

THE HIGH COURT

COMMERCIAL

[2011 No. 1548 S]

[2011 No. 86 COM]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

JOHN MORRISSEY

DEFENDANT

SUPPLEMENTAL JUDGMENT ON OUTSTANDING ISSUES of Ms. Justice Finlay Geoghegan delivered on the 12th day of November, 2013

1. On 14th May, 2013, I delivered a judgment on issues which, by order of the High Court (Kelly J.) of 23rd January, 2012, were set down to be tried and determined in advance of the determination of any other issues in the proceedings. Those issues were:-

"(a) Whether the plaintiff was entitled to make demands on foot of the loan facility of February [2009] as it did; and

(b) Whether the relationship between the plaintiff and the defendant went beyond that of a contractual relationship such that a fiduciary relationship existed between the plaintiff and the defendant."

2. In the judgment delivered on 14th May ([2013] IEHC 208), I decided at para. 152 that the following declarations should be made on the issues set down for the reasons fully set out in the judgment ("the May judgment"):-

"(i) The plaintiff was entitled to make demand on the defendant pursuant to the facilities granted in February, 2009 as it did in January, 2010.

(ii) The relationship between the plaintiff and the defendant did not go beyond that of a contractual relationship such that a fiduciary relationship existed between the plaintiff and the defendant."

3. The background to the present proceedings which were commenced by summary summons on 13th April, 2011, is fully set out in the May judgment and I do not propose repeating herein save as is absolutely necessary. In the proceedings the plaintiff, the former Anglo Irish Bank Corporation Ltd., seeks judgment in a sum at the time of issue of proceedings claimed to be €36,787,674.38 plus interest. The amount in respect of which judgment is now sought has reduced by reason of, *inter alia*, realisations of certain properties over which the plaintiff held security from the defendant and a concession on interest.

4. Following consideration of the May judgment by the parties the matter was before me on 31st May, and on that day, an order was made adjourning it to Friday, 21st June, for the purposes of determining the following issues:-

(a) What orders should be made following the judgment delivered on 14th May, 2013?

(b) What issues remain to be determined in the proceedings?

5. In advance of 31st May, the defendant, through his solicitors, had indicated by letter that there were further issues to be determined and that an amendment to the pleadings might be necessary. On 31st May, 2013, liberty was given to him to issue a motion returnable for 21st June, seeking to amend the defence and counterclaim. Directions were also given on the same day for the filing of the submissions by the plaintiff on or before 12th June, 2013, and by the defendant on or before 19th June, 2013, on each of the above issues.

6. At the hearing on 21st June, 2013, the defendant's motion to amend the defence and counterclaim was firstly heard and determined. The amendments sought to be made related exclusively to the enactment of the Irish Bank Resolution Corporation Act 2013, and Directive of the European Parliament and of the Council 2001/24/EC of 4th April, 2001, on the reorganisation and winding up of credit institutions. No amendments were sought in relation to any other claims attempted to be made by way of defence or counterclaim in the proceedings. For the reasons given in an *ex tempore* ruling in the course of the hearing on that day, I refused the application to amend.

7. It followed from that decision that the question as to what issues remain to be determined in the proceedings must be decided on the amended defence and counterclaim delivered on behalf of the defendant on 21st November, 2011. That was the same pleading as before Kelly J. when he made the order of 23rd January, 2012, directing trial of the two issues which were the subject of the May judgment.

8. The plaintiff, both in its written submissions delivered pursuant to the directions given on 31st May, 2013, and in oral submission through counsel at the hearing, submits that no further issues remain to be determined in these proceedings and that the plaintiff is now entitled to judgment. An affidavit of Mr. Mark Ambrose on behalf of the plaintiff was delivered on 21st June setting out an amount claimed as of that date of €31,971,343.14. In computing that figure, the plaintiff reduced the sum claimed by a sum of €9,869.55 in respect of what it understood to be disputed interest. At the hearing, it was stated that the plaintiff, without admission

of liability, was willing to reduce the amount by a further sum of approximately €75,000 which was in dispute in relation to interest charged.

