THE HIGH COURT

[2016 No. 377 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND
SEAMUS WHITE

DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 29th day of June 2018

1. The within proceedings were instituted by way of summary summons dated 29th February, 2016 in which the plaintiff claimed the sum of €1,213,306.77 against the defendant, being money lent by the plaintiff to the defendant on foot of Loan Account No. 71439897.

2. An appearance was duly entered by the defendant on 6th April, 2016.

3. The within motion for liberty to enter final judgment issued on 1st June, 2016. A number of affidavits have been sworn on behalf of the plaintiff and the defendant in the within proceedings. It is the plaintiff's case that the defendant has no bona fide defence to its claim. The defendant however maintains that he has a defence and that he is entitled to a set off and counterclaim against the plaintiff.

Preliminary Objection

4. In the first instance, however, the defendant maintains a preliminary objection to the within application on the grounds that the special indorsement of claim on the summary summons is fundamentally defective in that it is:

(a) deficient;

(b) improperly constituted;

(c) fails to comply with the requirements with the Rules of the Superior Courts (RSC) governing summary proceedings, and;

(d) fails to provide sufficient particulars and/or the grounds thereof which, if true, would give rise to a cause of action against the defendant.

Alleged defects in the summary summons

5. The defendant maintains that the summary summons does not accord with the requirements of the RSC in particular that there is no reference to a contract or a demand for monies payable in the indorsement of claim, as required by O. 2, RSC. It is further submitted that the indorsement of claim does not set out "all necessary particulars the relief claimed and the grounds thereof", as required by O. 4, r. 4.

6. As formulated, the special indorsement of claim reads:

"1. The plaintiff's claim is for the sum of €1,213,306.77 and the Defendant having failed to pay the sum due.

2. €1,213,306.77 being money payable by the Defendant to the Plaintiff for money lent and advanced by the Plaintiff's Clonakilty County Cork Branch to the Defendant at the Defendant's request within the past six years and for money now due on foot of Loan Account Number 71439897 of the said defendant with the plaintiff …"

7. The defendant asserts that the indorsement of claim does not meet the test set out in Caulfield v. Bolger [1927] I.R. 117, namely, "… t*he special endorsement must be valid as a statement of claim* …", an approach echoed by the Supreme Court in Bond v. Holton [1959] I.R. 302. It is submitted that notwithstanding that summary proceedings contemplated an abbreviated and concise form of pleading, "*this is no bar to its containing all essentials of a correct pleading*", as per Hanna J. in *Caulfield v. Bolger*.

8. The defendant asserts the plaintiff has failed to provide particulars and/or sufficient particulars in relation to the sums claimed. In particular, the indorsement of claim contains no particulars of demand on the part of the plaintiff. It is submitted that this is in circumstances where the letter of loan facility of 11th January, 2012 identifies the loan as being repayable on demand. Moreover, it is submitted that the plaintiff has failed to plead particulars and/or sufficient particulars of default on the part of the defendant. Albeit, the special indorsement of claim refers to "money now due", there is no reference to why it is allegedly due. Nor, the defendant asserts, are there sufficient particulars relating to his alleged failure to pay the said sum. In those circumstances, counsel for the defendant submits that no cause of action is pleaded and that the defendant is thus entitled to seek to have the plaintiff's action dismissed. It is also submitted that a defective special indorsement of claim cannot be amended or cured by affidavit.

9. Counsel for the plaintiff submits that there is no merit in the defendant's assertion that the summary summons is defective. Counsel relies on the decision of the Court of Appeal in AIB v. Pierce [2015] IECA 87. where Hogan J. opines:

"15. In the present case the particulars supplied by AIB in the indorsement of claim refer to the sum outstanding, the date of demand and the relevant account. To my mind, this is sufficient, at least so far as the present case is concerned. It is clear from the correspondence from her financial adviser which has been exhibited in the grounding affidavits filed on behalf of AIB that she is fully acquainted with the nature of the bank's claim against her. Adopting the words of Ryan J. in Bank of Ireland v. Keehan [2013] IEHC 631, it cannot be said that this defendant "has asserted…any confusion or uncertainty as to his liability."

16. Counsel for Ms. Pierce, Mr. Sheahan S.C, suggested that the Bank could and should have provided by way of particulars contained in the indorsement of claim a running account of the loan obligations, with additional details as to

interest, nature of the loan, repayments and so forth. Doubtless all of this information could have been supplied, save that in that situation the indorsement of claim would have taken on the character of a bank statement rather than a pleading. It is clear, however, from the language of Ord. 4, r. 4 that this is what the drafters of the Rules sought to avoid: they aimed instead for a pithy and concise statement of the claim.

17. I do not doubt but that there might be special cases involving proceedings brought by way of summary summons where more elaborate particulars might be required. Yet such cases are likely to be unusual - perhaps even exceptional - and no objection to the form of pleading should properly be entertained unless the defendant has first made out a convincing case by way of replying affidavit to the effect that, absent such additional particulars, the fair defence of the proceedings would be compromised.

18. Nothing of the sort arises in the present case. Indeed, Mr. Sheahan S.C. freely conceded that the objection here was based on a pure pleading point to the proceedings as cast in their present form. In my view, however, the indorsement of claim in the present case complies with the requirements of Ord 4, r. 4. It follows, therefore, that the present appeal should be allowed and the matter remitted to the High Court for a determination on the merits."

10. The defendant maintains that the present case is distinguishable from AIB v. Pierce, given that, unlike the position in the latter case, there is no reference in the within indorsement of claim to a demand having been made of the defendant or to any date of such demand.

11. Overall, I am not persuaded that the summary proceedings should be struck out because of alleged defects in the pleadings. To my mind, there is sufficient in the special indorsement of claim to persuade the Court that the defendant knows the case he has to meet. While it is the case that there is no specific reference to a demand for repayment having been made, it is pleaded, however, that the defendant has failed to pay the sum claimed by the plaintiff. Moreover, the defendant has made no case on affidavit that a fair defence of the proceedings is compromised by the absence of any additional particulars such as are now alleged on the defendant's behalf in oral and written submissions. On the contrary, the defendant has sworn affidavits setting out the basis upon which he asserts that he has a *bona fide* defence to the plaintiff's claim, including by way of set off and counterclaim.

