

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

MIRIAM O'DONOHUE AND PETER O'DONOHUE

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 26th day of June, 2018**Background:**

1. By notice of motion the plaintiff is seeking to enter judgment against the defendants in respect of monies due and owing. By letter of offer dated 15 July 2009, the plaintiff offered to advance to the defendants a loan facility in the amount of €520,000. This loan was accepted in writing by the defendants on 12 August 2009. The loan was to be secured over an apartment at Booterstown, County Dublin ("the apartment") and was to be repaid over a period of 20 years at an initial interest rate of 2.678%. The monies were drawn down by the defendants on 5 November 2009.

2. On various dates following the draw down, the defendants failed to discharge the instalments due. Consequently, on 19 June 2015 letters of demand issued seeking the immediate repayment of the sum of €576,415.29. Further interest accrued on the said sum and the plaintiffs are now seeking judgment in the sum of €602,714.60.

3. The plaintiff provided an overdraft facility to the second named defendant in the sum of €25,000 by way of facility sanction on 25 June 2013. The second named defendant availed of this facility from the said date. According to the letter of offer, the facility was subject to interest that was to be payable at the bank's AA rate of 7.850% from the date of the loan offer. The facility was repayable on demand.

4. By letter dated 19 June 2015, the plaintiff demanded repayment of the sums then due and owing, together with interest, from the second named defendant. The second named defendant did not discharge the said sum by reason of which the plaintiff is claiming the sum of €34,283.53 which, together with the amount due on the loan of July 2009, amounts to a sum of €641,580.08.

5. The defendants are husband and wife. Initially the first named defendant, a retired bank official, was not legally represented. However, at the hearing of the motion before this Court she was represented by solicitor and counsel. The second named defendant was not legally represented and conducted his own defence. Both defendants filed a number of affidavits seeking to have the plaintiff's action remitted to plenary hearing.

Defences of the First Named Defendant

6. In a replying affidavit, sworn 11 October 2017, the first named defendant set out a number of defences:-

(i) Breach of the Unfair Terms in Consumer Contracts Regulations 1995

(ii) A counterclaim.

Although these defences were put forward by the first named defendant, should I find that there is substance in the defences as would require the Court to remit this action to plenary hearing then the second named defendant would also be entitled to the benefit of these defences.

Unfair Terms in Consumer Contracts Regulations 1995 ("the Regulations")

7. In her affidavit, the first named defendant states that she worked as an assistant manager for the plaintiff bank for some 40 years. By reason of this, she was entitled to seek a fixed interest rate of 3% over the term of the loan. The loan was used to buy out an existing loan on the apartment and to pay off two other loans that the defendants had with the plaintiff and ACC Bank respectively. The loan with ACC Bank related to the second named defendant's farming business.

8. The loan was secured by a mortgage over the apartment and was subject to the plaintiff's "general terms and conditions of offer of mortgage loan" and "mortgage conditions" (2006 edition). The first named defendant highlighted a number of conditions which she claims are contrary to the Regulations.

9. These conditions are:-

(i) Clause 3.5 of the "general terms and conditions of offer of mortgage loan" provides:-

"3.5 Standard variable interest rate mortgage loan, the interest rate applicable, at any time, will vary according to the prevailing rates set generally by the bank from time to time subject to these conditions."

and

Clause 4.1 of the "mortgage conditions" (2006 edition) which provides:-

4. Interest

"4.1 Subject to the provision at the end of this sub-clause a lender may at any time or times and from time to time during the continuance of the mortgage if and whenever the relevant lender in its absolute discretion shall consider it desirable vary the applicable interest rate in respect of all or any part of the total debt payable to that lender to such extent as the relevant lender in its absolute discretion determines and in regard to any such variation following provisions shall apply and have effect . . ."

