THE HIGH COURT

CHANCERY

[2014 No. 4532 P]

BETWEEN

JOHN CONNELL

PLAINTIFF

AND

DANSKE BANK A/S

DEFENDANT

JUDGMENT of the Hon. Ms. Justice Stewart delivered on the 14th day of December, 2017.

1. The motion currently before the Court relates to a plenary summons dated 16th May, 2014, which seeks numerous reliefs which relate primarily to the operation of a facility letter dated 22nd September, 2011. On 24th October, 2016, the defendant issued a notice of motion seeking to have the plaintiff's claim dismissed as not disclosing a reasonable cause of action, unsustainable, bound to fail, frivolous and vexatious and/or an abuse of process. Dismissal was sought pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or pursuant to the Court's inherent jurisdiction. The defendant also seeks judgment against the plaintiff for the monies owed under the facility letter and has sought summary judgment from this Court in the same notice of motion that sets out its application to strike out the plaintiff's claim.

2. The grounding affidavit to this motion was sworn by Marie Moylett, a debt recovery manager employed by the defendant, and is dated 23rd August, 2016. She sets out therein the following background facts. Two loans were provided to the plaintiff by the defendant (referred to herein as the Land Loan and the Shed Loan) on 18th June, 2007, and 4th September, 2008. The Land Loan amounted to €120,000 for assistance in the purchase of lands and was to be repaid on a capital-and-interest bi-annual basis over 25 years. The Shed Loan amounted to €80,000 for assistance in the construction of a slatted shed and was to be repaid on a consecutive quarterly basis over ten years. These loans were regularly in arrears and gave rise to a letter of demand dated 3rd December, 2010, in respect of the Shed Loan, which became immediately due and owing. Some payments were made but the majority of the debt remained unsatisfied and another demand letter issued on 7th June, 2011. Following negotiations between the parties, both loans were restructured by way of supplemental facility letters dated 19th and 22nd September, 2011 (both of which were signed by the plaintiff on the 23rd September). The latter of these restructured the Shed Loan and is the subject matter of these proceedings. The plaintiff continued to default on the Shed Loan and a letter of demand issued in respect of both loans on 12th November, 2013. The Bank appointed a receiver in respect of these loans on 17th April, 2014, per the terms of a mortgage dated 20th August, 2007, which operates over the plaintiff's land and acts as security for both loans.

3. The plaintiff's action is grounded in allegations that the 2011 facility letter is void for uncertainty and that he was deprived of the opportunity to get legal advice before signing both the 2011 and the original Shed Loan facility letters. The challenge to the latter of these only arose in the plaintiff's Statement of Claim and was not included in the plenary summons. Ms. Moylett draws the Court's attention to the fact that the Land Loan is not challenged in any way and avers that this is sufficient to call in the Shed Loan, as the terms of the Shed Loan clearly state that it can be called in if the plaintiff defaults on any other facility provided by the defendant. Even if the 2011 facility letter were set aside, this would allegedly have no substantive impact on the position of the parties, as the Shed Loan would still be due and owing under its original terms (either on foot of its defaults under the original facility letter or on foot of the defaults of the Land Loan). Ms. Moylett avers that, as evidenced in the terms of the facility letters, the plaintiff was strongly encouraged by the Bank to seek independent legal advice before signing. In this respect, she refers to the warnings and declarations included in the facility letters, which the plaintiff signed. At the hearing, counsel also highlighted the warning box included at the bottom of various letters, which specifically states that default on one facility can lead to all loans being called in. The Court's attention is also drawn to terms in the facility letters, which state that said terms are only variable by a duly appointed signatory and such amendments must be in writing. In the run up to the restructuring, Ms. Moylett avers that the plaintiff was regularly contacted by the defendant to inform him that both of his loans were in arrears. Ms. Moylett avers that this ongoing correspondence and negotiation, along with the fact that the plaintiff was given a number of weeks to accept the facilities, is inconsistent with the plaintiff's allegation that he was rushed or pressured into the restructuring agreement.

4. Ms. Moylett avers that the Land Loan was restructured to facilitate 42 consecutive instalments every six months and that the plaintiff makes no complaint regarding this loan. She avers that the Shed Loan was restructured to facilitate two consecutive annual instalments to be repaid on a capital-and-interest basis and to conclude in September, 2013. However, the terms of the facility letter refer to a ten year repayment profile. According to Ms. Moylett, this means that interim repayments (in effect, the plaintiff's 2012 repayment) would be calculated as if the plaintiff had ten years to repay the loan but that the final payment of the loan (the balance of the loan minus the 2012 repayment) would still occur in 2013. One repayment was made by the plaintiff on 18th January, 2012. Ms. Moylett avers that this payment was insufficient to meet the terms of the restructuring and that the plaintiff was repeatedly contacted over the course of 2012 and 2013 to communicate that fact. On that basis, the letter of demand dated 12th November, 2013, calling in both loans was issued and a receiver was appointed six months later. Ms. Moylett also avers that the plaintiff did not adhere even to his alleged understanding of the loan's operation, as such understanding would mandate a payment after year 1 of the restructure, which was not made.