The relevant legal principles as to whether the within proceedings should be adjourned for plenary hearing
12. Before dealing with the basis upon which the plaintiff claims an entitlement to summary judgment, and the defendant's response thereto, it is apposite to set out the relevant legal principles to be applied by the Court on an application for liberty to enter final judgment where it is maintained that there is a bona fide defence to the claim.

13. In *Aer Rianta C.P.T. v. Ryanair Limited* [2001] 4 I.R. 607, McGuinness J. described the relevant test as being "*whether there is a fair or reasonable probability of the defendant having a real or a bona fide defence*". In his judgment in the same case, Hardiman J. expressed the relevant test in the following terms:

"In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

14. In his judgment in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J., after an extensive review of the case law, set out the considerations which the Court should bring to bear on an application for summary judgment:

"9. From these cases it seems to me that the following is a summary of the present position:-

(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 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."

15. Thus, it is clear that the defendant does not have to establish a convincing case, or a case that is likely to succeed. However, the Court is entitled to consider the credibility of the defence that is put forward and is not required to accept as true a "mere assertion" in an affidavit sworn by the defendant which is unsupported by any evidence.

16. The parameters of the Court's approach was described by Clarke J. in *IRBC v. McCaughey* [2014] 1 I.R. 749, as follows:

> *"The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta. … It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."*

The case advanced on affidavit by the plaintiff for liberty to enter final judgment and the defendant's response thereto

17. The plaintiff's position is set out in the grounding affidavit of Mr. Brendan Murphy, Business Manager in the plaintiff bank. He avers that the loan facility in issue in the within proceedings, being Loan Account No. 41439897, was extended to the defendant pursuant to a Facility Letter dated 11th January, 2012 which was accepted by the defendant on 10th February, 2012. The facility letter provided for the advance of €1,089,728.18 to the defendant by way of "Commercial Mortgage". The purpose of the facility was described as the "renewal of existing facility (Account No. 71439897)…" The purpose of the offer letter was "to restate and replace an existing Offer Letter".

18. Interest was set at 4.05 until 1st March, 2015. It was also stated that exact repayments would be determined on date of drawdown based on the interest rate then prevailing. The facility letter also provided that the commercial mortgage was payable in full within 186 months of renewal. Provision was made for interest only payments for a period of six months. It was also provided that the facility "is repayable on demand which demand can be served at any time by the Bank in its sole discretion and without stating reasons for such demand." The facility was secured on a first legal mortgage/charge over property at Clogheen Industrial Estate, Clonakilty, Co. Cork, registered in the name of the defendant.

19. At para. 5 of his affidavit, Mr. Murphy avers that the defendant failed to meet the repayment obligations on the loan as a result of which he was issued with letters of demand on 6th July, 2015 and 18th December, 2015, which demands were not met by the defendant.

20. In his replying affidavit sworn 19th October, 2016, the defendant sets out the basis on which it is claimed that the subject matter of the dispute warrants a full plenary hearing.

21. At para. 7, he avers as to the following "summary of material events" :

> "(a) Loan monies which are the subject matter of this dispute were initially advanced to me on foot of a facility letter written by the Plaintiff to me dated the 1st of June, 2007. The amount and type of the facility was for €1.5 million by way of business loan and the dual purpose for seeking the monies were to refinance my then existing total borrowings with Permanent TSB, and associated costs … with the remainder of the loan advancement intended to assist me with the brand new build of my new kitchen workshop/tile store at Clonakilty, Co. Cork …
>
> (b) I refer to a copy of the plans and drawings of the proposed new development which I submitted as part of my business plan which accompanied my said loan application …
>
> (c) I refer to photographs that I took myself on the 7th October 2016 which show the current extent of the non-completed structure and I also refer to other virtual images what was intended (the envisaged completion) but which never materialised …
>
> (d) As per the said loan agreement, several drawdowns were made in the following months bringing the development to a stage of approximately almost ¾ completion. Each of these said several drawdowns were contingent on the Plaintiff receiving a professional certificate of inspection from an engineer … and this did happen for all drawdowns received.
>
> …
>
> (f) I say that when building construction (for the build of my said new kitchen workshop/tile store at Clonakilty, County Cork) had reached a stage of partial completion (but far from being fully finished), I had to demolish part of my existing (sic) and move my production facilities into the unfinished new building in order to facilitate further and necessary aspects of construction. At some point thereafter a bank official of the Plaintiffs, a John E. O'Donnell, paid a visit to the said development under construction. My understanding from his verbal comments was, *inter alia*, that things had changed within the bank and have tightened up considerably and that I would therefore not be receiving the remaining loan monies. This came out of the blue to me and meant that I would have to try to complete construction of the said building without further recourse to the additional final 2 drawdowns as promised. This meant that I had to use my life savings and withdraw from my day to day overdraft to try to complete the project… I made it clear to the said John E. O'Donnell telling him that I needed more money to complete the construction and that my business would be caused to go into serious difficulties as a result of not receiving the final drawdowns. I pointed out to him that we had no toilet facilities, no running water and that the development was totally unfinished. Furthermore, I say that this was a cause of concern for me as I had never defaulted on the said loan and my business was doing well at the time."

22. The defendant further avers:

> "9. I say in summary that the Plaintiff and I entered into a loan agreement … in good faith on 1st June 2007. As sworn in this affidavit, I honoured my part of the contractual loan obligation yet for no reason the Plaintiff reneged and/or 'welched' on the said agreement in or around September 2008 when the Plaintiff's agent informed me at a meeting that things within the bank had changed and tightened up considerably and that I would be getting no more monies. I say that

> I now have learned (from the limit data protection documents disclosed to me to date) that the Plaintiff's reasoning for reneging on the said agreement was that the development was in its words, 'completed ahead of budget'. This is I say is patently untrue and the drawings, plans and photographs which I have exhibited … prove same…
>
> 10. Moreover, I say that the Plaintiff breached the agreement as alleged without carrying out any basic assessment of the material facts and without consulting with me and the way that the Plaintiff terminated the agreement was negligent."

23. In response to the defendant's affidavit, Mr. Murphy swore a further affidavit on 26th January, 2017. He avers as follows:

> "5. It appears from the Defendant's affidavit that he does not dispute that he borrowed the money now sought by the Bank in the within proceedings. The Defendant does not take issue with any of the averments in my Grounding Affidavit sworn herein on 27th May 2016".