9. Counsel for the plaintiff makes two related submissions in support of the plaintiff's contention that it is now entitled to judgment without the trial of further issues. Firstly, he relies upon the basis on which the order of 23rd January, 2012, for the trial of the two issues as a first module, was made. In particular counsel relies on the reasoning of Kelly J. in making the order, as recorded in an *ex tempore* ruling. Secondly, he submits that upon an analysis of the claims pleaded in the defence and counterclaim, that in substance, the allegations of wrongdoing by the plaintiff in respect of which causes of action are pleaded by way of defence or counterclaim are dependent upon the claimed fiduciary relationship between the plaintiff and the defendant. In his submission, the decision in the May judgment that there was no fiduciary relationship between the plaintiff and the defendant precludes the pursuit of any further defence or claim pursuant to a cause of action pleaded in the existing amended defence and counterclaim as they depend upon the existence of a fiduciary relationship.

10. The written submissions filed on behalf of the defendant pursuant to the directions given by the Court in the Order of 31st May, 2014, were primarily concerned with the proposed challenges to the Irish Bank Resolution Corporation Act 2013, and the impact of Directive 2001/24/EC. At paragraph 32 of the submissions, the following was stated in relation to the issues remaining to be tried on the existing amended defence and counterclaim:

"32. The amended defence and counterclaim has also relied upon the wholly unlawful and reprehensible conduct of the plaintiff's predecessor in title, Anglo Irish Bank plc on which his title relies, which is raised by way of defence and counterclaim in these proceedings.

. . .

The defendant respectfully submits that it is necessary to consider a separate module that addresses the issue of the dishonest course of conduct of the plaintiff's predecessor in title, Anglo Irish bank plc, as such egregious conduct affords the defendant a defence to the claim. It also buttresses his counterclaim. Details of the conduct are particularised in the amended defence and counterclaim especially in paragraph 50 of the defence and paragraphs 4 to 8 and particulars of the counterclaim."

11. As appears from the above, the basis upon which it is submitted on behalf of the defendant that the Court should permit a future module in relation to the alleged wrongful conduct of the plaintiff is that such "egregious conduct affords the defendant a defence to the claim". The submission does not identify, however, where in the existing amended defence and counterclaim matters are pleaded in relation to the alleged wrongful conduct which, independently of the alleged fiduciary relationship or duty (now held not to exist), could arguably provide a defence to the plaintiff's claim or constitute a cause of action in the counterclaim giving rise to a claim for damages against the plaintiff which could be the subject of a setoff. Other than in relation to the specific matters referred to by counsel for the defendant at the hearing and set out below, no existing pleading, either in the defence or counterclaim has been identified which could, independently of the alleged fiduciary relationship, give rise to an arguable defence to the plaintiff's claim or a cause of action giving rise to a claim for damages as pleaded in the counterclaim.

12. At the hearing, counsel for the defendant also emphasised by reference to the correspondence passing between the solicitors in December 2011 and January 2012, that there was no agreement that if the issue as to the existence or not of a fiduciary relationship between the plaintiff and defendant was determined in favour of the plaintiff that such decision would bring to an end the remaining defences and counterclaims of the defendant. He then sought to identify a number of issues which he submitted remained to be determined in the proceedings, notwithstanding the decision of the Court on the two issues in the May judgment. These may be summarised as follows:

- (i) An issue as to the quantum of the interest claimed by reference, *inter alia*, to paragraph 11 of the defence.
- (ii) Issues in relation to an alleged defence of breach of trust and confidence and related prayers for relief at paragraphs 5 and 8 of the counterclaim.
- (iii) Alleged misrepresentation by the plaintiff, pleaded as a defence in paragraphs 44 and 46 and the related claim for damages for deceit in paragraph 8 of the prayer for relief in the counterclaim.
- (iv) The matters pleaded as a defence in relation to the negotiations concerning TPG at paragraphs 45 to 49 (bis) inclusive.
- (v) The matters pleaded as a defence in relation to the investment in shares at paragraphs 50 (bis) to 53 inclusive.

13. Prior to the hearing on 23rd January, 2012, the plaintiff and the defendant had set out their position in correspondence between 14th December, 2011, and 20th January, 2012. The plaintiff issued a motion on 18th January, 2012, seeking an order pursuant to O. 63A, r. 5, 6 and/or 14 that the issues which ultimately were the subject of the court order be heard and determined in advance of any other issue in the proceedings. In that correspondence whilst the solicitors for the plaintiff maintained that if such issues were determined in favour of the plaintiff it would, in effect, determine the proceedings, there was no express agreement given by or on behalf of the defendant to such a position. Counsel for the plaintiff did not submit at the hearing before me that there was such an agreement. Rather, he relied primarily on the position taken on behalf of the plaintiff in seeking the trial of the two issues and the reasoning of Kelly J. in the short *ex tempore* decision (the transcript of which was available) which gave rise to the order of 23rd January, 2012, where he stated:

"So the net position that then obtains is that there is basically no disagreement between the parties as to the desirability and, indeed, appropriateness of this case being dealt with in a modular fashion. I am satisfied on the basis of my knowledge of the case from the various applications that have been made to date and on what is set out in the affidavit grounding the parameters of the various matters that were identified by Mr. Justice Charleton in *McCann v. Desmond* where he set out a non-exclusive series of considerations which the Court might take into account on an application of this sort. I believe that it makes a great deal of sense that there would be a trial of these two issues because in essence what the Defendant says by way of his defence in this action is that there was no entitlement on the part of the Plaintiff to seek to recover the funds which are the subject of these proceedings because of the existence of a fiduciary relationship between him and the Plaintiff Bank which superseded the mere contractual obligations undertaken in the various documents which were relied upon by the Plaintiff. If that issue is tried, then we will have an answer either in favour of the Plaintiff, that is in effect an end of the proceedings. If the answer is against, then Mr. Morrissey will be at

large in relation to the various other matters which he would wish to adduce in evidence in support of this motion that there was indeed this fiduciary relationship and that events which are touched upon in the papers that have been placed before me concerning, for example, the Maple 10 are matters which are to be taken into account by the Court in reaching a final conclusion on the matter."

14. The above ruling of Kelly J., in my judgment, should not be treated as determinative of the question which I now have to decide as to the remaining issues to be determined in the proceedings. The ruling is obviously a matter which I should take into account as it is the reasoning of the Court which made the order for the trial of the two issues as a first module, albeit that the order was made substantially on consent.

15. Insofar as counsel for the defendant sought to rely upon the fact that the order of 23rd January, 2012, ordered that the issues set out "be tried and determined in advance of the determination of any other issue in the proceedings" to imply that it was envisaged or intended that there be a further trial of other issues, it does not appear to me that the order can be so construed. The question as to whether there remain any other issues to be tried is something to be determined after the decision on the two issues set down in the order.

16. I now turn to the specific issues raised by counsel for the defendant. I am appending to this judgment a copy of the amended defence and counterclaim delivered on 21st November, 2011, so as to avoid having to set out in full the relevant paragraphs relied upon. Reference needs to be made to the detail of the pleading to understand the decisions which I have reached.

17. The defence is divided into four parts; an introduction and what appear to be three distinct defences to the plaintiff's claim: wrongful termination of the facilities, fiduciary relationship and investments in shares. In addition, there is a plea in the counterclaim that the defendant is entitled to set off such damages as may be awarded in the counterclaim against the plaintiff's claim.

18. The defence and counterclaim must be considered in the context of the plaintiff's claim. It is a claim for monies due on specified loan accounts together with interest thereon. The proceedings were commenced by summary summons and no statement of claim was delivered. The defendant, at paragraph one of the defence, admits that a loan was made to him. There has been no dispute as to the principal amounts alleged to have been loaned and now sought to be repaid.

19. On the first issue raised by counsel for the defendant, it appears to me that there does remain an issue which the defendant is entitled to have tried as to the amount of interest which the plaintiff did and was entitled to charge on the loan facilities. This arises by reason of the specific plea at paragraph 11 of the defence which states:

"The Accounts and Bank Statements of the Plaintiff on foot of which the sums claimed herein are inaccurate. Interest on foot of the Facility Letter of 2009 and all preceding Facility Letters were charged at the Plaintiff's stated rate which wrongfully and unlawfully included an undisclosed additional margin over the EURIBOR rate."

20. Whilst the above plea is made in the context of the overall assertion by the defendant that the plaintiff wrongfully terminated the facilities of the defendant, it appears to me that the defendant, having so pleaded, should be entitled to challenge the amount of interest now included in the amounts claimed by the plaintiff on the ground set out in paragraph 11 of the defence notwithstanding the decision in the May judgment that the plaintiff was entitled to make demand the defendant pursuant to the facilities granted in February, 2009 as it did in January, 2010. This is a dispute raised on the pleading which goes to the quantum of the plaintiff's claim, which was not in issue in the first module. However, the defendant is only entitled to dispute the amount of the plaintiff's claim and the matters pleaded in paragraph 11 are the only grounds upon which the defendant is now entitled to dispute or challenge the amount of the interest included in the sums claimed on the summary summons.

