THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 2015 S.]

BETWEEN:

IRISH BANK RESOLUTION CORPORATION LIMITED

PLAINTIFF

AND

KEN DRUMM

DEFENDANT

JUDGMENT of Mr. Justice Herbert delivered the 30th day of July 2013

1. By a Consumer Hire Purchase Agreement in writing (regulated by the provisions of the Consumer Credit Act 1995), made on the 23rd January, 2006 and having a reference number 2318652, the plaintiff as owner, agreed to hire to the defendant as hirer, a B.M.W. x5 motor vehicle, registration number 05-D-36142 for a hire purchase price of €91,361.65 (declared cash price €78,950), payable by 48 monthly instalments of €1,170.63 on the 28th day of each successive month commencing on the 28th February, 2006, with a final payment of €35,000.

2. By a Notice of Substitution dated the 27th September, 2006, accepted by the plaintiff, the defendant substituted a Landrover Discovery motor vehicle, registration number 05-KE-1682 for the B.M.W. x5, registration number 05-D-36142 and thereby agreed to be bound by the terms and conditions of the original contract. An invoice dated the 28th September, 2006, records the supply of a Landrover Discovery, registration number 05-KE-1682 to the defendant for the sum of €75,000 less allowance for a B.M.W. x5, registration number 05-D-36142.

3. By a Business Hire Purchase Plan offered by the defendant on the 9th November, 2006, and accepted by the plaintiff on the 13th November, 2006, and bearing No. 2318652, the plaintiff as owner agreed to hire to Shrewsbury Developments Limited (of which, the defendant is a director) the Landrover Discovery, registration number 05-KE-1682 for a hire purchase price of €91,190.24 payable by 48 monthly instalments of €1,170.63 and a final instalment of €35,000. The stated cash price was €78,950.

4. After setting out the reference number, VAT number and a number of business addresses for the plaintiff, the Business Hire Purchase Plan contains the following:-

> "INDEMNITY
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> To: Anglo Irish Bank Corporation plc and its assigns (hereafter called "the Owner"), registered Office: Stephen Court, 18/21 St. Stephen's Green, Dublin 2. In consideration of your entering at my/our request into the annexed Hire Purchase Agreement (hereinafter called "the Agreement") which I/we have read in respect of the Goods therein described (hereinafter called "the Goods") with Shrewsbury Developments Limited (hereinafter called "the Hirer"). I/we undertake and agree as follows:
>
> (1) To indemnify you against any loss resulting from or arising out of the Agreement and to pay to you the amount of such loss on demand and whether or not at the time of demand you shall have exercised all or any of your remedies in respect of the Hirer or the Goods but so that upon payment in full by me/us of my/our liabilities hereunder I/we shall obtain such of your rights as you may at your discretion assign to me/us.
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> (2) The amount of your loss for the purpose of this indemnity whether or not the hiring period referred to in the Agreement shall have expired shall be the Hire Purchase Price plus all expenses you may incur in the exercise or enforcement of your rights under the Agreement or in connection with any done acts or in proceedings taken for the purpose of obtaining the return or possession of the Goods or any of them from any person whatsoever including, but with derogation from the generality of the foregoing any payment made to obtain the discharge of any repairer's or storer's lien over the Goods or any of them or the discharge of the liability of Hirer or any other person for repair of or in respect of storage thereof less the amount actually paid to you under the Agreement by the Hirer.
>
> (3) This indemnity and Undertaking shall in no way be affected by any time given or indulgence shown to the Hirer.
>
> (4) If the Indemnity and Undertaking shall be given by two or more persons the obligation shall be deemed to be joint and several.
>
> Signed by the Indemnifier (Signature of the defendant)
>
> FULL NAME [KEN DRUMM]
>
> PRIVATE ADDRESS (ADDRESS STATED)
>
> DATE [BLANK]"

5. Despite the statement in the Letter of Demand, dated the 30th March, 2012, from Arthur Cox, Solicitors, on behalf of Irish Bank

Resolution Corporation, formerly known as Anglo Irish Bank Corporation plc, that:-