24. With regard to the alleged breach by the plaintiff of 2007 loan, Mr. Murphy avers that any allegations in respect of the 2007 loan are not relevant to the within proceedings and do not affect the plaintiff's entitlement to judgment against the defendant.

25. Without prejudice to that position, Mr. Murphy disputes the defendant's contentions and asserts that in accordance with the 2007 loan agreement, the plaintiff advanced funding to the defendant. With regard to the allegation that the plaintiff acted in breach of the 2007 contract by failing to advance some €250,000 funds sanctioned under that agreement, it is averred that under the terms of the 2007 loan agreement the plaintiff was required to advance funds on receipt of an architect's certificate of expenditure. It is averred that on various dates in 2007 and 2008, funds were advanced upon receipt of an architect's certificate. According to Mr. Murphy, the last such certificate was furnished on 12th February, 2008, and that thereafter, "no further certificate was ever submitted and no request for additional funds was ever made by the Defendant."

26. Mr. Murphy goes on to aver that in or around the end of 2008, the defendant decided to increase his monthly repayments on the 2007 loan to a level above that which was required under the terms of the 2007 loan agreement and that such increased repayments commenced in February 2009, again increasing in March 2010.

27. As to the defendant's allegation that the plaintiff refused to honour its commitments under the 2007 loan, Mr. Murphy avers as follows:

> "15. If the bank had unilaterally refused to advance funds to the Defendant to allow him to complete his proposed building project, forcing the Defendant to use his own savings to do so as he alleges in his Affidavit, it is difficult to understand why the Defendant would simultaneously choose to make larger loan repayments than he was required to do.
>
> 16. The Defendant first had difficulty making loan repayments under the 2007 Loan Agreement in or around the end of 2011. It was at this point that the Defendant requested an interest only period of 6 months. The Bank acceded to this request and the loan was refinanced upon the execution by the Defendant of 2012 Loan Agreement …"

28. In his affidavit sworn 10th February, 2017, Mr. John O'Donnell, Senior Business Manager with the plaintiff, sets out his account of his dealings with the defendant in respect of the 2007 loan, as follows:

> "5. I say that I was the Bank official that dealt with the Defendant in respect of his original borrowing from Bank of Ireland in June 2007. I issued the Letter of Offer dated 1st June, 2007 to the Defendant. …
>
> 6. The purpose of the facility – which was sanctioned for up to €1,500,000 – was to refinance borrowings that the Defendant had with Permanent TSB to fund the build of a new kitchen workshop in an industrial estate in Clonakilty, Co. Cork.
>
> 7. The facility was to be repaid within 240 months, and the Defendant was afforded a 24 month period of interest only payments.
>
> 8. The facility was to be reviewed in a year's time. In the end, I believe that a review was undertaken by me in August/September, 2008. I recall visiting the Defendant's premises at Clogheen Industrial Estate in Clonakilty. It was an amicable meeting. Mr. White informed me that he no longer required the remaining undrawn–down funds which totalled about €250,000 as he said the build had been completed within budget.
>
> 9. Accordingly, I cancelled the remaining undrawn balance on the internal system. … I say that I made the entry in that document which states 'REDUCE LOAN TO €1251K (€1.5 M APPROVED), AS BUILD WITHIN BUDGET". This reflected what Mr. White had told me.
>
> 10. Mr. White never subsequently communicated any concern to me that he had not obtained the full loan amount sanctioned. Mr. White never made any request for a further drawdown.
>
> 11. Mr. White also chose in early 2009 to commence interest and capital repayments on the loan although he was not required to do so until 24 months after drawdown.
>
> 12. I say that the averments in Mr. White's affidavit that state that I informed him that the remaining monies sanctioned under 2007 Letter of Offer would not be forthcoming are incorrect. I never made such a statement and the reason that the remaining funds were not drawn down is because Mr. White informed me that he did not need the funds as the building had been completed."

29. In his second affidavit sworn 22nd February, 2017, the defendant takes issue with Mr. O'Donnell's account that the parties met at Clogheen Industrial Estate. He further avers that at the time of the meeting his building project was (and remains) incomplete. He avers that Mr. O'Donnell's contention that the project came in under budget "is simply untrue". The defendant accounts for the fact of his not having reverted to Mr. O'Donnell in respect of the final €250,000 tranche of the 2007 loan facility on the basis that Mr. O'Donnell had made clear to him that no further monies would be forthcoming from the plaintiff. The defendant accounts for the fact of his having increased repayments on the 2007 loan on the basis that this was in response to representations made by Mr. Joe Doyle of the plaintiff bank who, the defendant avers, advised him in February, 2010 that if he made an increased payment on the loan it would extend comfort to the plaintiff regarding his capacity to service the €1.5 million loan.

30. The defendant avers that such was his "financial desperation" (including illness) in or about February, 2010 that he sought accommodation from the plaintiff by way of interim relief in the form of interest only payments for six months.

31. The defendant next addresses the issue of interest overcharging. He avers:

> "12. At this material time I was not aware that the plaintiff had substantially overcharged me as identified by forensic accountants, Forths International. In my first affidavit I made reference to my belief that the bank was keeping me in the dark; and I reserved the right to furnish a supplemental affidavit upon being furnished with all the relevant information in non-redacted form and this remains my position. It will take a formal discovery application for me to appreciate fully and expose the bank for what I believe it did to me. However, at this stage I can say that I now know that the plaintiff had overcharged me in excess of €25,000 that time and further continued to overcharge me to this current date to the figure of around €132,900. The said varied agreement in 2012 (whilst not advancing me any of the further loan monies due to me), I assumed was all that I could obtain from the bank at that time. It represented some immediate respite for me in light of the terrible position that the bank had left me in as [a] result of the breach of their agreement with me."