5. Ms. Moylett avers that interest continues to accrue on the outstanding debt, which amounts to approximately €156,313.83 as of the date of swearing. This amount comprises of the balance of the Land Loan and the Shed Loan plus interest, which accrues on a daily rate (€7.06 and €5.80 respectively). It is stated that the Bank would have sought summary judgment against the plaintiff, were it not for the existence of these proceedings, and that the substance of the plaintiff's action would not amount to a bona fide defence in summary proceedings. Ms. Moylett avers that, even if the plaintiff were to succeed on all the legal and factual issues, it would have no impact on his practical position because the Shed Loan remains due and owing under its original terms and/or on foot of the failure to repay the Land Loan. On that basis, it is stated that these proceedings are frivolous, vexatious and an abuse of process. Ms. Moylett swore a supplemental affidavit dated 9th February, 2017, in which she remedied a procedural flaw in her original affidavit related to the witnessing of one of the exhibits attached thereto.

6. The plaintiff, John Connell, swore an affidavit dated 7th March, 2017. He avers that he met with the Business Manager attached to

his accounts at that time, Danny Hamilton, on the 9th and 23rd September, 2011. The plaintiff avers that the following agreement was reached at the first of these meetings:

> - Payments made to him by the Dept. of Agriculture would be mandated directly to the defendant. The term of the Shed Loan would be extended from its remaining seven years to be paid over the course of ten years, with annual interim payments every December. Bi-annual payments would be made every June and December in respect of the Land Loan

Mr. Connell avers that, at the latter of these meetings, he was presented with documentation for the first time and advised to sign them accordingly. He avers that the contents of the facility letters were not read over to him and he did not receive any independent legal advice. Allegedly, he was never informed that the terms of the loans had been changed, that the Shed Loan was due over two payments or that default in respect of one loan could render the other due and owing. He avers that he defaulted on the 2011 loan facility because the due date for repayment set out therein did not coincide with the dates agreed at the meetings with Mr. Hamilton, which were designed to dovetail with the dates that seasonal income and Dept. of Agriculture payments would accrue. Mr. Connell exhibits schedules of payment from the Dept. of Agriculture and argues that the defendant contrived a default by issuing a letter of demand immediately prior to the date at which those payments were scheduled to be made. He avers that, had the defendant not manufactured this default, he could have brought the loan accounts up to date using those payments and the seasonal income from November and December, 2013. In making this argument, Mr. Connell seeks to characterise correspondence from the defendant dated 4th October, 2013, as a letter of demand. He refers to the actual letter of demand dated 12th November, 2013, in which the defendant sets out that it stopped Mr. Connell's accounts, as the reason why further payments have not been made by him in the intervening three and a half years.

7. On 14th March, 2017, Mr. Connell swore a supplemental affidavit, in which he notes that Ms. Moylett failed to address the allegations made in his statement of claim regarding his meetings with Mr. Hamilton in September, 2013 and the terms allegedly agreed with him. He also refers to documentation received under a subject access request pursuant to the Data Protection Acts. In particular, he relies on the minutes of a meeting that allegedly occurred on 3rd September, 2013, not long before the full amount of the Shed Loan allegedly became due and owing, as well as a Company Profile dated 25th August, 2011. Mr. Connell avers that the content of these documents reflects his understanding of the agreement (i.e. that the Shed Loan was to be repaid over a period of ten years). Given that discovery has not yet been obtained and that the defendant has not denied on affidavit the existence of an oral agreement between the parties, the plaintiff argues that this matter should proceed to a plenary hearing.

Submissions

> - The Defendant

8. In response to the plaintiff's suggestion that an oral agreement existed between himself and Mr. Hamilton, the defendant wholly denies the circumstances of loan restructure as alleged. Even if his account were accurate, the defendant would rely on the terms of the loan and the *parol* evidence rule to negative the effect of any oral agreement deemed to exist. Such reliance occurs in circumstances where the alleged agreement with Mr. Hamilton came into being in 2011 and the 2008 Shed Loan facility letter, along with the other facility letters, states that it cannot be amended other than in writing. With regard to their failure to specifically dispute the plaintiff's allegations on affidavit, the defendant submits that this was intentional because to do otherwise would be to put a factual dispute before the Court that it cannot resolve at this juncture and does not need to resolve in order to decide this matter. The defendant relies on *AIB Mortgage Bank v. Hayes* [2016] IEHC 280 as a statement on how the parol evidence rule is to be applied.

