided for by the due date;*
>
> *3. If the borrower dies;*
>
> *4. If the borrower shall default in the performance of any term, condition, covenant or agreement contained in the letter of sanction and such default shall continue un-remedied after written notice thereof shall have been given by the bank to the borrower."*

6. In all there were fourteen events set out in the schedule.

7. It is not in dispute in these proceedings that the defendants availed of the facilities offered to them by the plaintiff bank by the facilities letter of 27th April, 2004 and that they drew down the loan amount of €190,000.

8. By a further facility letter dated 4th April, 2006, the plaintiff bank offered to make available to the defendants a term loan in the sum of €912,000 repayable on demand for a term of one year together with a variable rate of interest which, at the time of the letter of offer, was 4.550% and otherwise subject to the terms and conditions set out in that letter and in documentation accompanying that letter.

9. Although the term of the loan was specified to be one year, the interest provisions of the letter of offer provided for the interest only period of the loan to be extended to two years with an annual review after year one and that in the absence of demand, the defendants would repay the loan in full within the term. As to the repayment of capital it was specified that the bank had agreed to a 24 month capital moratorium on the loan which was to be secured in the manner set out in the letter. It was a further term of the repayment provisions that:-

> *"Loan is to be repaid within one year from sale of serviced sites or suitable repayment schedule put in place."*

10. The facility letter further provided that any demand or notice was required to be made in writing, signed by an officer of the bank and that that was to be served on the borrowers either by personal delivery or by post to the borrowers at the address last known to the bank.

11. The letter also contained general conditions applicable to all facilities and these included the following:-

> *"4. The above facilities and the terms and conditions attaching thereto are subject to annual review with the first review to be conducted no later than 31st August, 2006."*
>
> *5. In the event that this facility or any or all of these facilities shall become due and payable to the bank, whether*

following formal demand by the bank or otherwise, interest shall accrue and be payable on such facilities on a compound basis until its/their discharge.

6. Notwithstanding anything heretofore contained in this letter, the facility/ies with interest accrued thereon shall become immediately due and payable on demand being made by the bank on the occurrence of any of the events on the attached form."

12. The facility letter contained specific provisions in relation to default and in that regard provided:-

"On the occurrence of any of the events specified on the attached enclosure, the bank may, by giving notice to the borrower, cancel any outstanding commitments and treat the borrowings as being repayable on demand without prior notice and may exercise its rights under any security which it holds."

13. A schedule of events entitling the bank to require repayment on demand was enclosed with the facility letter in terms identical to the schedule enclosed with the facility letter of 27th April, 2004, save that the schedule of events enclosed with the letter of offer dated 4th April, 2006, referred to a facility letter dated 28th March, 2006.

14. The defendants accept that they availed of the facility, drew down the funds and that, as with the loan the subject matter of the facility letter of 27th April, 2007, the loan amount remains unpaid. It is also accepted by the defendants that the bank provided current account facilities to them and that the balance on foot of that account claimed by the bank remains unpaid.

15. The defendants got into serious financial difficulties and were unable to meet their repayment commitments. What appears to have happened is that the plaintiff bank reviewed the loans on a yearly basis and maintained these in place on an interest only basis but with an adjustment being made with regard to the interest rate increasing to a rate sufficient to cover the funding of costs. It appears that some repayments were made by the defendants, the last of which was on 20th July, 2009. Thereafter, it appears the plaintiff's Mr. McNally sought from credit control a capital moratorium on the loan facilities until the end of 2010. He notified the defendants that the credit department of the bank were agreeable to that request but subject to a number of conditions, none of which were agreed to or complied with by the defendants and which ultimately led to the plaintiff's Mr. McNally writing to the defendants on 11th October, 2010, notifying them that they were in default and reserving the bank's position in relation to all rights and remedies available under the terms of the facility letter. In addition, formal demand was made for the repayment of €7,973.51, in respect of the current account loan and to be paid by the defendants to the plaintiff within 21 days from the date of that letter. No payments were made and the default of the defendants ultimately resulted in the bank's solicitors, Lyons Dermody, issuing a formal letter of demand dated 3rd December, 2010, for repayment of both term loans and the balance then due on the current account and the aggregate of which totalled €1,130,652.99.