32. The Forths International Report as exhibited by the defendant is that of Mr. Anthony Flint dated 17th February, 2017. With regard to "potential overpayment of interest" by the defendant, and having reviewed letters from the plaintiff dated 27th July, 2007, 3rd March, 2008, 1st March, 2010, 3rd March, 2015, 3rd June, 2015, 3rd September, 2015 and 3rd December, 2015 , the facility letters of 1st June, 2007 and 11th January, 2012 and copies of the defendant's bank statements from 26th July, 2007 to 24th August, 2015, Mr. Flint states as follows:

> "1. I understand that, in 2007, Mr. White was provided with a loan facility by Bank of Ireland of €1,500,000. I understand that he drew an initial tranche of €560,000 with effect from 26th July 2007, later drawing further tranches between August 2007 and February 2008 by which time he had drawn of total of €1,250,000.
>
> 1. I attach, at appendix C1, a copy of the June 2007 facility letter from which it can be seen that the rate of interest to be charged on the loan account was to be the bank's fixed margin of 1.5% per annum above its cost of funds. I am instructed that the cost of funds was based on EURIBOR."

33. In his report, Mr. Flint states that the interest charged by the plaintiff followed EURIBOR until the rate change with effect from 1st March, 2010. Mr. Flint states that he is "instructed that it is contended the rate should correctly have followed EURIBOR after this date as it had done up to this point." Accordingly, on the basis of his instructions, Mr. Flint concludes that the defendant has paid additional interest "as a result of the rate applied being increased above EURIBOR after 1 March, 2010." Mr. Flint concludes that the defendant overpaid interest by some €132,867.57 to August, 2015.

34. The defendant's contention that he was overcharged interest, and Mr. Flint's report, is addressed by Mr. Murphy in his further affidavit sworn 23rd March, 2017. He avers as follows, with regard to Mr. Flint's report:

> "6. The reports' author, Anthony E. Flint, states that there is no disagreement with the interest charged on the account from 2007 until 1 March, 2010, but that after this date, a rate of 1.92% should have applied.
>
> 7. However, Mr. Flint does not seem to take into account the signed contracts entered into between the Plaintiff and the Defendant when calculating the interest rate that should apply to the borrowing and notes instead that he is "instructed" that one month EURIBOR plus 1.5% should apply.
>
> 8. Mr. White signed a fixed rate agreement on or about 9th March 2010 which fixed the interest rate to his loan at 4.05% for a period of five years (up to March 2015) …
>
> 9. Mr. White then accepted a facility letter dated 11th January 2012 which replaced his previous facility…
>
> 10. As appears from page 2 of the facility letter, the interest rate agreed was 4.05%. The agreement states that the rate is fixed until 1st March, 2015. At that point it was agreed that the rate would roll over to the new Bank Cost of Funds Rate.
>
> 11. I should also add that far from the Plaintiff over charging interest on the loan account, the Plaintiff in fact chose not to apply surcharge interest in the amount of 9% per annum to the Defendant's account although it was permitted by Clause 8 the Terms and Conditions Governing Business Lending to do so.
>
> 12. The statement of account for loan account 71429897 is exhibited to my Affidavit sworn herein 26th January 2017 … and I say that the statements demonstrate that the correct interest rate was applied to the loan account in accordance with the contractual agreement between the parties."

Considerations

35. As the defendant's affidavits disclose, there are, essentially, two strands to his claim that he has a *bona fide* defence to the plaintiff's motion for summary judgment. Firstly, he asserts that the plaintiff overcharged on interest. Secondly, he relies on an alleged breach of the 2007 loan agreement such as gives rise to a defence by way of counterclaim and equitable set off.

Alleged overcharging of interest

36. In aid of his submissions that the defendant was overcharged interest in relation to the 2012 loan agreement, counsel for the defendant points, in the first instance, to the terms of the 2007 loan agreement as to the applicable interest rate. It provided as follows:-

> "The Interest Rate applicable is a fixed money market rate. Money market rates are calculated by totalling the following:
>
> (A)
>
> The Bank's Cost of Funds for the selected period. The actual rate will be determined with reference to the market on the date of drawdown. If EURIBOR is utilised the actual rate will be determine with reference to the market two days prior to drawdown.

(B)

Cost of Liquidity (if applicable).

(C)

The Bank's Fixed Margin of 1.5% per annum. Any break incurred in amending a fixed rate will be borne by the borrower. While the actual rate will be determined at date of drawdown, indicative all inclusive rates for a number of fixed interest periods are as follows:-

24 Months: 6.28% 36 Months: 6.29% 60 Months: 6.29%"

37. The defendant contends that the rate provided for in the 2007 loan agreement followed EURIBOR. It is also contended by the defendant that it is the February/March 2010 manuscript note furnished by Mr. Doyle to the defendant, denoting the interest rate at 4.05% (calculated as cost of funds 2.55% and a the margin of 1.50%), is what is in issue in this case. Mr. Flint contends that the 2.55% cost of funds is incorrect, given that the interest rate charged by the plaintiff with regard to the defendant's loan had followed EURIBOR until 1st March, 2010. There was, therefore, a link with EURIBOR for a period of time.

38. It is also contended by the defendant that the definition section of the terms and conditions which attached to the January 2012 loan agreement refer, *inter alia*, to the plaintiff's "Prime Rate" as meaning the rate determined by the plaintiff "and primarily determined by reference to…(EURIBOR), utilising the average of the 1 month EURIBOR over the working days in the preceding week".

39. It is thus submitted on behalf of the defendant that there is a clear dispute between the parties in relation to interest overcharging and the true extent of same. In this regard, the defendant has put before the Court a report and affidavit evidence of his expert, Mr. Flint. It is submitted that this satisfies the low hurdle test as set out in *Aer Rianta*. As is clear from the defendant's affidavit, and that of Mr. Flint, it is disputed by the defendant that the correct rate of interest was applied to his loan between 1st March, 2010 and 15th August, 2015.

40. In those circumstances, it is submitted that the defendant has an arguable case with regard to overcharging of interest. Counsel further submits that the granting of a summary judgment is discretionary and must not be used to "*shut out a possible defence*".

41. It is submitted on behalf of the plaintiff that insofar as the allegation of overcharging is raised, this can only be a partial defence in circumstances where the plaintiff's claim is for excess of €1.2m and the alleged overcharging is said to be €132,900. In any event, counsel for the plaintiff disputes the overcharging of interest claim and reiterates that both the 1st March, 2010 agreement and the January 2012 loan agreement set out the contractual rate of interest at 4.05%. It is contended that the defendant had not referred to anything in the contract which would have required the plaintiff to apply a lower rate of interest. It is further submitted that the defendant's figure of €132,900 alleged overcharging is based on a one month EURIBOR rate and is, therefore, inaccurate in any event.