9. With regard to the Court's inherent jurisdiction to strike out these proceedings, the defendant relies on *Salthill Properties Ltd v. Royal Bank of Scotland Plc* [2009] IEHC 207 as a basis for engaging in some analysis of the evidence before deciding whether to exercise that jurisdiction. It is conceded that the case sets out a high threshold, in that the jurisdiction is exercised sparingly and only in clear cases. It is also conceded that the highest element of truth must be afforded to the plaintiff's claim in these kind of applications. However, it is submitted that the type of analysis provided for by Clarke J. is sufficient to encompass the circumstances of this case, where the plaintiff's version of events (and any truth therein) is contradicted by the terms of the contract and where complete success in his arguments would not change the fact that the loans are due and owing. In underlining the Court's ability to exercise its jurisdiction in cases where the law and the facts are quite plain, the defendant also relies on Fennelly J.'s judgment in *Delahunty v. Player & Wills (Ireland) Ltd* [2006] 1 I.R. 304.

10. Further reliance is placed on *McSorley & McSorley v. O'Mahony* (Unreported, High Court, Costello J., 6th November, 1996) in submitting that it is an abuse of process for litigation to be maintained where it can confer no benefit on the plaintiff. In this case, it is submitted that the plaintiff can never enjoy any benefit from these proceedings because he has not challenged the Land Loan,. This allegedly means that the Shed Loan will always remain due and owing on foot of the plaintiff's defaults in repaying the Land Loan, no matter what conclusion the Court may reach regarding the Shed Loan facility letters. It is submitted that the failure to challenge the Land Loan also undermines any attempt to challenge the appointment of the receiver under the terms of the mortgage.

11. With regard to its counterclaim for summary judgment against the plaintiff, the defendant relies on *Stapleford Finance Ltd v. Lavelle* [2016] IECA 104 as a statement of the Court's power to fashion its own rules in order to see justice done and efficient case management carried out. It is submitted that, if this matter were reconstituted as summary judgment proceedings and if the plaintiff had employed the content of his Statement of Claim as a defence to those proceedings, he would have failed. The defendant submits that all the required documents are before the Court, the plaintiff is on notice and all the necessary ingredients are in place for summary judgment to be handed down. In the event that the Court does not see fit to grant summary judgment against the plaintiff at this juncture, the defendant seeks liberty to issue a motion seeking summary judgment as if the defendant's counter proceedings had commenced as a summary summons.

12. With regard to the plaintiff's reliance on the Bank's internal documentation, the defendant submits that this material can only assist the plaintiff's case where it is read on a selective basis, as any reference to a ten year repayment profile is accompanied by a reference to a two year legal maturity.

13. For the sake of thoroughness, the defendant has set out the caselaw establishing that a tort of reckless lending does not exist in Irish law, namely *ISC Building Society v. Grant* [2010] IEHC 17 and *McConnon v. President of Ireland & Ors* [2012] 1 I.R. 449. They were motivated to set this out in light of the plaintiff's Statement of Claim, which sets out a claim in negligence against the defendant.

> - The Plaintiff

14. The plaintiff submits that there was a representation made by Mr. Hamilton (the plaintiff also raises questions regarding Mr. Hamilton's authority to make this representation) at their first meeting on 9th September, 2011, and that he signed the loan facility at the following meeting on the basis of that it reflected the representation made to him. It is suggested that, in circumstances where the Court is applying the term that an oral agreement cannot amend the terms of the loan, there is relevance to be found in the fact that this representation came before the signing of the 2011 agreement. With regard to the documents exhibited to his second affidavit, which appear to corroborate his version of events, the plaintiff highlights the Comments and Conclusion sections of the Credit Application dated 25th August, 2011, which refer to terming out the residual balance over ten years and restructuring the loan over a longer period. The plaintiff submits that these references, combined with the references to a two year legal maturity, give rise to an ambiguity in the agreement that can only be resolved in a plenary hearing. The plaintiff also relies on a contemporaneous note of a telephone conversation that took place between himself and an unidentified bank official, in which it would appear that he is setting out a basis for continuing repayments over the latter half of 2013. If the loan became fully due and owing during that period, the plaintiff questions why the Bank official entertained these notions, instead of indicating to him that the entirety of the Shed Loan fell due during the repayment period he was addressing. During oral submissions, counsel for the plaintiff repeated her client's allegation on affidavit that this conversation took place in September, 2013, one month before the defendant decided to call in the loans. However, no date appears to be provided on the document itself, other than a handwritten note at the top, which may be a date but has been redacted.