(ii) Clause 5.4 of the "general terms and conditions" provides:-

"5.4 Surcharges on arrears:

Without prejudice to the rights conferred by Condition 8 of these terms and conditions, the bank shall be entitled, in the event of default by the customer in the repayment of principal and/or interest on due dates to charge surcharge interest at the rate of 6% per annum in addition to the interest rate applicable on the mortgage loan ..."

(iii) Clause 7.1 of the "mortgage conditions" provides:-

"7.1 at any time after the execution of the mortgage, a lender may without any further consent from or notice to the mortgageor or any other person enter into possession of the mortgage property or any part thereof or into receipt of the rents and profits of the mortgage property or any part thereof."

I will now look at the relevant statutory provisions.

10. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts was transposed into domestic law by S.I. No. 27/1995- the Regulations. A "consumer" means an actual person who is acting for purposes which are outside his business.

11. Article 3 provides:-

"(1) Subject to the provisions of Schedule 1, these Regulations apply to any term in a contract concluded between a seller of goods or supplier of services and a consumer which has not been individually negotiated.

(2) For the purpose of these Regulations a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.

....

(4) A term shall always be regarded as having not been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence its substance, particularly in the context of a pre-formulated standard contract.

....

(7) An indicative and non-exhaustive list of the terms which may be regarded as unfair, pursuant to Article 3.3 of the Council Directive, is set out in the Annex to the Directive and in Schedule 3 to these Regulations."

Article 4 provides:-

"A term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services supplied, in so far as these terms are in plain, intelligible language."

Article 6 provides:-

"(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties, if it is capable of continuing in existence without the unfair term."

Schedule 3 is titled "*Unfair Terms in Consumer Contracts*" (referred to as the "grey list")

"1. Terms which have the object or effect of:

...

(I) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded"

"2(c) Subparagraphs ...(I) do not apply to;

— transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control."

Above I have set out the relevant articles in the Regulations. In my view, the wording of the Regulations and the language used lack the clarity which one should expect from such important consumer protection legislation. Interestingly, Article 5(1) of the Regulations provides that:

"(1) In the case of contracts where all or certain terms offered to the consumer are in writing, the seller or supplier shall ensure that terms are drafted in plain, intelligible language".

12. Directive 1993/13/EEC and the Regulations have been considered in a number of judgments by both the Irish courts and the European Court of Justice. In *Aziz v. Caixa d'Estalvis de Catalunya* (Case C- 415/11, Judgment of 14 March 2013) the ECJ considered the applicable Spanish legislation implementing Directive 93/13/EEC. The case concerned a loan agreement secured by a mortgage on

Mr. Aziz's family home. Clause 15 of the mortgage agreement, which made provision for an event of default, stated that the Spanish bank providing the loan had the right to bring enforcement proceedings to reclaim any debt arising and that for the purpose of those proceedings the Bank could quantify the debt by submitting an appropriate certificate indicating that amount. Mr. Aziz defaulted on his loan and the bank instituted recovery proceedings against him. At the enforcement stage of the proceedings, Mr. Aziz applied for a declaration to the effect that clause 15 was unenforceable under the terms of the said Directive. In concluding its judgment, the court stated:-

"44. [I]t should be noted first that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge...

45 As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them..

46 In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task..."

13. The Regulations were considered by Faherty J. in *AIB Mortgage Bank and Allied Irish Banks plc v. Gerard Cosgrove* [2017] IEHC 803. In that case it was submitted that the defendants were not entitled to rely upon the Regulations because where a defendant borrowed money to purchase a premises, the person knew that the sum borrowed had to be repaid with interest and that the sum borrowed would be secured by way of a charge on the property. Such terms were to be considered "core terms". This submission was accepted by the learned trial judge. Faherty J., having referred to *Aziz*, stated:-

"60. Furthermore, I am satisfied that the terms of the contract, upon which the plaintiffs seek to rely in the within proceedings, cannot be said to come within the ambit of the Unfair Terms Regulations, such that the provisions of the mortgage contract should be deemed unenforceable against the defendant."