16. It appears on the affidavits filed that as a result of the financial circumstances in which they found themselves the defendants, together with their three young children, emigrated to New Zealand.

17. In late June or early July 2011, after the commencement of these proceedings, the defendants instructed their chartered accountants, Thomas P. Fox and Company, to write to the plaintiff's solicitors, Lyons Dermody, with a view to outlining some proposals for repayment of the loans. Thomas P. Fox and Company wrote to the plaintiff's solicitors on 21st July, 2011, and repeated the content of a proposal contained in a letter sent by them and dated 4th July, 2011, to Brian Lawlor, an employee of the plaintiff bank attached to its Athlone office. That letter contained the following proposal:-

"Seán and Pauline will sell the property known as 'the Barracks' in Rathdowney. They have received a very strong expression of interest in the property, with the potential purchasers even carrying out surveys on the property. It is felt that the property could be sold for in the region of €370,000 - €390,000.

Seán and Pauline have also received a very strong expression of interest in part of the site at Errill, Co. Laois, on which there is an old disused house. The local auctioneer feels that this should sell for in the region of €30,000 - €40,000 with the price closer to the latter if a deal is closed soon with the party that is currently interested in it.

Ulster Bank would receive the net proceeds, after selling costs and any taxes are deducted, from the sale of 'the Barracks' and that part of the site on which the old disused house is situated.

Seán and Pauline would then hand full title of the site with planning permission for 50 units (planning permission No. 06-1886) in Errill, Co. Laois, back to Ulster Bank for them to sell it or hold onto it as they see fit.

All of the above will then be used to settle the debt owed to Ulster Bank in full."

18. The penultimate paragraph of that letter of 21st July, 2011, stated:-

"Unfortunately, if the above offer is not accepted by Ulster Bank, then Seán and Pauline will have no other means of meeting their repayments and will have no other options to try to remedy their current situation. I hope you will view this offer in a favourable light and see it as a very genuine attempt on the part of Seán and Pauline to honour the commitments to Ulster Bank in the current economic circumstances."

19. The plaintiff has by two separate motions on notice sought liberty to enter final judgment against the defendants. On each occasion, the Master of the High Court struck out the proceedings. From the first Order the plaintiff appealed and the result of that was that the Master's Order was varied to provide that the original notice of motion be struck out, consequent upon which the plaintiff brought a further motion for liberty to enter final judgment which resulted in the Master making a further Order dated 26th June, 2013, again striking out the summons and from which the plaintiff has appealed to this Court on notice of motion dated 13th July, 2013.

20. At the outset of the hearing before me, it was acknowledged by counsel for both parties that the real issue for determination was whether the plaintiff should be given liberty to enter final judgment or the defendant should be given leave to defend the proceedings.

21. In relation to the plaintiff's application for liberty to enter final judgment, a number of affidavits were sworn by or on behalf of the defendants. Both the affidavit of the defendants' solicitor, Peter Dempsey, which was sworn on 31st May, 2012, and the defendants' affidavit sworn on 1st June, 2012, were highly critical of the plaintiff and its behaviour in seeking to recover judgment by way of summary proceedings. Moreover, it was averred that the plaintiff was not entitled to either the sum claimed or any sum in these

proceedings.