15. The plaintiff submits that all of the above background facts bring this case within Finlay-Geoghegan J.'s reasoning in *ACC Bank v. Mike O'Dwyer Motors Ltd* [2013] IEHC 57, wherein the defendant to summary proceedings was able to prove that his defence went beyond mere assertion and the matter was remitted to plenary hearing. The plaintiff also relies on this case in resisting the defendant's counterclaim for summary judgment. As for the defendant's reliance on the *parol* evidence rule, the plaintiff distinguishes *Hayes* on the ground that it was a decision issued following a plenary hearing. The plaintiff also submits that the rule should be disapplied to this case because the alleged misrepresentation made by Mr. Hamilton constitutes an oral preliminary contract within the meaning of Finlay Geoghegan J.'s decision in *AIB Plc v. Galvin Developments (Killarney) Ltd* [2011] IEHC 314 and Gilligan J.'s decision in *Carey v. Independent Newspapers (Ireland) Ltd* [2004] 3 I.R. 52. In effect, it is submitted that there is sufficient evidence before the Court to suggest that there is a collateral agreement between the parties and that the loan facilities does not contain the entirety of the agreement between the two sides.

16. The plaintiff directs the Court's attention to the precise language used in the facility letter and in Ms. Moylett's affidavit, which refer to instalments and repayments, in the plural rather than in the singular. It is submitted that this language is incongruous with the defendant's version of events, as a two year term loan would only have one reduced-sum instalment before the full loan became due and owing, and not multiple reduced-sum instalments, as envisioned by the loan facility. In light of this alleged ambiguity in the facility letter, it is submitted that the *contra proferentem* rule applies.

17. The plaintiff also relies on the Code of Conduct for Business Lending to Small and Medium Enterprises. While he has not put an authority before the Court which declares this Code to be binding on the defendant in their dealings with customers such as himself, he does note that similar Codes related to mortgage arrears and consumer legislation have been found to bind lenders. He submits that the Code has been designed in such a way that it was intended to have legal effect. If the Court holds against him on this point, he submits that compliance with the Code was an implied term in the contract between the parties, as evidenced by references to the Code in the letters of warning and demand. It is also submitted that questions over the binding nature of the Code may not be capable of being properly dealt with at this juncture and should be forwarded to a plenary hearing. In any event, the plaintiff notes that he was not offered an immediate review meeting, as envisioned by s. 23b of the Code, nor were the procedures outlined in ss. 24 – 28 adhered to. For its part, the defendant does not believe that it should have to engage with the Code because the plaintiff has not pleaded at any point that the loan is unenforceable due to a breach of the Code.

18. The plaintiff submits that this matter also requires a plenary hearing in order to determine which letter of demand is relied upon and when the loans became due and owing. Allegedly, this not only has an impact on the propriety of the defendant's actions but also on the level of interest accruing on the monies under the General Terms and Conditions to Term Loan Facility Letters. Allegedly, the amount of daily interest that has accrued varies depending upon which letter of demand the defendant intends to rely. It is submitted that this lack of clarity with regard to the amount of interest payable introduces a degree of ambiguity into the plaintiff's alleged liability that can only be resolved at a plenary hearing, per Irvine J.'s decision in *Ulster Bank Ireland Ltd v. Grimes* [2015] IECA 346.

19. The plaintiff submits that all of the above issues give rise to a scenario where there is potentially a material factual dispute capable of resolution only on oral evidence. Thus, he relies on the principles applicable to applications to dismiss for being bound to fail, as outlined in *D&L Properties Ltd v. Yolanda Ltd* [2017] IECA 11. The plaintiff submits that these principles set out an almost insurmountable threshold for applications to dismiss in scenarios such as the above because the application can only be acceded to where it is shown that there is no possible way for the plaintiff to succeed, no matter what may emerge in discovery or in cross examination.

20. With regard to arrears on the Land Loan, the plaintiff submits that said arrears only arose following the emergence of this dispute and the closure of his accounts by the defendant. The defendant submits that the Land Loan was in arrears prior to the restructure and that the Bank's forbearance in acting on these arrears was predicated on that restructuring in 2011. If the restructure were to be set aside, then it is submitted the previous state of affairs re-asserts itself and the Land Loan becomes due and owing on foot of those arrears.

21. The plaintiff objects to the grant of summary judgment in these proceedings on grounds that such a relief is not included in the defendant's motion and that the grant of that relief is incongruous with the suggestion that these proceedings are an abuse of process to prevent the advancement of summary proceedings. During oral submissions, reference was made to an estoppel as a defence to summary judgment proceedings. It was also submitted that the defendant's actions and the reliance placed on the restructure by the plaintiff should estop the defendant from relying on the letters of demand and events of default that pre-date the restructure. The principles outlined in *Harrisrange v. Duncan* [2003] 4 I.R. 1 were also relied on.

Decision

22. The plaintiff's case involves six grounds: 1) he was deprived of the opportunity to get legal advice before signing both Shed Loan facility letters, 2) there is an effective, oral preliminary/collateral agreement in place between the plaintiff and the Bank arising out of his meetings with Mr. Hamilton, 3) a misrepresentation is at play in this case, 4) there is uncertainty or ambiguity in the 2011 facility letter because the Bank's own internal documentation contradicts its submitted interpretation of terms of the facility letter and/or the precise language of those terms also contradicts that interpretation, 5) the Code of Conduct for Business Lending to SMEs is legally effective and has been breached by the Bank, and 6) there is a lack of clarity with regard to the demand letter relied on and the amount of interest owed.