> "On 13th November, 2006, the Bank assigned the Hire Purchase Agreement number 2318652 from Mr. Ken Drumm to Shrewsbury Developments Limited with the agreement of Mr. Drumm pursuant to an agreement executed on that date,"

I am satisfied on the exhibited documentary evidence that the plaintiff did not assign either its interest in the goods or its interest in the agreement. The various rights of the defendant under the Hire Purchase Agreement of the 23rd January, 2006, are a chose in action and there could have been an equitable assignment of those rights to Shrewsbury Developments Limited without any writing, provided such an intention could be ascertained from communications between them or from the course of conduct. However, the Agreements of the 23rd January, 2006 and the 19th November, 2006, are not the same save for the substitution of a new hirer. They have the same number (23128652), relate to the same goods, have the same hire-rent and are for the same hire period, but the terms and conditions and the hirer's declarations and acknowledgements are entirely different. The Agreement of the 23rd January, 2006, was regulated by the provisions of the Consumer Credit Act 1995, while the Agreement of the 13th November, 2006, is entirely outside the provisions of that Act.

6. During the course of argument, counsel for the plaintiff submitted that the terms, "assign" and "assignment" used in the grounding affidavit of Ciaran McAreavey was an inappropriate employment of those terms by a lay deponent. Counsel submitted that the true position was that the agreement of the 23rd January, 2006 had been terminated by mutual agreement of the plaintiff and the defendant and was replaced by a new agreement made at the request of the defendant and on foot of a personal indemnity furnished by him, by the plaintiff with Shrewsbury Developments Limited of which the defendant was a director.

7. I am satisfied for the reasons given by reference to the exhibited documentary evidence that there was no assignment or even novation in this case. The Agreement of the 13th November, 2006, is pleaded in the particulars at para. 2 of the special endorsement of claim on the summary summons. It contains both the Indemnity and the Business Hire Purchase Agreement entered into on foot of it. The additional reference to the agreement of the 23rd January, 2006, is redundant and may be regarded as irrelevant. The defendant does not deny his signature on the Indemnity or as a director on behalf of Shrewsbury Developments Limited, on the Business Hire Purchase Agreement of the 13th November, 2006.

8. I am satisfied that the alleged ground of defence to this aspect of the plaintiff's claim, that it has failed to produce and prove the assignment referred to at para. 7 of the grounding affidavit of Ciaran McAreavey, sworn on the 8th August, 2012, does not disclose even an arguable defence (*Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 at 623 per. Hardiman J.).

9. The plaintiff is entitled to judgment against the defendant for the sum of €55,996.37. However, I am satisfied that the defendant does have an arguable defence to the claim for interest in the sum of €1,655.10. Paragraph 2 thereof defines the "amount of your loss for the purpose of this indemnity" as:-

> "The hire purchase price plus all expenses you may incur in the exercise or enforcement of your rights under the Agreement or in connection with any done acts or in proceedings taken for the purpose of obtaining the return or possession of the Goods or any of them from any person whatsoever including but with derogation from the generality of the foregoing any payment made to obtain the discharge of any repairer's or storer's lien over the Goods or any of them or the discharge of the liability of the Hirer or any other person for repair off or in respect of storage thereof less the amount actually paid to you under the Agreement by the Hirer."

10. There is no reference in this formula to interest pursuant to the provisions of 3(c) of the Terms and Conditions of the Agreement. It is significant that this is described in the Letter of Demand dated the 30th March, 2012, to which I have already adverted as, "penalty interest".

11. The defendant claims that Agreement No. 5524113 made between him and the plaintiff on the 23rd July, 2007, was not, despite its form and terms, a simple borrowing of €20,000 by him repayable in 60 fixed instalments of €396 each. He asserts that it was an advance made to him by the plaintiff for the exclusive purpose of enabling him to purchase shares in the plaintiff, to which the plaintiff would solely look to recoup any sums due to it.