This is an application of Article 4 of the Regulations.

14. The application of the Regulations to mortgage agreements has also been considered by the Circuit Court. I refer to the decision of Her Honour Judge Jacqueline Linnane in *Bank of Ireland Mortgage Bank v. Mahon & Woods* (Circuit Court, Judge Linnane, 9 August 2017):-

"Counsel for the plaintiff ... and for the defendants have agreed between themselves that the court is obliged to examine the mortgage deed having regard to the [Directive 93/13/EEC] to see if any of the terms are unfair. It would seem to me that the first point should be whether the ... Directive applies and if the mortgage deed comes within the scope thereof bearing in mind that Article 4(2) of the Directive provides that the assessment of the unfair nature of the terms shall not relate to the definition of the main subject matter of the contract.

The obligation to pay instalments and repay the loan is the defendants' main contractual obligation. Once there is a default in so doing this entitles the plaintiff to exercise its right to possession. The terms of the mortgage deed are common and standard in contracts of this nature..."

Her Honour Judge Linnane held that the Regulations did not apply.

15. The Regulations were further considered in *Allied Irish Bank plc v. Peter Counihan & Mary Counihan* [2016] IEHC 75. In particular I refer to the part of the judgment of Barrett J. where he considered the difficulties that can arise where a court has to consider "of its own motion" whether provisions of a contract are contrary to the Regulations.

"14. Fifth, of some concern when it comes to the application of *Aziz* is how the task identified by the Court of Justice falls to be discharged in a common law system grounded upon, *inter alia*, the rules of precedent. If, for example, the court at summary hearing reviews particular terms and conditions and identifies clauses A, B, and C as potentially unfair, is a later court of equal or lesser jurisdiction precluded from finding that clauses X, Y and Z in the same terms and conditions present a difficulty in this regard? It seems to this Court that they could reasonably be contended not to be so bound because (a) each case will be decided to a great extent on its own facts, and/or (b) ultimately even the demands of precedent must yield to the supremacy of European Union law, where applicable, and/or (c) because of the precedential weight to be ascribed a judgment following summary hearing, as opposed to a judgment given after full plenary hearing."

16. Having considered the authorities and having regard to the provisions of the Regulations, I am of the view that the provisions in the "general terms and conditions of offer of mortgage loan" (clause 3.5) and the "mortgage conditions" (clause 4.1) that relate to the payment of interest are not in breach of the Regulations. I reach this conclusion for the following reasons:-

(i) Article 4 of the Regulations provides that a term will not be "considered to be unfair by relation to the definition of the main subject matter of the contract". The main subject matter of the contract in question is that monies were advanced to the defendants to refinance the purchase of an apartment. This was of clear benefit to the defendants. The monies advanced had to be repaid to the plaintiff over the term of the loan. Having the benefit of these monies, which the defendants would not otherwise have had, came at a price – interest was payable. The interest rate may vary over the term of the loan. Thus, in my view, the amount advanced, the term of the loan and the interest that is payable are the "main subject matters of the contract". Therefore, applying Article 4 of the Regulations, the clauses in question that relate to the payment of interest do not fall within the scope of the Regulations.

(ii) It seems to me that interest rate clauses, such as the ones in the instant case, do not fall within the scope of the Regulations. I refer to what is called the "grey list" in Schedule 3 subparagraph (I) of the Regulations. Subparagraph (I) covers situations where a supplier of services increases prices, in this case, increasing interest rates. Such may be an "unfair term" and it would appear to support the defendants' case. However, Schedule 3 goes on to specifically provide that subparagraph (I) does not apply to "...financial instruments and other products or services where the price is linked to fluctuations in...a financial market rate that the seller or supplier does not control."

I would suggest that this provision is consistent with the view that interest rate clauses, such as those in question before this Court, are the "main subject matter", as per Article 4, of a mortgage or loan agreement and thus not covered by the Regulations.