22. A number of affidavits were sworn on behalf of the plaintiff and subsequently the first defendants swore an affidavit on behalf of himself and his wife, the second named defendant, on 28th January, 2014, which contained the essence of what the defendants say is their defence to the plaintiff's claim. The defendants challenged the facility letters which were exhibited in the affidavit of Eoin O'Shea, sworn on behalf of the plaintiff on 1st October, 2012, on the grounds that these appeared to be draft documents and in this regard the defendants made the case that they dealt with a Mr. David Kavanagh, an employee of the plaintiff bank and whom they maintain would corroborate their account of what had been agreed by them with him. The defendants maintain that the documents produced by Mr. Kavanagh, at the time and signed by them in connection with the loan for €912,000, were amended, and altered in their presence by Mr. Kavanagh who also initialled certain terms. In this regard, specific reference was made to what purported to be the facility letter of 4th April, 2006, as initially exhibited by the plaintiff's Eoin O'Shea in his affidavit of 1st October, 2012. The defendants maintain that contrary to what appeared in that letter it had been specifically agreed between the plaintiff and the defendants that a house on two acres would not be part of the security to be held by the bank and that, moreover, there were other discrepancies between that letter and the documentation signed by them. As to the actual loan itself, it is accepted by the defendants that the sum of €921,988.77, was advanced but the defendants say that what was agreed between them and the plaintiff was that this sum was to be repaid within one year from the sale of serviced sites on the property at Errill, Co. Laois or the putting in place of a repayment schedule. It was the defendants' contention that David Kavanagh was a party to the making of the arrangements between the plaintiff and the defendants and that he would be in a position to confirm that any monies advanced by the plaintiff were for the purposes of purchasing the sites and were to be repaid on the expiry of one year from the sale of those sites. That, however, had not occurred and the sites had remained unsold due to planning difficulties to which the plaintiff bank itself had contributed in dealing with the defendants' affairs. Moreover, it was contended for by the defendants that no agreement had been reached between the plaintiff and the defendants in relation to a repayment schedule. As far as the defendants are concerned, no question of repayment, therefore, arises because the sites had remained unsold and that no agreement has been entered into between the plaintiff and the defendants in relation to putting in place a repayment schedule. Furthermore, the defendants say that no lawful demand was made of them by the plaintiff.

23. The defendants also claim that the approach of the plaintiff prior to the commencement of the proceedings was confusing at the time and was rendered more confusing by the paperwork advanced in support of the plaintiff's claim and exhibited in a number of the plaintiff's affidavits. It was asserted that the approach of the plaintiff was a major factor in forcing the defendants to emigrate. Otherwise, complaint is made by the defendants that the plaintiff's affidavit had been sworn by persons other than those with whom the defendants had dealt and that the paperwork which was exhibited was incomplete, inconsistent with the agreements actually entered into and were otherwise self contradictory. Finally, a complaint was made as to the manner in which the plaintiff delayed in the proceedings and then withheld from the defendants' legal advisers, the costs which had been awarded against the plaintiff on the original motion for liberty to enter final judgment.

24. By way of supplemental affidavit sworn by Eoin O'Shea on behalf of the plaintiff on 24th February, 2013, the plaintiff exhibited true copies of the original facility letters showing the amendments and initials which the first named defendant had referred to in his affidavit as having been made by David Kavanagh on the documents which they had signed. It is now accepted by the plaintiff that the defendants' family home and an area of two acres was, as had been contended for by the defendants, to be excluded from the security provided by the defendants to the plaintiff for the loan, the subject matter of the facility letter of 4th April, 2006.

25. The defendants had also contended that the schedule of events of default accompanying the original letter of 4th April, 2006, was questionable and contradictory. It was said that the schedule of events of default could not be relied upon as it referred to a letter of offer of 28th March, 2006. No letter of offer of 28th March, 2006, was produced nor was a schedule of events of default referable to a letter of offer of 4th April, 2006. The explanation of the plaintiff is that the reference in the schedule of events of default to a letter of offer of 28th March, 2006, was incorrect and should have been a reference to 4th April, 2006, being the date upon which the facility letter issued and which was in fact the facility letter signed and dated by the defendants themselves at that time.

26. The plaintiff's response to the contention of the defendants that the loan was to be repaid within one year of the sale of serviced sites or a suitable repayment schedule being put in place is that what was intended was that if the loan was not repaid from the sale of serviced sites after one year from the commencement of the loan then a suitable repayment programme was to be put in place. That had not occurred, the defendants were in default, and accordingly, all money due on foot of the loan was repayable forthwith.