42. While it is acknowledged there is a reference to EURIBOR in the January, 2012 loan agreement, the plaintiff asserts that that is merely a reference to other interest rates (i.e. the Prime Rate) which the plaintiff might apply. It is argued that this cannot assist the defendant in circumstances where the 1st March, 2010 interest agreement and the January, 2012 loan agreement specifically fixed the interest rate at 4.05 until 3rd March 2015. The plaintiff argues that even if the Court could look behind the contractual agreement, what the defendant contends for, at its highest, is that the fixed rate ought to be lower by reference to EURIBOR. The plaintiff further submits that there is no necessary correlation between the plaintiff's three months rate as referred to in the 2012 loan agreement and EURIBOR.

43. It is thus submitted that the defendant's arguments do not reach the requisite "arguable case" threshold for the matter to be remitted to plenary hearing.

44. I accept the plaintiff's arguments in respect of the allegation of the overcharging of interest. To my mind, notwithstanding the arguments advanced by the defendant, the contractual documents are clear. Interest was fixed in March 2010, at 4.05%. This rate was arrived on foot of an agreement reached between the defendant and a Mr. Joe Doyle on behalf of the plaintiff at a meeting on 26th February, 2010. On 1st March, 2010, Mr. Doyle wrote to the defendant with reference to the 4.05% rate, stating, "[t]he purpose of this letter is to confirm the fixed rate we agreed on 26/02/2010" The defendant was asked to complete an enclosed acceptance form which was duly completed on 9th March, 2010.

45. The facility letter of 11 January, 2012, duly signed by the defendant on 10th February, 2012, subsequently provided, as regards interest, as follows:

"The rate(s) set out in this Offer Letter are indicative only in respect of the new facilities detailed and are subject to change between the date of this offer letter Offer and the actual drawdown of the facilities. The actual rate will be determined on drawdown and subsequent roll over dates (if applicable) and as set out in Clause 5 of the standard Terms and Conditions set out in the appendix hereto.

1. The fixed interest rate is at present 4.05% per annum, representing the 3-month rate plus a margin of 1.5%. This rate is fixed until 01/03/2015, at which stage it will rollover to the New Bank Cost of Funds Rate.

…

Exact repayments will be determined on date of drawdown based on the interest rate then prevailing"

46. The terms and conditions attaching to the 2012 facility letter provide, *inter alia*, at clause 5(i):

"Fixed rates are rates fixed for an interest rate period in excess of one year, determined on the date of original drawdown or such other date.

The Fixed Rate(s) set out in this Offer Letter will be determined by the Bank, with reference to three components:

(1) Bank Cost of Funds

(2) Liquidity Costs

(3) Bank Lending Margin

…

The Borrower will be notified in writing of the new interest rate and the fixed rate period or Market Related Rate interest rate period if and when a further fixed rate period or Market Related Rate interest rate period is effected. ”

47. Clause 5(ii) provides that the "Market Related Rates" would be determined by the plaintiff with reference to three components:-

(i) Bank Cost of Funds;

(ii) Liquidity Costs; and

(iii) Bank Lending Margin.

48. The "Bank Cost of Funds" is defined in the agreement as "the rate determined by the Bank on the date of drawdown or interest rate rollover and calculated by reference to the cost to the Bank of funding the Loan or facility from whatever sources it may reasonable select. The interest rate will be set on the date of drawdown and shall be reset on the first day of each interest rate period".

49. There is no reference to EURIBOR in Clause 5 of the Terms and Conditions pertaining to the 2012 loan agreement, albeit I accept that there is reference to EURIBOR in the definition of “Prime Rate” in the “DEFINITIONS” section of the conditions attaching to the January, loan facility. However, no arguable basis has been established to persuade the Court that this is sufficient to remit the allegation of interest overcharging to plenary hearing.

50. I note that on 3rd March, 2015, the plaintiff wrote to the defendant advising that the loan had rolled over and advising that a new interest rate was applied to the loan account from 3rd march, as follows: “New Interest Rate 2.48%” “Cost of Liquidity 0.000%”. The next roll over date was advised as 2nd June, 2015. Again, on 3rd June, 2015, the defendant was advised that the loan account had rolled over, with the “New Interest rate” advised as 2.380% and “Cost of Liquidity” 0.000%. The next rollover dates were 3rd September, 2015 and 2nd December, 2015 respectively, and on each of these occasions, the defendant was advised as to the new interest rates, respectively, “2.37%” and “2.24%”, with the “Cost of Liquidity” in each case at “0.000%”. No issue is taken with these interest rates provisions, which appear consistent with what was provided in the January 2012 loan agreement as to what was to happen upon the expiry of the five year fixed interest rate period on 1st March, 2015.

51. Mr. Flint swore an affidavit in the proceedings on 4th May, 2017. He acknowledges that there is no disagreement but that the defendant agreed to a five year fixed term in 2010. He avers however that what is not agreed is the rate of interest should have been applied by the plaintiff. Mr. Flint reiterates his belief that the cost of funds of 2.55%, as set out in Mr. Doyle’s manuscript note to the defendant is incorrect and not in accordance with the terms of the defendant’s loan facility.

He goes on to state:

> “7. I [say] and believe that [in] the January, 2012 facility letter … it is stated that *“[t]he fixed interest rate is at present 4.05% per annum, representing the 3-month rate plus a margin of 1.5%”*, it is my belief that [t]his 3-month rate referred to of the Euribor Rate and as can be seen from the attached print out from the euribor – rates.eu website, as at January, 2012 the 3-month Euribor was tracking between 1.343% and 1.115%. Indeed, as at March, 2010 the 3 month Euribor was tracking at between 0.655% and 0.635 and so it is clear that the costs of funds as applied in March 2010 was incorrect per the terms of his facility letters…
>
> 8. I further say and believe and as can be seen from a copy of the March, 2008 Interest Agreement, from which it can be seen that the costs of funds at this stage was 4.07% and again with reference to the enclosed printouts from the euribor-rates.eu website it can be seen that this was in line with the 3-month Euribor rate at that stage …
>
> 9. I say and believe that it is therefore the case that by reference to previous agreements and the facility letters, that the costs of funds applied by Bank of Ireland, (as at March, 2010) were incorrect and should have been significantly lower, hence my opinion that there was overcharging to Mr. White in this regard.”