(iii) Fundamental to the Regulations is a lack of negotiating power in persons, so that, in effect, the terms of a loan are dictated by financial institutions such as the plaintiff. The defendants infer that when it came to the interest rate and how it was to be calculated they had "not been able to influence it substance" as per Article 3(4) of the Regulations. I do not believe that this is the case here. As previously noted, the first named defendant was a former employee of the plaintiff and so was entitled to a 3% fixed rate for the term of the loan. Thus she did not have to take the variable rate but rather choose to do so. Further the plaintiff was not the only mortgage provider available. I think that it is reasonable to assume that at the time other financial institutions had on offer "mortgage products" and went to some length to advertise such to the general public.

17. The defendants relied on the ECJ decision in *R.W.E. Vertrieb A.G. v. Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11). This case related to price variant clauses in respect of gas services. Between July 2003 and 1 October 2005, R.W.E. increased its gas prices on four occasions. During that period the customers concerned in the main proceedings had no possibility of changing gas supplier. *Verbraucherzentrale*, on behalf of those consumers, claimed reimbursement from R.W.E. of the additional amounts paid to it following the price increases. In the course of its judgment, the court considered not only the Unfair Terms Directive but also Directive 2003/55/EC. Directive 2003/55/EC directs that Member States should take appropriate measures to protect consumers and, in particular, vulnerable customers. Protection was to be given to consumers connected to the gas network in remote areas.

18. In its decision, the ECJ, considering the Unfair Contracts Directive in conjunction with Directive 2003/55/EC, held that it was of fundamental importance that:-

"49....whether the contract sets out in transparent fashion the reason for and method of the variation of the charges for the service to be provided, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges...

51. ...the lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation."

and

"55. — whether the right of termination conferred on the consumer can actually be exercised in the specific circumstances."

19. It is my view that the decision of the ECJ in *R.W.E.* is distinguishable from the instant case. Firstly, the interest rate term was negotiated in that the defendants declined an offer of a fixed 3% rate. Secondly, the price of gas in *R.W.E.* did come within the "grey list" in Schedule 3 subparagraph (I), whereas, as referred to at para. 11 above, subparagraph (I) does not apply to "financial instruments and other products or services where the price is linked to fluctuations". Thirdly, the decision involved the provisions of Directive 2003/55/EC which was to give protection to gas consumers.

20. The defendants in the instant case also submitted that both clause 5.4 (the entitlement to charge a surcharge interest rate of 6% in addition to the interest rate charged on arrears) and clause 7.1 (right of entry of the mortgagor) were not binding owing of the Regulations. The plaintiff, however, does not seek to rely on these clauses and even if they did, and they were contrary to the Regulations, clauses under Article 6(2) are severable.

21. I am mindful that the ECJ has stated in *Aziz infra* that:-

"41. ...the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it legal and factual elements necessary for that task..."

I agree with the observations of Barrett J. in *Allied Irish Bank plc v. Peter Counihan & Mary Counihan* that such an exercise is more appropriate for an inquisitorial system of law rather than the adversarial system under which we operate. This exercise is to be embarked upon as a means of compensating for the imbalance that may exist between a supplier and a consumer. In this case, however, both the supplier (the plaintiff) and the consumer (the first named defendant) were legally represented before the court and this, to my mind, goes a considerable distance to removing the "imbalance". Counsel for the first named defendant, Mr. Gary Fitzgerald B.L., has identified the terms which he says are contrary to the Regulations and relies upon a number of legal authorities. The opposite view is taken by Mr. Roland Rowan B.L., on behalf of the plaintiff. Thus there is an "equality of arms". It is therefore unclear as to what this Court is expected to do when carrying out an assessment "of its own motion" in circumstances where both the supplier and consumer are fully and ably legally represented. To resolve this, the Court, of its own motion, having heard the arguments and legal submissions of the plaintiff (the supplier) and the first named defendant (the consumer) finds, firstly, that the clauses providing for a variable interest rate does not fall within the scope of the Regulations by reason of Article 4. Secondly, that the interest rate clauses are not on the "grey list" referred to. Thirdly, if this is not correct, that in any event the variable interest rate clause was "individually negotiated" and thus not contrary to the Regulations. As regards clauses 5.4 and 7.1, the Court is not required to reach a conclusion as it does not have "available to it legal and factual elements necessary for that task" as these clauses are not being relied upon by the plaintiff.