27. In legal argument, counsel for the plaintiff, Mr. Rudderdale, submitted that there was no factual basis for any defence to the plaintiff's claim in relation to the monies due on foot of the current account or monies due on foot of the loan account, the subject matter of the facility letter of 27th April, 2004. With regard to the facility letter of 4th April, 2006, he submitted that it was now clear from the copy of the original letter of offer exhibited in the supplemental affidavit of the plaintiffs, Eoin O'Shea that this was the agreement actually signed and entered into by the defendants and that irrespective of the meaning of the provision relating to the repayments of the loan from the sale of serviced sites, as the defendants had failed to pay the interest in accordance with the interest only provision of the loan a default had occurred entitling the bank to call in the loan.

28. In response, counsel for the defence, Mr. O'Floinn, submitted that there was no proper demand in accordance with the terms of the facility letter of 4th April, 2006, namely that no demand in writing had been signed by an officer of the bank. In this regard, there was a difference between the terms relating to demand contained in the facility letter of 4th April, 2006, and those contained in the facility letter of 27th April, 2004. There were also contradictions with regard to the loan comprised in the facility letter of 4th April, 2006, with separate references to periods of one year and 24 months respectively. In addition, there could not be certainty that the schedule of events purported to have been enclosed with the facility letter of 4th April, 2006, was in fact applicable at all and noted that the only schedule of events exhibited purported to be relating to a letter dated 28th March, 2006. Of critical importance, counsel for the defendants submitted, was the fact that the loan was not due because the agreement which had been entered into between the plaintiffs, Mr. Kavanagh on the one hand and the defendants on the other was that the loan would in fact be repayable within a year of the sale of serviced sites or in default in accordance with a repayment schedule but which had never been agreed to between the parties and which was required to be put in place.

29. Not surprisingly, counsel for the plaintiff submitted that the wording of the relevant clause in the facility letter was not open to that construction or interpretation, moreover, the loan was in any event repayable because the term had expired.

The Law

30. There was broad agreement between the parties as to the legal principles applicable in relation to an application for liberty to enter summary judgment. These have been the subject matter of a number of decisions which in modern times can conveniently be said to commence with the decision of the Supreme Court in *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75.

31. In that case, the plaintiff had issued a summary summons seeking judgment on foot of a personal guarantee allegedly given by the defendant; the Master of the High Court directed that the case should be placed in the judges' list. Costello J. refused to give the defendant leave to defend the action on the basis that there was no credible evidence of a real *bona fide* defence to the plaintiff's claim and granted summary judgment to the plaintiff. On appeal by the defendant, the Supreme Court, in a judgment delivered by Murphy J. stated that:-

> *"For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action…*
>
> *In my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank Plc v. Daniel [1993] 1 W.L.R. 1453. The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms:-*
>
> > *'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.'*
>
> *In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-*
>
> > *'I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?'*
>
> *The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 is what the defendant says credible?, amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence."*

32. This statement of the principles was followed by the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607. In her judgment, McGuinness J. endorsed the test laid down in *First National Commercial Bank Plc v. Anglin* and summarised it as follows:-

> *"Thus it is for this Court to decide whether in the instant case the defence set out in the affidavits of Mr O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence…. The Court does not ask whether Mr O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."*

33. Hardiman J. delivered a concurring judgment in which he engaged in a comprehensive review of the authorities relating to the jurisdiction to grant summary judgment. Having reviewed the case law he expressed his own view in the following terms:-

> *"In my view, the fundamental question be posed on an application such as this remains: 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?"*

34. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J., enumerated the principles to be applied by a court in deciding whether to grant summary judgment or give a defendant leave to defend in the following way:-

> *"(i) The power to grant summary judgment should be exercised with discernible caution,*
>
> *(ii) In deciding upon this issue the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done,*
>
> *(iii) In so doing the Court should assess not only the Defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the Plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting Affidavit evidence,*
>
> *(iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use,*
>
> *(v) Where however, there are issues of fact which in themselves are material to success or failure, then their resolution is unsuitable for this procedure,*
>
> *(vi) Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues,*
>
> *(vii) The test to be applied, as now formulated is whether the Defendant has satisfied the Court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the Defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result,*
>
> *(viii) This test is not the same as and should be not be elevated into a threshold of a Defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence,*
>
> *(ix) Leave to defend should be granted unless it is very clear that there is no defence,*
>
> *(x) Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the Defendant or has reason to doubt whether he has a genuine cause of action,*
>
> *(xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of*

a given situation which is to form the basis of a defence and finally,

(xii) The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be."