12. This Agreement states that it is a "Consumer Credit Agreement" regulated by the provisions of the Consumer Credit Act 1995. At s. 2(1) of the Act of 1995, "Credit Agreement" is defined as meaning:-

> "An agreement whereby a creditor [a person who grants credit under a credit agreement in the course of his trade, business or profession, including a group of such persons] grants or promises to grant to a consumer a credit in the form of a deferred payment, a cash loan or other similar financial accommodation."

13. The Agreement, in compliance with the provisions of s. 30 of the Act of 1995, is made in writing and is signed by the defendant as customer and is signed on behalf of the plaintiff and contains their respective names and addresses. There is no contract of guarantee relating to this transaction from the defendant or any other party. In compliance with the provisions of s. 30(2)(a) and s. 36 of the Act of 1995, it states on the front page under the caption, "IMPORTANT INFORMATION", -

> "N.B. you may withdraw from this agreement at anytime within 10 days of receiving this agreement or a copy of it."

14. This statutory right was waived by the defendant in accordance with the provisions of s. 50(2) of the Act of 1995 at Clause 6 of the Agreement which is a separate term of the agreement.

15. The Agreement, contrary to the provisions of s. 31(1) of the Act of 1995, does not state the rate of interest charged, the A.P.R. or the date or method of determining the date upon which each repayment instalment is payable. Clause 5 of the Terms and Conditions provides that "[t]he interest rate and the A.P.R. applicable to the loan shall be as specified in the schedule". There is no Schedule to the Agreement and the space provided for this information at Clause 4(6) and 4(7) of the Agreement is blank. Clause 3 of the Terms and Conditions provides that:-

> "REPAYMENT
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> The borrower shall repay the Loan to the Lender in accordance with the terms and conditions of this agreement and in particular shall punctually and without prior demand pay to the Lender the Repayment Instalments referred to overleaf the first such repayment to be made on the date specified overleaf and subsequent repayments to be made on the same date in each following month. In the event that the Borrower fails to make a Repayment Instalment on its due day the

> Borrower shall pay interest to the Lender thereon at the rate of 2% per month calculated from the due date to the date of actual receipt by the Lender."

16. At Clause 4(5) of the Agreement the space provided for these repayment details is blank. As noted, there is no schedule to the Agreement and this information is not furnished in the statutory notification on the front page. In a Letter of Demand, dated the 30th March, 2012, from Arthur Cox, Solicitors, it is stated that no instalment repayments had been made by the defendant after the 22nd January, 2010 and that the sum of €17,587.76 was then due. Additionally, pursuant to Clause 5 of the Agreement, interest at the rate of 2% per month on all overdue instalments from the due date was also claimed. The amount claimed for interest in the special endorsement of claim as of the 30th May, 2012, was €4,383.56.

17. Section 38 of the Consumer Credit Act 1995, provides as follows:-

> "ENFORCEABILITY
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> A creditor shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no security given by the consumer in respect of money payable under the credit agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements specified in this Part have been complied with:
>
> > Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable."

18. These present proceedings are an "action". The defendant raised no issue on these points. From the fact that 60 fixed repayment instalments were specified in the Agreement, both parties appear to have accepted that the period of the Agreement was as stated in the "Important Information" set out on the front page to be 60 months. From the reference in Term 3, "on the same date in each following month", the parties appear to have accepted that the repayment instalments were payable monthly: probably on the 24th day of each successive month as the Demand Letter refers to the fact that, "the full amount of the facility was drawn down by you on the 24th July, 2007". The defendant is a businessman and from the information contained in the Agreement would be able to calculate the rate of interest and possibly even the A.P.R. by reference to the provisions of ss. 9 and 10 of the Consumer Credit Act 1995.

19. I am satisfied on the affidavit evidence and in particular the exhibited documentary evidence, that the omission of this information in the Agreement was not deliberate and did not prejudice this defendant. I am satisfied that in these circumstances it would be just and equitable to dispense with the requirement and to permit unconditionally the enforcement of the Agreement against the defendant subject to the other alleged defences advanced by him.