52. It is, I believe, noteworthy that Mr. Flint does not refute the fact that the interest rate to be applied was fixed in both March, 2010 and January, 2012. Nor does he say that the plaintiff did not apply the rate of interest agreed in the contract.

53. While the Court is more than alert to the low threshold which the defendant has to overcome to have the issue of alleged interest overcharging adjourned to plenary hearing, to my mind, given the clear terms of both the 2010 agreement and the 2012 agreement that interest was fixed at 4.05% for five years, I find that Mr. Flint’s averments on the issue do not go beyond the realm of mere assertion. I note the terms in which his report is couched. In particular, where he states that he is “instructed that it is contended that the rate should correctly have followed Euribor” after 1st March, 2010 but does not point to any document evidencing an agreement that the rate fixed on 1st March, 2010 should not prevail.

54. The fact of the matter is that howsoever it was made up, the rate of interest was set at 4.05% for five years and this is evidenced in writing and agreed to by the defendant, both in 2010 and 2012. To my mind, this is cogent evidence put forward by the plaintiff, and is the type of cogent evidence McKechnie J was referring to at principle (iii) of the *Harrisrange* principles. Accordingly, I am satisfied that there is no basis to adjourn the matter to plenary hearing by reason of alleged overcharging of interest.

The defendant’s counterclaim

55. Aside from the defendant's contention with regard to alleged interest overcharging for a period of time (a contention which the Court finds does not reach the arguable ground threshold), the defendant does not otherwise challenge the validity of the 2012 loan agreement or the fact that he has not paid back the monies borrowed in 2012. The defendant however asserts a claim for damages for breach of contract and/or negligence in respect of the 2007 loan agreement which is in the nature of a counterclaim which, it is asserted, gives rise to an equitable set off.

56. The question to be determined is whether the defendant, by virtue of what he alleges with regard to the 2007 agreement, can maintain an entitlement to an equitable set off.

57. Where the defence to a claim is in the nature of a counterclaim and set-off, the Court is required to take into account a number of matters in the exercise of its discretion as to whether or not summary judgment should be granted.

58. The requisite principles to be applied where the nature of the defence amounts to a cross claim are comprehensively set out in Moohan v. S.& R. Motors (Donegal) Limited [2008] 3 I.R. 650. There, Clarke J. stated:

> *"9 4.2 Where the nature of the defence put forward amounts to a form of cross-claim slightly different considerations may apply. In those circumstances the court has a wider discretion. Where the defendant does not establish a bona fide defence to the claim as such, but maintains that he has a cross-claim against the plaintiff, then the first question which needs to be determined is as to whether that cross-claim would give rise to a defence in equity to the proceedings. It is clear from Prendergast v. Biddle (Unreported, Supreme Court, 31st July, 1957) that the test as to whether a cross-claim gives rise to a defence in equity depends on whether the cross-claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross-claim may be made out.*
>
> *10 4.3 On the other hand if the cross-claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part be set against the claim. What the position is to be in the intervening period creates a difficulty as explained by Kingsmill Moore J., in Prendergast v. Biddle (Unreported, Supreme Court, 31st July, 1957)*
>
> *…*
>
> *12. 4.5 It seems to me that it also follows that a court in determining whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set off is equitable in nature and, it follows, a defendant seeking to assert such a set off must himself do equity.*
>
> *13. 4.6 On that basis the overall approach to a case such as this (involving, as it does, a cross-claim) seems to me to be the following:-*
>
> > *(a) it is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's claim. In order for the asserted cross-claim to amount to a defence as such, it must arguably give rise to a set off in equity and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off;*
> >
> > *(b) if and to the extent that a prima facie case for such a set off arises, the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);*
> >
> > *(D) if the cross-claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast v. Biddle (Unreported, Supreme Court, 31st July, 1957)."*

Is the defendant contractually precluded from relying on a set off?

59. Counsel for the plaintiff submits that the defendant has no answer or defence to his indebtedness and that no arguable ground for a counterclaim can be established. It is further contended that even if the counterclaim could be construed as an equitable set off, the defendant is precluded from relying on a set off by virtue of the terms of the 2012 loan agreement. In this regard, counsel points to clause 17 of the 2012 loan agreement. It is contended that this clause is sufficient to bar a set off, be it in common law or in equity.

60. Clause 17 of the general Terms and Conditions of the loan agreement provides, in relevant part:-

> "…
>
> The Borrower may not set off any amounts payable by the Bank to the Borrower against any matured obligation due from the Borrower to the Bank. All payments made or to be made by the Borrower will be calculated and made without, and free and clear of any deduction for, set off or counterclaim or any other deduction or withholding (including without limitation, any deduction or withholding for or on account of tax)."

61. In *Moohan*, Clarke J. considered the question of when it is open to a defendant to raise a set off in equity against a claim made by the plaintiff. He opined that the issue is essentially one of contractual construction. He stated:

> *"20 5.6 It seems to me, therefore, that the overall test is as to whether, as a matter of construction of the contract taken as whole, it can properly be said that the parties have agreed that there can be no set off.*
>
> > 21 5.7 The default position is that a party is entitled to a set off in equity in relation to any cross-claim arising out of the same contract. Thus if a builder is owed money on foot of a construction contract, the employer is prima facie entitled to a set off in equity, in principle, in respect of any defective works. The question which arises is as to whether that prima facie position has been displaced by the terms of the contract. There is no doubt but that the parties are free to agree that there will be no set off. The question is whether they have in fact done so. I am not satisfied that the balance of the authorities favours the view that the current standard form RIAI template does give rise to an agreement to exclude a set off, at least, and this is the only issue relevant in this case, in

> circumstances where the contract is completed to the stage of a certificate of practical completion having been issued by the architect and where, therefore, any entitlement to arbitration on the part of the employer is immediate. It is, of course, the case that Finlay P. in John Sisk and Son Ltd. v. Lawter Products B.V. [1976-1977] I.L.R.M. 204 had significant regard to the fact that, in the case then under consideration, there was no immediate right to arbitration as the contract was ongoing."