Counterclaim

22. The affidavit of the first named defendant sets out the basis for a counterclaim against the plaintiff. It avers to the fact that in December 2013 the second named defendant's business closed resulting in a loss of income which led to the financial difficulties with the plaintiff. According to the first named defendant, negotiations were entered into with the plaintiff to resolve matters. The apartment, the mortgaged property, was central to those negotiations.

23. The first named defendant claimed that the defendants were asked to put the apartment on the market for sale as part of a proposed solution. At that time the apartment was rented and bringing in a monthly rent of €2,900. The defendants were advised by a firm of estate agents, appointed by them but with the approval of the plaintiff, that the apartment would achieve a higher price if it was sold unoccupied. According to the first named defendant, the lease was terminated on the basis that the parties would be able to come to a solution to the financial difficulties which would be favourable to the defendants. The first named defendant claims,

however, that the solution proposed by the plaintiff was “unfavourable and unworkable” whilst they were also suffering the loss of the rental income which the first named plaintiff claims amounted to approximately €29,000 per annum.

24. It seems that the substances of the counterclaim relates to the loss of the rental income from the apartment referred to. It should be noted, however, that the advice that the apartment should be sold unoccupied emanated from an estate agent that had been appointed by the defendants themselves and not the plaintiff. There is no evidence before the Court to suggest that such advice was given negligently or in breach of any duty owed to the defendants by the estate agent. Further, the defendants maintain that the plaintiff failed to honour its assurance that it would propose a solution to their financial problems that would be favourable to them.

25. In the written submissions of the first named defendant it is further stated that if the plaintiff is entitled to rely upon the variable interest rate clause, that such figures should be calculated to reflect the first named defendant’s right under clause 3.6.3 to switch to a fixed interest rate “appropriate to the mortgage loan”. It is difficult to see how such a claim arises as the wording of this clause makes it clear that it is the customer (the defendants) who may elect to convert from a variable to a fixed loan. There was no evidence adduced by the defendants that they did so elect.

26. As to how a court should approach the issue of a counterclaim or crossclaim, I refer to the High Court decision in *Moohan v. S & R Motors (Donegal) Ltd* [2008] 3 I.R. 650. In the course of his judgment, Clarke J. (as he then was) stated, at p.656:-

“[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);

(c) 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).”

I will now refer to the principles set out by Kingsmill Moore J. in *Prendergast*:-

“It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answers 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 until after the counterclaim has 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 sum of the factors which a judge before whom the application comes may have to take into account in consideration in the exercise of this discretion.”

Applying the foregoing principles to the facts of the instant case, it seems to me that, though related, the claim being made by the defendants against the plaintiff is essentially an independent claim. However, there does appear to be an overlap in that the sale of the apartment was central to discharging the amounts owed to the plaintiff which, in turn, led to the apartment being put on the market with full vacant possession thus bringing to an end the rental income which the defendants enjoyed. Though I have serious doubts on so much of the counterclaim as relates to the advice given to sell with full vacant possession there may well be an issue on the assurance, allegedly given by the plaintiff, that it would come up with a solution to the defendants’ financial problems which, in the words of the first named defendant’s was “favourable to us and would meet our needs”.