35. This annunciation of the approach to be taken by the court in connection with an application for liberty to enter a summary judgment was cited with approval by Finlay Geoghegan J., in her judgment in *Bank of Ireland v. Walsh* delivered on 8th May, 2009.

36. In relation to the test to be applied, she observed:-

"As appears from sub-paragraph (vii) above, the threshold is one of an arguable defence and is, in relative terms, a low threshold. However, in making that determination, the Court should have regard to whether what the defendant is saying is mere assertion and whether the proposed defence is credible in the sense explained by Hardiman J. in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607."

37. With regard to the approach to be adopted in relation to factual issues, Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, referring to the decision in *Aer Rianta v. Ryanair* stated at para. 3.4:-

"So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved."

38. In applying the test, the court must be mindful that the completeness of the defence available to a defendant may only be available as a result of the adoption of certain court procedures such as discovery, inspection or interrogatories. However, a general assertion that a defence may well become available as a result of the adoption of these procedures would clearly be insufficient. In *GE Capital Woodchester Limited v. Aktiv Kapital Asset Investment Limited* [2009] IEHC 512, Clarke J. observed:-

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

39. With regard to the approach that should be adopted in relation to legal issues on a motion for summary judgment, Clarke J. in *McGrath v. O'Driscoll* stated:-

"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."

40. Whilst it may well be open to a court on a motion for summary judgment to resolve a question of law or to construe a document there is no obligation on the court to do so. Rather the question is whether the defendant has established an arguable defence. (See *Danske Bank v. Durkan New Homes* [2010] IESC 22 and *Bussoleno Limited v. Kelly* [2011] IEHC 220.)

Decision

41. Applying these principles and having read and considered the affidavits filed and the submissions made by counsel, I am not satisfied that the defendants have met the low threshold of an arguable defence to the plaintiff's claim in respect of the sums due on foot of the current account facility nor in respect of the term loan, the subject matter of the facility letter of 27th April, 2004.

42. As to the loan, the subject matter of the facility letter of 4th April, 2006, I am, however, satisfied that there is an issue for determination in relation to the construction and true meaning of certain terms and conditions of that letter which it would not be appropriate for the court to attempt to resolve on an application for summary judgment. In coming to this conclusion, I have not overlooked the fact that the defendants, through their accountants by letter dated 27th April, 2011, acknowledged that they were indebted to the plaintiff. However, this was without specifying in what amount such acknowledgment was being made and moreover, may well have been made without the benefit of legal advice nor have I overlooked the fact that the defendants do not dispute but that the loan amount, the subject matter of the facility letter of 4th April, 2006, was drawn down by them. The defendants contend, however, that they had a very specific understanding and agreement with the plaintiff and that this agreement is reflected in what they say is the correct interpretation and construction to be placed on certain terms of the facility letter, particularly those relating to repayment of the loan. That proposition the plaintiff disputes and contends that irrespective of that the monies are due by reason of the non-payment of the interest on the monies borrowed. The defendants, however, contend that no valid demand was made in accordance with the terms of the demand provision contained in the facility letter of 4th April, 2006. In this regard, I note that the demand provisions differ from the provisions of the facility letter of 27th April, 2004. I am satisfied there is in fact an issue as to whether or not the demand made on behalf of the plaintiff by the plaintiff's solicitors complies with the express provisions in that regard and comprised in the facility letter of 4th April, 2006. Moreover, there is also a conflict of evidence in relation to the issue as to whether or not a default schedule relied upon by the plaintiff is in fact referable at all to this particular facility. That there are such issues and that such a conflict as to the true meaning and interpretation to be placed on certain terms and conditions of the agreement exists confirms me in the view that if resolved in the defendants' favour, it would offer a defence to the plaintiff's claim and consequently, is more properly to be dealt with by plenary hearing. That being so, I direct that aspect of the plaintiff's claim be dealt with accordingly.

43. I will discuss with counsel the form of the orders to be made on foot of the notice of motion of 31st July, 2013.