23. At para. 16-05 of the 3rd Ed. of Delany and McGrath's "*Civil Procedure in the Superior Courts*", the basis upon which the Court can exercise its jurisdiction under O. 19, r. 28 is set out as follows:-

> "16-05 It is well established that the jurisdiction conferred by order 19, rule 28 is exercisable by reference to the pleadings only…This basic principle was reaffirmed by Costello J. in *DK v. King* where he stated that rule 28 only applies where it can be shown that the text of the plaintiff's summons or statement of claim discloses no reasonable cause of action or that the action is frivolous or vexatious. So, for the purposes of considering whether to concede to an application based on rule 28, the court should consider the pleadings only, ignoring any affidavit evidence filed, and further must proceed on the basis that any statements of fact contained in the pleading sought to be struck out are true and can be proved by the party."

24. At para. 16-15, the basis upon which the Court can exercise its inherent jurisdiction is set out as follows:-

> "When considering an application to strike out proceedings pursuant to its inherent jurisdiction, "the court is not limited to considering the pleadings of the parties, but is free to hear evidence on affidavit relating to the issues of the case". However, a court can only exercise this jurisdiction on the basis that "on admitted facts, it cannot succeed"…"

The Court will now assess each element of the plaintiff's case and determine whether the defendant has established that it comes within either of these two standards and could therefore be struck out.

25. At para. 4 of the plaintiff's Statement of Claim, the plaintiff says:

> "…In or around the 4th September 2008 the Plaintiff received by post the Facility Letter of the same date whereby the Defendant agreed to lend the sum of €80,000 to the Plaintiff (hereinafter the 'Shed Loan'). The Plaintiff took time to review the letter and compared it to the Facility Letter in respect of the Land Loan. The Plaintiff was satisfied that the Facility Letter for the Shed Loan was very similar to the Land Loan so he signed and returned it by post to the Defendant."

26. At the end of both of the facility letters for the Shed Loan and the Land Loan, a warning box was inserted, under which the plaintiff signed and dated the letters. While the warning box contained in the first Shed Loan and Land Loan facility letters is different to the warning box contained in the 2011 restructuring facility letters, the information conveyed is broadly similar. The warning box indicates that signature acts as a confirmation that the plaintiff agrees with the terms and conditions of the letters, that he undertakes to carry out the obligations specified therein, that the loan is for business purposes only, that the information provided by him to the Bank with regard to the loan's purpose is true and correct, that he has had the full opportunity to acquaint himself with the agreement and take independent legal advice and that the Bank strongly recommends him to take such independent advices before signing. At para. 3 of the Statement of Claim, the plaintiff says:-

> "…The Plaintiff received a copy of a Facility letter dated the 18th of June 2007 in or around the same date whereby the Defendant agreed to lend the Plaintiff the sum of €120,000 (hereinafter the 'Land Loan'). The Plaintiff sought legal advice from John Prior, solicitor and after attaining such advice signed the Facility Letter agreeing to borrow the said sum from the Defendant."

27. In assessing the plaintiff's first argument, I am satisfied that his argument that he was denied the opportunity to get legal advice in respect of the first Shed Loan facility letter is bound to fail. As evidenced by para. 4 of the Statement of Claim, he took time to review the facility letter and compare it to the original Land Loan letter. It was a matter for him to procure independent legal advice and he clearly elected not to do so. Under either of the standards outlined above, the Court could be satisfied to strike out this aspect of the plaintiff's claim. Regarding the second letter, the Statement of Claim says that "Mr. Hamilton stressed that he had other people to see and pressed the Plaintiff to sign". While this is quite unspecific, it must be noted that these pleadings are not extensive and that no particulars or replies to particulars have been put before the Court. Therefore, I am satisfied that the above pleading is sufficient for the Court to refuse to exercise its jurisdiction under O. 19, r. 28. In respect of the Court's inherent jurisdiction, the Court is entitled to look to the affidavits for a more specific allegation. At para. 7 of the plaintiff's affidavit, sworn on 7th March, 2017, he avers:-

> "…I say that I never received any documentation prior to [my second meeting with Mr. Hamilton]. On [23rd September, 2011], Mr. Hamilton advised me that everything was sorted and all I needed to do was sign the facility letter. I did not receive any independent legal advice and Mr. Hamilton did not read through the facility letter with me".