21. The next issues which counsel for the defendant submits remain outstanding and entitled to a trial, notwithstanding the decisions in the May judgment, are the defences in relation to alleged breach of trust of confidence as pleaded in paragraphs 1, 4 and 7 of the defence, and the related reliefs sought at paragraphs 5 and 8 of the prayer for relief in the counterclaim, namely, a declaration that the plaintiff is guilty of equitable fraud and an alternative claim of damages for breach of trust.

22. In relation to the reliance placed upon the reliefs sought in the counterclaim, counsel for the plaintiff relied upon the judgment of Geoghegan J. in the Supreme Court in *Croke v. Waterford Crystal Ltd.* [2005] 2 I.R. 383 (with which Murray C.J., Denham, McGuinness, and Fennelly JJ. agreed) where he stated at p. 387 at para. 10:

"It is trite law that a cause of action merely mentioned by name in the prayer does not and cannot in any sense constitute the pleading of such cause of action. It is, therefore, necessary to look at the main body of the statement of claim."

23. Similarly, in this instance, it is necessary to look at the substance of the defence and the counterclaim and the matters pleaded therein. The pleadings, in paragraphs 1, 4 and 7 of the defence in relation to an alleged relationship of trust and confidence are, in my judgment, pleadings which relate to the alleged fiduciary relationship between the plaintiff and the defendant, which has already been determined. There is no relationship of trust pleaded, other than the alleged fiduciary relationship nor any specific facts which could constitute a cause of action giving rise to a claim for damages for breach of trust as claimed in the counterclaim other than pursuant to the alleged fiduciary relationship. Counsel did not identify any pleading in the body of the counterclaim (and, on my review of the counterclaim, he could not so do) which sets out a basis for cause of action which, arguably, would entitle the defendant to a declaration that the plaintiff is guilty of equitable fraud. Accordingly, I have concluded that there are no further issues to be determined on the basis of this submission.

24. Next, counsel for the defendant submits that there is pleaded against the plaintiff a claim in relation to alleged misrepresentation which remains to be determined, notwithstanding the finding of no fiduciary relationship between the plaintiff and the defendant. He referred, in particular, to paragraphs 44 and 46 of the defence and the claim for damages for deceit in the prayer for relief at paragraph 8 of the counterclaim.

25. In considering this submission, the question which I think must fairly be addressed is whether, considering the relevant pleas in the defence and counterclaim, the defendant can be considered to have pleaded a cause of action entitling him to pursue a claim for damages for false representation or damages for deceit independently of the alleged fiduciary relationship. My conclusion is that no such cause of action is pleaded.

26. Counsel for the defendant refers, in particular, to paragraphs 44 and 46 of the defence. Those paragraphs form part of the section of the defence headed 'Fiduciary Relationship' and must be considered in that context. Paragraph 46, when read in the

context of paragraph 45, appears to me to relate to the defendant's dealing with the plaintiff on behalf of TPG, to which I will refer below. Paragraph 44 pleads:

"44. Further and/or in the alternative, by reason of (i) the matters aforesaid (ii) the special relationship and/or fiduciary relationship between the Plaintiff and the Defendant, (iii) the false representations made to the Defendant by the Plaintiff, its servants and/or agents as pleaded in the Counterclaim herein and (iv) the Defendant's reliance on these false representations, the Defendant has suffered great loss and damage such that a Court of equity should give relief in respect thereof."

27. On a fair reading of paragraph 44, it appears to be a claim based upon four cumulative allegations, one of which is the alleged fiduciary relationship between the plaintiff and the defendant. Secondly, insofar as there is a reference to false representations allegedly made to the defendant by the plaintiff, they are stated to be those pleaded in the counterclaim. There is no express pleading of a false representation in the counterclaim. Insofar as paragraph 4 of the counterclaim pleads that the defendant misled the defendant as to its solvency and its compliance with the regulatory regime, that plea is made in the context of and as part of several pleas, all of which relate to the alleged fiduciary relationship between the plaintiff and the defendant. This is exemplified by the particulars included in the counterclaim which are particulars of non-disclosure and appear to be pleaded in support of paragraph 5 of the counterclaim which alleges that the plaintiff, in breach of the fiduciary duty owed to the defendant, did not disclose all relevant information to the defendant necessary pursuant to the existence of a fiduciary relationship.