62. In *Staple Ford Finance Limited v. Courtney* [2014] IEHC 668, Barton J. had cause to consider whether a clause not dissimilar to Clause 17 in the loan agreement in issue in these within proceedings operated to debar the defendant in that case from asserting a right to a set off. In *Stapleford v. Courtney*, the clause at issue was in the following terms:-

> "All repayments and payments by the borrower hereunder shall be made, without set off or counter claim, in the currency of the facility to such account as the bank may from time to time notify to the borrower."

63. Barton J. opined as follows:-

> *"24. It is not in every case, however, where a defendant establishes a defence by way of counter claim giving rise to a set off that the defendant will be given liberty to defend the proceedings. This is best illustrated by a claim arising on foot of a contract by which the parties have agreed that there is to be no counter claim or set off or at least that any payments to be made under the contract are to be made without set off or counter claim. As to whether or not the parties have made such an agreement is a matter of construction of the contract as a whole.*
>
> *25. Clarke J. in Moohan v. S & R Motors (Donegal) Ltd gave as an example of a party entitled to a set off in equity in relation to any crossclaim arising out of the same contract that of a builder owed money on foot of a construction contract where the defence of the employer was by way of a counter claim in respect of defective works arising from the same contract. In those circumstances it is said that the employer is in principle prima facie entitled to a set off in equity for such amount as may be found to be due in respect of any defective works. That prima facie position, however, may be displaced by the terms of the contract. As a matter of contract law the parties were free to agree whether or not there should be a set off with the only question then for determination being whether or not they had in fact done so."*

64. Applying the principle set out in Moohan, Barton J. held:

> *"Even if the defendant had a defence by way of a counter claim entitling him to a set off of an amount as was found due on such claims that would not, in the circumstances of this case, operate to warrant the court refusing the bank's application for liberty to enter summary judgment since it was a term of the contract between the bank and the defendant that all repayments on foot of the facilities were to be made without counter claim or set off: there being no dispute or challenge to the facility letters or the letter of pledge that is a term to which the court must give effect." (at para. 78)*

65. Having regard to the provisions of clause 17 of the terms and conditions which attached to the January, 2012 loan agreement, I am satisfied that that the defendant is contractually precluded from relying on a set off.

66. Thus, even if the defendant had a defence by way of counterclaim arising out of the allegations he makes with regard to the 2007 loan agreement, such a defence cannot operate so as to refuse the plaintiff leave to enter final judgment since the 2012 loan agreement provides that all payments to be made by the defendant were to be "calculated and made without, and free and clear of any deduction for, set off or counterclaim".

67. *Prima facie* therefore, I find that the plaintiff is entitled to enter summary judgment against the defendant in the sum of €1,22046.77.

Are there grounds for a stay of execution?
68. There remains the question of whether in this case execution of judgment should be stayed based on what is asserted by the defendant by way of counterclaim. The Court's discretion in this regard is to be exercised having regard to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle*:

> *"On the one hand it may be asked why a plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of judgment on his claim because the defendant asserts a plausible but unproved (sic) and contested counterclaim. On the other hand, it may equally be asked why a defendant should be required to pay the plaintiff's demand when he asserts and may be able to prove that the plaintiff owes him a larger amount.*
>
> *…*
>
> *It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim till after the counterclaim had been heard, for the plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counterclaim would be fruitless. I mention only some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion…"*

69. Accordingly, in exercising its discretion as to whether a stay of execution is warranted, the Court must first decide the relative strength of the defendant's counterclaim.

70. The plaintiff asserts that even if it were the case that the defendant was not contractually precluded from relying on a set off, the defendant has not set out an arguable basis such as might have given rise to an equitable set off. The plaintiff also asserts that there is no arguable basis for a stay of execution. While accepting that the Court cannot determine conflicts of fact, it is the plaintiff's contention that the defendant makes bare assertions only with regard to the 2007 agreement.

71. What the defendant alleges by way of crossclaim is alleged negligence and breach of contract on the part of the plaintiff in relation to the 2007 loan agreement such that the defendant's business was harmed, thereby rendering the defendant unable to

complete the development of his tile and kitchen warehouse, for which the 2007 funds were, in part, secured from the plaintiff. This alleged harm remains as yet unquantified by the defendant.

72. Insofar as the defendant may have a claim, I am satisfied that it does not arise on foot of the 2012 loan agreement, despite the submission of the defendant's counsel that there is a substantial cross-over between the 2007 loan agreement and the 2012 loan agreement. No issue regarding the January 2012 loan agreement is engaged by the defendant's claim on foot of the 2007 loan agreement. To my mind, the crossclaim relates to an independent standalone claim, namely alleged damage to the defendant's business interests as a result of an alleged breach of contract and negligence on the part of the plaintiff in respect of the 2007 loan agreement.

73. As can be seen from the defendant's affidavits, he claims in essence that in September, 2008, the plaintiff wrongfully refused to pay out on the final two tranches of the €1.5m loan which had been agreed in 2007, resulting in his being unable to complete his building project. The defendant exhibits photographs said to show the unfinished state of the development.

74. The plaintiff's position is that the defendant's cross claim does not make sense. It is submitted that the defendant has adduced no evidential support for his claims, and that his assertions do not make sense in the context of the chronology of the events, or the factual matrix of the contract.

75. In particular, the plaintiff disputes the defendant's assertion that he was told in September 2008 that the final €250,000 of the loan monies which had been sanctioned would not be available for drawdown, thus leaving him unable to finish construction of his workshop. The plaintiff says that this assertion is unsupported by any evidence and argues that all of the contemporaneous documentation and evidence points to the final loan tranches never having been requested by the defendant.

76. The plaintiff contends that a number of factors serve to substantially undermine the defendant's claims, not least Mr. O'Donnell's evidence that he was informed by the defendant at a meeting in August/September 2008 that the final two drawdowns of the 2007 loan were not required as the defendant's building project had been completed within budget. The plaintiff asserts that this is reflected in a contemporaneous bank file note dated 29th August, 2008. The plaintiff points to the fact that the defendant has not provided documentary or other evidence to support his contention. It is submitted that this evidence should be available to the defendant, particularly in circumstances where he instituted plenary proceedings against the plaintiff in 2014.