28. In light of the warning box outlined above, in which the plaintiff signed to affirm that he was not a consumer and that he understood that the Bank strongly advised him to take legal advice before signing, I am satisfied that this aspect of the plaintiff's claim could be struck out. The facts as set out do not give rise to any cause of action that is known, or likely to become known, to Irish law. The plaintiff does not, for example, aver that Mr. Hamilton sought to exercise some duress or undue influence over him to force him to sign the facility letter. Rather, the case that the plaintiff appears to be making is that Mr. Hamilton is at fault for not reading the agreement over to him, not legally advising him as to the operation of the agreement and not forcing him to take time and consider the terms of the facility letter before signing. Given that Mr. Hamilton was dealing with a businessman, and not a consumer, I can think of no cause of action in Irish law in which a bank is to be faulted for not forcing another competent commercial actor to act with appropriate prudence before entering into a legal arrangement. The plaintiff was a businessman in the whole of his senses and the responsibility rested on him to exercise good sense, read the document he was about to sign and seek appropriate legal advice. The height of the plaintiff's claim is that Mr. Hamilton was a busy man and sought to conclude his business with the plaintiff with haste, with the result being that the plaintiff felt rushed and/or pressured to sign the facility letters. I do not accept that this gives rise to a cause of action. Therefore, I am satisfied that the entirety of the plaintiff's first ground could be struck out.

29. In reaching the above finding, the Court is aware that, in applications such as this, no onus rests on the plaintiff to sufficiently set out his case. Rather, the onus rests on the defendant, as the moving party, to establish that the plaintiff's claim is so without merit that the Court should strike it out. Nevertheless, plaintiffs are well advised to put sufficient information before the Court so that it has a full picture of the claim being pursued. Otherwise, a plaintiff risks his claim being struck out because the Court has not been given all the relevant information. In this case, the plaintiff has not alleged that the Bank forced him to sign or in any way took steps to prevent him from leaving the meeting and seeking independent legal advice before signing. In the absence of such a factual dispute, I am left with no choice but to conclude that no such improper actions were taken by the Bank and I am so satisfied that there is no reality to the plaintiff's first argument.

30. Turning now to the plaintiff's second ground, the Court is required to afford the highest element of truth to the plaintiff's case in

applications such as this. Therefore, for the purposes of this application, the Court will assume that Mr. Hamilton and the plaintiff did come to an oral agreement, as alleged. There are a number of references in the bank's internal documentation that also support this claim. Clause 15 of the "General Terms and Conditions Attaching to Term Loan/Loan Facilities for Individual Borrowers", which is appended to both of the original facility letters, states that the terms of the agreement between the plaintiff and the defendant cannot be amended orally. As set out in paras. 3 and 4 of the Statement of Claim, the plaintiff read both of these original facility letters and, in light of the legal advice sought from Mr. Prior in respect of the original Land Loan, he understood the legal import of this term. Therefore, it is entirely unsustainable for the plaintiff to argue that an effective oral contract came into being over the original agreement, as he is well aware that oral agreements are incapable of amending the terms of the original loan.

31. With regard to the argument that this oral agreement constitutes a preliminary/collateral contract, the agreement governing the restructure of the Shed Loan is made up of the terms contained in the facility letter dated 22nd September, 2011, and Danske Bank/National Irish Bank's "Terms and Conditions for Business Facilities". Clause 9.2 of this agreement states that the original agreement set out in the original Shed Loan facility letter has been cancelled. As outlined in *Hayes* and in *Galvin Developments*, the law on collateral contracts and the parol evidence rule is highly technical and a court's decision would generally turn on the particular facts of each case. A document containing the "Terms and Conditions for Business Facilities" has not been exhibited. Therefore, as the full restructure Agreement has not been put before the Court, it would be inappropriate to make any findings in an application of this nature as to the relationship between the written agreement and this assumed oral agreement. Therefore, the Court could not strike out this ground of the plaintiff's case.

32. Turning to the applicant's third ground, once again, the Court must afford the plaintiff's case the highest element of truth and therefore must assume for the purposes of this application that Mr. Hamilton did make a misrepresentation as to the intended agreement. Term 3 of the original Land Loan facility letter states that "The Loan will be repaid by 50 consecutive half yearly instalments…". Term 3 of the original Shed Loan facility letter states that "The Loan will be repaid by 40 equal consecutive Quarterly instalments…". Under the restructuring of the Land Loan, Term 3 was amended to state that "The Loan will be repaid by 42 consecutive half yearly instalments…". Term 3 of the restructuring Shed Loan facility letter states that "The Loan shall be repaid by way of 2 consecutive annual instalments…". Given the legal advice received from Mr. Prior and the plaintiff's resultant understanding of how Term 3 is to be construed, there can be no doubt that the plaintiff knew that the number provided in Term 3 refers to the total number of repayments required to fully pay off the loan. Term 3 is located on the front page of all the facility letters. At para. 9 of the Statement of Claim, the plaintiff admits that he did not read the restructuring facility letters before signing them. However, I am of the view that it goes much further than that. It is clear that the plaintiff did not even give the documents a cursory glance before signing them. It is extremely difficult to envisage a case of misrepresentation succeeding in circumstances where a plaintiff has been so negligent in carrying out their business that they did not even bother to scan the front page of the document they were signing and notice a key term that was so manifestly at variance with their alleged understanding of the document's legal effect.