28. The fact that the defendant has included a claim for damages for deceit in the prayer for relief in the counterclaim, as previously stated at para. 22 of this judgment, does not of itself constitute the pleading of a cause of action entitling the defendant to recover damages for deceit. The pleading requirements in relation to allegations of misrepresentation, fraud or deceit are particularly stringent. See, *inter alia*, O. 19, r. 5(2) of the Rules of the Superior Courts and *Keaney v. Sullivan and Others* [2007] IEHC 8. The elements of actionable deceit and the well-established principles set out by Shanley J. in *Forshall v. Walsh and Bank of Ireland* (Unreported, High Court, 18th June, 1997) were reviewed recently by Hardiman J. in the Supreme Court in *McCaughey v. Irish Bank Resolution Corporation Ltd. and Another* [2013] IESC 17. The defendant, in his defence and counterclaim, in my judgment has not pleaded a cause of action in relation to alleged false representations which might give rise to a claim for damages for deceit independently of the alleged fiduciary relationship between the plaintiff and the defendant. Hence, it follows from the May judgment, that there is no further issue to be determined on the existing pleadings under this heading.

29. The fourth matter raised by counsel for the defendant as still requiring determination are the matters pleaded in relation to the negotiations conducted by the defendant with or on behalf of TPG with the plaintiff. These matters are pleaded at paragraphs 45 to 49 (bis) of the defence. There are two sets of paragraphs numbered 49 and 50 appearing in the defence; hence the reference to paragraph 49 (bis). I have concluded that, having regard to the decision in the May judgment that there was no fiduciary relationship, there are no further issues which the defendant is entitled to have tried as part of his defence to the plaintiff's claim based on the pleadings in relation to TPG. The matters pleaded in relation to TPG are pleaded as part of the defence and relate to the alleged fiduciary relationship. Paragraph 45, which commences the pleading, expressly refers to the alleged fiduciary relationship. Importantly, there is no claim made as part of the counterclaim in relation to the matters pleaded concerning TPG. Hence, in these proceedings, there is no separate claim for damages made against the plaintiff arising out of the matters pleaded in paragraphs 45 to 49 (bis) of the defence. The matters are pleaded only by way of defence and as part of the claim that there was a fiduciary relationship or they are dependant on the existence of same. Hence they cannot be relied upon following the May judgment.

30. The final issues which counsel for the defendant contends require further trial and determination by the Court, notwithstanding the decisions in the May judgment, are the matters pleaded by way of defence at paragraphs 50 (bis) to 53 under the heading of 'Investments in Shares'. Again, as with the TPG issue, it must be noted that these matters are pleaded by way of defence and do not form part of any claim in the counterclaim in the proceedings. Counsel for the plaintiff submits that the matters pleaded as a purported defence in these paragraphs are predicated on the existence of a fiduciary relationship.

31. That submission appears to me correct. In paragraph 50 (bis) after setting out certain allegations of fact in relation to the plaintiff and its knowledge it is pleaded "[h]ad the Plaintiff disclosed these matters to the Defendant or had the Plaintiff simply declined to advance monies to the Defendant to invest in its own shares, the Defendant would not have suffered the loss . . .". Throughout the defence and counterclaim a duty of disclosure is alleged by reason of the alleged fiduciary relationship. This is the only pleaded basis for the alleged duty to disclose the matters pleaded in paragraph 50 (bis) or to refuse the lending. Hence it follows that in the absence of a fiduciary relationship, as has been found by this Court, there is no defence which remains to be pursued by reason of the matters pleaded in paragraph 50 (bis) and 51. Paragraphs 52 and 53 plead matters of fact but no basis upon which such facts could give rise to a distinct defence. .

32. Whilst I have noted the assertion made at the end of paragraph 50 (bis) to the effect "[w]ithout the losses incurred on these shares, the Defendant would have been able to continue to honour indefinitely the terms of his agreements with the Plaintiff", the decision of the Court in the May judgment that the plaintiff was entitled to demand repayment of the facilities in January 2010, pursuant to the facility letter accepted by the defendant in February 2009, precludes the pursuit of any defence based upon such an assertion.

33. For clarity, I wish to add that the remaining two paragraphs in the defence, paragraphs 55 and 56, in my judgment, are pleadings which relate to the entire defence and not just to the investment in shares. The dispute raised by paragraph 56 has been determined against the defendant in the decision on the first issue in the May judgment.