Defence of the Second Named Defendant

27. The second named defendant was unrepresented in court and conducted his own defence. He filed some six affidavits in response to the plaintiff’s claim. The first affidavit dealt with the service of the proceedings. The contents disclose nothing that would be relevant in the defence of the plaintiff’s claim. The second affidavit does make a number of points that relate to the mortgage loan and the overdraft. However, the documents exhibited in this regard appear to simply consist of a list of statutory provisions. It is also alleged that there was no letter of demand. The second named defendant alleges that there was no agreement to pay either “surcharge interest and interest on surcharge interest”. Whereas I am satisfied that there was a letter of demand, the issue of interest on the overdraft, to my mind, has not been dealt with as fully as it might have been in the affidavit filed on behalf of the plaintiff by Mr. David Nolan.

28. The third affidavit of the second named defendant questions the authority of Mr. Nolan to swear an affidavit on behalf of the plaintiff and again questions the interest charged on the overdraft. The fourth affidavit deals with the appointment of a receiver and the sale of the apartment. There are also allegations that the solicitors instructed by the plaintiff have a business name that has not been registered. There is no substance to this contention. Further, I am satisfied that Mr. Nolan did have the requisite authority to swear affidavits on behalf of the plaintiff.

29. The fifth affidavit of the second named defendant also concentrates on the sale of the apartment. However, it discloses no defence to the plaintiff’s claim. In the course of his submissions before the Court, the second named defendant pointed out that the letter sanctioning the overdraft issued from an address different to that of the branch which operated the overdraft. In my view this is immaterial. I am also satisfied that the named plaintiff herein is, contrary to what was submitted by the second named defendant, the correct plaintiff to bring and maintain these proceedings.

30. The sixth affidavit relied upon by the second named defendant simply exhibits a number of documents and does not add to his defence.

31. Therefore, regarding the submissions made by the second named defendant, the only issue which, in my view, has substance is that which relates to the method of calculation for the interest charged on the overdraft. I am satisfied that the principal sum on the overdraft, that being a sum of €25,000, is lawfully due and owing by the second named defendant to the plaintiff.

Test to be Applied

32. There are a number of authorities which set out the principles which a court should apply on an application by notice of motion to enter summary judgment. In general the test was stated by McGuinness J. in *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607, at p. 615:-

"Thus it is for this court to decide whether in the instant case the defence ... is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence.... The question is rather whether the proposed defence is so far fetched or so self-contradictory as not to be credible."

33. Of particular relevance in the instant case is the following passage from the judgment of Clarke J. (was he then was) in the High Court, *McGrath v. O'Driscoll* [2007] 1 ILRM, where he said, at p. 210:-

"So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

34. Clarke J. in the Supreme Court referred to this passage in *IBRC Ltd v. McCaughey* [2014] 1 I.R. 749:-

"[22] It is important, therefore, to re-emphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta c.p.t. v. Ryanair Ltd*. [2001] 4 I.R. 607, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in *McGrath v. O'Driscoll* [2006] IEHC 195, [2007] 1 I.L.R.M. 203, the court may come to a final resolution of such issues. That the court is not obliged to resolve such issues is also clear from *Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes* [2010] IESC 22, (Unreported, Supreme Court, 22nd April, 2010)."

35. In my view, the various issues raised by the defendants in their defence of the plaintiff's claims are ones of construction of the documentation and statutory interpretation. In the course of the hearing of the motion for summary judgment, the Court had the benefit of detailed legal submissions from Mr. Rowland Rowan B.L., on behalf of the plaintiff, and Mr. Gary Fitzgerald B.L., on behalf of the first named defendant. Both parties delivered written submissions together with books of authority. I am satisfied that this Court was in a position to give a determination on the various issue raised and has done so in the course of this judgment.

36. By reason of the foregoing, the plaintiff is entitled to final judgment in the amount sought as against the first name defendant in respect of the sum of €29,000, that being the estimated sum of the counterclaim. As regards the overdraft claim against the second-named defendant, I will grant judgment for €25,000, that being the principal sum, but will remit the amount due for interest to plenary hearing.

37. I will hear the parties as to the form of the order to be made.