33. In normal circumstances, given the absence of some legal argument to excuse such negligence, such as duress, I could be satisfied that the ground of misrepresentation is frivolous, vexatious, doomed to fail, and could therefore be struck out under the Court's inherent jurisdiction. However, from having reviewed all the papers, a case for fraudulent misrepresentation persists (as opposed to a misrepresentation made through no *mala fides* on the defendant's part), notwithstanding that such an allegation has not been expressly repeated outside the plenary summons. Legal authority on misrepresentation was, of course, not opened during the hearing of this application, but it goes without saying that courts tend to be far harsher on *mala fides* actors and more forgiving in respect of their victims. Whether the plaintiff's negligence is so far-reaching as to negative the impact of this *mala fides* behaviour (again, in applications of this nature, the Court must afford the plaintiff's case the highest element of truth and assume, insofar as reason, undisputed evidence and the law allows, that such behaviour did occur) is a matter to be determined at plenary hearing. In those circumstances, I could not be satisfied to strike out this aspect of the plaintiff's case.

34. Turning to the fourth ground, in light of the clear meaning of Term 3 (as set out above), there is no ambiguity in the facility letter with regard to the language it employs. While the meaning and intention of the facility letter is crystal clear when examined in isolation, the position is less clear following a review of the bank's internal documentation, as exhibited to the plaintiff's supplemental affidavit sworn on 14th March, 2017. In particular, page 7 of the Company Profile, dated 25th August, 2011, states in the "Conclusion" section that "Agreement in place initially to term out residual [balance] over 10 years". No information has been provided to the Court as to the operation of this initial agreement or how it came to be that a different agreement was reached. In circumstances where an ambiguity exists with regard to this initial agreement, and given that the entirety of the agreement reached has not been put before the Court, I am satisfied that this aspect of the plaintiff's case could not be struck out.

35. I am similarly satisfied with regard the plaintiff's fifth ground, for similar reasons. The defendant highlights that this issue was not expressly referred to in the pleadings. Where a gap in the pleadings can be remedied by an amendment, it would be wrong for the Court to strike out the action. It is a matter for the plaintiff, and another court if an application to amend pleadings is brought, to decide whether such an amendment should be made.

36. Finally, in respect of the plaintiff's sixth ground, I am satisfied that this aspect of the plaintiff's claim could be struck out. The letter of demand is the letter dated 12th November, 2013. The letter dated 4th October, 2013, could not reasonably be construed as a letter of demand, as that letter specifically states that the Bank was deferring its decision on whether or not to call in the loan for 30 days in order to give the plaintiff an opportunity to organise his affairs. This letter is clearly a warning letter which seeks to give the plaintiff one last chance to get his house in order. Any case built on this argument would be doomed to fail.

37. Having assessed the entirety of the case being made by the plaintiff, the Court has concluded that various aspects of these proceedings do not disclose a reasonable cause of action, are unsustainable, are bound to fail and/or are frivolous and vexatious. However, this is an application to strike out the entirety of the plaintiff's claim. Given that I am not satisfied that the entirety of the plaintiff's claim can be described in the above manner, I would refuse to strike the plaintiff's claim under any of those grounds.

38. However, the defendant has made one final argument: these proceedings are an abuse of process because they can bring no tangible benefit to the plaintiff, as condemned in Costello J.'s (as he then was) decision in *McSorley (supra).* The defendant argues that, no matter what conclusion the Court may reach in respect of the restructured Shed Loan, the money would still be due and owing either on foot of the default in the Land Loan or on foot of the original terms of the Shed Loan. I do not accept that submission. The Land Loan was restructured under a separate facility letter dated 19th September, 2011. At para. 27 its Objection, Defence and Counterclaim, the defendant states that the plaintiff defaulted in repaying both loans after the restructure. However, at para. 53 of Ms. Moylett's grounding affidavit, she refers only to the Shed Loan as being regularly in arrears. While Ms. Moylett states that the plaintiff was regularly notified of these defaults over the course of 2012 and 2013, no documentation has been exhibited to evidence any of those notifications between the date of the restructure and 30th September, 2013, when a letter indicating an inability to execute payment was sent to the plaintiff. There is no clear, undisputed evidence that the Land Loan was in default before the plaintiff's accounts were closed by the defendant in November, 2013.