34. In addition to the above matters, I wish to add that I have considered the entirety of the counterclaim pleaded in the amended defence and counterclaim delivered on 21st November, 2011. In my judgment, the decisions on the two issues in the May judgment determine all issues which are pleaded in the counterclaim in favour of the plaintiff and against the defendant. Paragraph 1 of the counterclaim, in asserting that the plaintiff was estopped from calling in or terminating the facilities, has been determined by the decision on the first issue in the May judgment. The remainder of the counterclaim, commencing with paragraph 2, is, on a fair reading of the matters pleaded, all dependant upon the plea that the plaintiff and the defendant had a fiduciary relationship. In substance, the causes of action pleaded relate to breaches of the alleged fiduciary relationship. There is no cause of action pleaded based upon any alleged duty of care owed by the plaintiff to the defendant pursuant simply to a banker/customer relationship or any relationship other than a fiduciary one. . Hence, it follows from the May judgment and this judgment that the counterclaim of the defendant must now be dismissed.

35. Counsel for the plaintiff submitted that even if the Court were now to permit certain further issues to be pursued, that the plaintiff should be entitled to judgment for so much of its claim as is not disputed by the issues which the defendant is entitled to pursue. Having regard to the conclusions reached in this judgment, it does not appear to me that the plaintiff is now, on the evidence

before the Court, entitled to judgment in any specified amount. Whilst, as already stated, the defendant admits that the various loans were made to him and there is no defence remaining to be determined in relation to the plaintiff's entitlement to recover the amounts loaned by Anglo to the defendant, the matters raised at paragraph 11 of the defence in relation to the interest charged expressly plead an alleged wrongful interest rate was charged on facilities prior to the facility letter of February, 2009. In such circumstances, it does not appear that the Court can determine on the evidence presently before it the amount in which the plaintiff is entitled to judgment in respect of the principal due on the facilities admittedly granted and in respect of which the Court has decided the plaintiff was entitled to demand repayment in January 2010. .

36. The final matter which I ought to raise arises out of the affidavit of Mr. Ambrose of 21st June, 2013, and the subsequent correspondence between the parties in relation to the quantum of the plaintiff's claim which, by agreement was furnished to me. Mr. Ambrose, in his averment of the amount claimed as of 21st June, 2013, gives credit properly for the amounts received by the plaintiff from the receiver in respect of the sale of properties of the defendant over which the receiver was appointed and the net funds then held by the receiver on its behalf. Whilst I wish to make clear that there is, in these proceedings, no outstanding issue in relation to the validity of the appointment of the receiver and, on the pleadings, no challenge to the steps taken by the receiver(who is not a party to the proceedings) in the realisation of properties, nevertheless, at the hearing of the remaining issues in these proceedings, the plaintiff will have to adduce evidence of the amounts realised by the receiver and the amounts for which the defendant should be given credit in accordance with the provisions of the relevant security documents.

Conclusions

37. For the reasons set out in this judgment, the Orders which I have concluded should be made following the judgment delivered on 14th May, 2013, are:

1. Declarations on the issues set down by the Order of 23rd January, 2012, as set out at paragraph 152 of the May judgment in the following terms:

(i) The plaintiff was entitled to make demand on the defendant pursuant to the facilities granted in February, 2009 as it did in January, 2010.

(ii) The relationship between the plaintiff and the defendant did not go beyond that of a contractual relationship such that a fiduciary relationship existed between the plaintiff and the defendant.

2. An Order dismissing the defendant's counterclaim in these proceedings.

39. On the second question as to what issues remain to be determined in the proceedings, I have concluded that the only issue which remains to be determined in these proceedings is the amount in which the plaintiff is entitled to judgment against the defendant on its claim herein. Further, that the only issues which remain to be determined in relation to the amount in which the plaintiff is entitled to judgment are:

(i) The defendant's dispute in relation to the amount of interest charged upon the facilities upon the grounds set out in paragraph 11 of the defence; and

(ii) The plaintiff's proof of the amounts for which the defendant should be given credit by reason of realisations made by the receiver less the deduction of any expenses permitted in accordance with the relevant security documents.

40. I will hear counsel prior to giving directions in relation to further steps which require to be taken prior to the trial of the remaining issue.

APPENDIX

[See attached defence and counterclaim delivered on 21st November 2011]