77. On the other hand, the defendant asserts that the plaintiff's claim that it was advised that the project was completed within budget is "simply untrue" and asserts that the contrary was in fact the case, in respect of which the defendant will adduce evidence at plenary hearing. At para. 6 of his affidavit sworn 22nd February, 2017, the defendant outlines a number of unforeseen expenses which the development project incurred which, he avers, led to the budget for the project having to be increased. The defendant maintains that he is in a position to call expert witnesses in this regard.

78. While I must of course have regard to the contemporaneous note dated 29th August 2008, which on its face is supportive of the plaintiff's contention that Mr. O'Donnell was told by the defendant in 2008 that he did not require the drawdown of the final two tranches of the 2007 loan, the Court is conscious that, at its height, that document evidences only the plaintiff's version of the outcome of the meeting between the defendant and Mr. O'Donnell in 2008 and cannot, in the light of the defendant's denials and assertions on affidavit, be considered decisive, albeit it may be relevant to the defendant's credibility in due course.

79. In support of its claim that there is no substance in the defendant's assertions, the plaintiff also points to the fact that the defendant's actions in opting to unilaterally increase his loan repayments August/September 2008 (and later in March 2010) belie the assertions he now makes with regard to the alleged withdrawal by the plaintiff of the final tranches of the 2007 loan facility.

80. It is not disputed that the defendant made increased loan repayments in 2009 and 2010 a course of action which the plaintiff contends is entirely at odds with the case now being advanced by the defendant which is that as a result of the plaintiff's actions in late 2008 he was left in dire financial circumstances. It is submitted that the uncontroverted evidence of the defendant's overpayments is completely at odds with the defendant's assertion that the plaintiff's alleged breach of contract left him struggling financially.

81. The defendant answers the plaintiff's contention in this regard by stating that he made the increased repayments on the representations of Mr. Doyle of the plaintiff bank who, the defendant asserts, advised him that if he made increased repayments, the plaintiff might be induced to release the full amount of the 2007 loan facility. He says that he increased his repayments in order to demonstrate that he had the capacity to meet his contractual obligations, albeit that it was extremely difficult for him to make the increased repayments. According to the defendant, the increased pressure he was under at this time led him to seek a six month interest only payment period.

82. The plaintiff further points to the fact that it was furnished with four architect certificates in 2007 and 2008, pursuant to which amounts totalling €690,000 were drawn down by the defendant, with no further certificate ever sent by the defendant.

83. It is also pointed out that whilst the defendant claims that his workshop facilities were left with no running water or other facilities by virtue of the alleged breach, he provides only photographs of the exterior of the building and not the interior. It is further contended by the plaintiff that the architect's certificate dated 12th February, 2008 contradicts the defendant's version of events by certifying that internal finishes, ceiling, floor finishes and services were complete.

84. The defendant accepts that no further architect certificate was sent after 2008 but contends that the absence of architect certificates after 2008 cannot be decisive in circumstances where it had been made clear to him in late 2008 that no further monies would be forthcoming from the plaintiff.

85. The plaintiff further maintains that the defendant puts forward no evidence that he ever complained to the plaintiff either by breach of contract at any time from 2008 to March 2014.

86. It is submitted that in light of the foregoing, the defendant has not established an arguable crossclaim in respect of any alleged breach by the plaintiff of the 2007 loan agreement.

87. I am of the view that the defendant's explanations for why he made increased payments in 2009 and 2010 and why no further architect's certificates were furnished to the plaintiff after 2008 are not unarguable and that they reach the arguable threshold.

88. Overall, I am satisfied that the defendant's claims with regard to the events of 2008 are arguable to the extent necessary for this

Court to contemplate a stay of execution.

89. Notwithstanding that the defendant has established that his crossclaim is of relative strength such that the Court should consider a stay of execution, before determining whether a stay of execution is warranted in this case however, the Court must also have regard to a number of other factors, including the question of the defendant's delay in asserting the claims he now makes with regard to the 2007 loan agreement. The plaintiff submits that the defendant's delay in pursuing his plenary proceedings debars him from any stay of execution.

90. In *Moohan*, a delay of less than two years in attempting to quantify the crossclaim was found not to be timely. In the instant case, the plaintiff argues that the defendant's delay is significant given that the alleged breach of the 2007 loan agreement is said to have occurred in 2008.

91. It appears that the allegation of a breach of the 2007 agreement was raised for the first time in a telephone call from the defendant’s solicitor to the plaintiff in mid March, 2014. It was reiterated at a meeting between the plaintiff and the defendant and his solicitor on 20th March, 2014, as documented by a file note dated 21st March, 2014. The plenary proceedings instituted by the defendant on 29th April, 2014 alleging a breach by the plaintiff of the 2007 loan agreement have not advanced beyond the service the plenary summons. No steps have been taken to advance the case, beyond a notice of intention to proceed which issued on 1st April, 2016. Counsel for the defendant asserts that the reason the defendant has not advanced his plenary proceedings is that he was concentrating on the within proceedings.

92. Given, however, that the issue of the breach was in fact raised at a meeting with the plaintiff in 2014, prior to the institution of the within proceedings, and not just raised for the first time in the within proceedings, the Court will give some weight to that factor in balancing the defendant’s overall delay in advancing the claim he now makes. The Court also attaches some small degree of weight to the possibility that the new loan agreement entered into between the plaintiff and the defendant in January, 2012, may have tempered the defendant’s desire to pursue the alleged breach of the earlier agreement.

93. It is the case that the defendant has not quantified his claim. The plaintiff argues that it is not possible for the Court to arrive at a conclusion as to what portion, if any, of the plaintiff's judgment might be stayed. Reliance is also placed by the plaintiff on the fact that in the event that the defendant ultimately succeeds in his claim against the plaintiff, it has more than sufficient resources to meet any award of damages in the defendant’s favour.

94. The plaintiff thus submits that even if the Court were minded to find that the defendant has raised an arguable case with regard to the crossclaim which will be pursued in the defendant's own plenary proceedings, the Court should not grant a stay of execution of the summary judgment, applying the principles set out in *Prendergast v. Biddle*.

95. Overall, having regard to the factors which the Court has taken account of, as set out above, in the exercise of its inherent jurisdiction, the Court is minded to grant a stay of execution on condition that the defendant pursues his plenary proceedings with all due diligence in accordance with the rules of the Superior Courts. I will hear submissions as to how this should be managed.