39. As for the original terms of the Shed Loan, it would be an absurdity if those facts could simply re-assert themselves and the plaintiff could be held to be in default for the last seven years. If a court were to conclude that the 2011 facility letter is void, the defendant would not thereby be entitled to act as if the restructure never occurred. If the original terms of the 2008 facility letter were to be re-established, I am of the view that the proper, fair procedure to follow would be to instigate the process of calling in the loan afresh. In those circumstances, the plaintiff would have won his case and may very well have received a substantial award in damages. It is quite possible that such an award could then be used to pay off the Shed Loan and obviate the need for the loan to be called in in full. Given that I have not concluded that the entirety of the plaintiff's claim does not disclose a reasonable cause of action, is unsustainable, is bound to fail and/or is frivolous and vexatious, I cannot ignore this possibility of repayment. Therefore, I am of the view that this aspect of the defendant's argument fails.

40. However, another more nuanced argument exists regarding abuse of process, as set out at paras. 50 and 53 of Ms. Moylett's affidavit. At para. 50, she avers that the plaintiff failed to comply even with his understanding of the terms of the restructure agreement, as such an agreement would have required another instalment after year 1, which was not paid (the plaintiff states at para. 10 of the Statement of Claim that he did not become aware of the reality of terms he was bound by until October, 2013, and so, on his understanding, a year 2 payment would be required). At para. 53, she also avers that the one payment made in 2012 was insufficient to meet the terms of the restructure and communications began immediately thereafter to notify the plaintiff of this. If true, this would mean that rectification of the agreement does not change the fact that the plaintiff has been in default and the plaintiff's case is a lost cause. It could also mean that the plaintiff has delayed in bringing these proceedings (as he would have been informed of the reality of the agreement in 2012) and/or brought the proceedings for the improper motive of frustrating the bank's attempts to realise its security. Any one of these would be an abuse of process.

41. Once again, it is to be noted that the plaintiff failed to dispute either of Ms. Moylett's averments. As stated by the Court above, the defendant is the moving party in this application and the onus rests solely on it to establish that an order striking out the proceedings should be made. However, the Court is entitled to consider undisputed facts and evidence when reaching its decision on an application to strike out under the Court's inherent jurisdiction. If the plaintiff fails to dispute a fact, then it is to be taken as admitted. A plaintiff is not required to prove anything in an application of this nature but it is undeniably in their best interests to ensure that a court has been informed as to what facts are in dispute and what facts are not.

42. While the Court has some concerns as to the propriety of the plaintiff's actions in this matter, it cannot be overlooked that several key documents have not been put before the Court. While Ms. Moylett avers to communications over the course of 2012 and 2013 notifying the plaintiff that he is default, no documentation has been exhibited to evidence this. Receipt of these communications is certainty in dispute, as the plaintiff has stated that he did not become aware of the facility letters' true meaning until October, 2013. More fundamentally, as referred to above, the "Terms and Conditions for Business Facilities" has not been put before the Court and so the entirety of the contract binding the parties is unavailable at this juncture. In applications to strike out, it seems to me that, save in exceptional circumstances, it would be improper to strike out a claim for breach of contract when no court has had an opportunity to examine the contract in full.

43. In light of all of the above, the Court will refuse the application to strike out the plaintiff's claim.

44. Turning finally to the issue of summary judgment, it is a correct statement of law that the Rules of the Superior Courts are facilitative and should not be construed in such a way as to impede justice and efficient case management. However, there are natural limits to this. Summary judgment is a very significant relief to seek, with enormous consequences for the impacted parties. A very clear procedure is in place through which summary judgment can be secured and the relevant rights and interests of those involved can be protected. I am not satisfied that the Court's powers, as helpfully set out in the *Lavelle* decision, are so far-reaching that I could effectively subvert the entire process purely because it would be more expedient to do so. The defendant is correct in its submission that the issues being litigated in these proceedings are extremely similar to the issues that would arise for consideration in summary judgment proceedings. It could be argued that it would be in the interests of justice to have these proceedings and any summary judgment proceedings the defendant may wish to bring heard consecutively or concurrently. The onus rests on the defendant to issue those proceedings and bring an application to have the two cases heard in such a fashion. But I do not propose to grant summary judgment in these circumstances, especially in light of the findings reached above.

45. Having considered the pleadings, affidavits, evidence and submissions in this matter at length, I cannot escape the conclusion that both the plaintiff and the defendant have failed to put all the evidence in their possession before the Court and have failed to fully inform the Court of all the facts. Whether those failures were deliberate or inadvertent errors remains to be seen. Where such failures were deliberate, the issue of whether it was proper to withhold that information will be a matter for another court to consider.

46. It goes without saying that the Court's findings, as set out above, are confined to this decision and should not be relied on in any future hearing in this matter. My findings are heavily influenced by the extent of the evidence put before the Court, the identified gaps therein and the procedural requirement to afford the plaintiff's case the highest element of truth. The issues in this case will fall to be determined with finality by the Trial Judge at plenary hearing.

47. For the reasons set out above, I refuse the reliefs sought.