20. The defendant claims that he was not handed a copy of the Agreement when it was made nor was a copy delivered or sent to him within 10 days of the 24th July, 2007, the date of acceptance by the plaintiff, or at all. By virtue of the provisions of s. 30 of the Act of 1995, this would render the agreement unenforceable as this requirement of s. 30(1)(a) is excluded from the relieving provisions of s. 38.

21. At no stage during the several meetings nor in the course of the extensive correspondence between the defendant and the plaintiff and the plaintiff's solicitors from the 18th May, 2011, to the 1st June, 2012, was an allegation of non compliance with the provisions of s. 30(1)(a) of the Act of 1995 raised by the defendant. It was first raised by him at para. 4.2 of the replying affidavit sworn on the 19th November, 2012 (the summary summons was issued on the 30th May, 2012), as follows:-

> "In particular the bank has breached several provisions of the Act, Sections 31 – 37 and more particularly on each and every occasion has breached Section 30 of the act. I intend to provide evidence including oral evidence that the bank has consistently failed in the requirements of the Act and has rendered any alleged agreement unenforceable as a result."

22. At para. 10 of his affidavit in response sworn on the 23rd November, 2012, Ciaran McAreavey states as follows:-

> "At paras. 4 and 5 of his Affidavit the Defendant states that the Plaintiff has breached *inter alia* sections 30 – 37 of the Consumer Credit Act. Despite the fact that the Plaintiff and the Defendant have been in on-going communication in relation to the outstanding balances on the five different credit facilities the subject of these proceedings for a considerable period of time, this is the first time that any suggestion has been made that the Plaintiff is in breach of its obligations pursuant to the Consumer Credit Act in relation to the Defendant. The Defendant does not provide any substantive evidence of these breaches but states that he intends to provide this evidence which shall render any agreements unenforceable. I refute entirely the allegation set forth by the Defendant. The Plaintiff has no reason to believe that it has acted in breach of its obligations under the Consumer Credit Act and there is no breach which the Defendant can identify which would render any agreements unenforceable."

23. At para. 6.2 of a further affidavit sworn by the defendant on the 20th March, 2013, he states that:-

> "I intend to provide independent evidence that this was a significant issue for the Plaintiff in that it was aware at all times before and during the period of the alleged agreements that a significant amount of its agreements were unenforceable due to the Plaintiffs failure to comply with the Act. In particular the Plaintiff has breached several provisions of the Act Sections 31- - 37 and more particularly on each and every occasion has breached Section 30 of the Act. I intend to provide evidence including oral evidence that the Plaintiff has consistently failed in the requirements of the Act and has rendered any alleged agreement unenforceable as a result."

and at para. 6.3 he continues as follows:

> "In seeking Summary Judgment the Plaintiff could have been expected by any reasonable person to produce on affidavit evidence that this assertion is untrue and without foundation. They have not done so. Despite this they continue to seek Summary Judgment in the full knowledge that all and every agreement is unenforceable under the Act where they have failed on each and every enforceability requirement including Section 30. I beg the Court not to allow them to ignore the provisions of the Act and answer the defence in a full hearing of the trial."

24. At para. 11 of an affidavit sworn by him on the 28th March, 2013, Ciaran McAreavey avers as follows:-

> "The Defendant also avers at para. 4.5 that the Plaintiff had no expertise in retail matters including its obligations under the Consumer Credit Act and that this is the 'context where they continually failed in dealing with transactions subject to the Consumer Credit Act'. I say that this is not accurate and furthermore that the assertion made is entirely unsupported by evidence. The Leasing Department of the Plaintiff, which department deals with hire purchase agreements entered into by the plaintiff including those at issue in the proceedings, comply with an in internal compliance procedure whereby, in respect of any credit agreement executed by a customer, that following the execution of that agreement the details of the agreement are entered into the computer system by a member of the team and the account is activated on the computer system. Thereafter, but within 10 days of the execution of the agreement, either a carbon copy attached to the agreement is detached or the agreement is photocopied and a copy sent by ordinary pre-paid post to the customer for their records in accordance with the requirements under s. 58 of the Consumer Credit Act. An affidavit has been sworn by Maria Treacy in the Leasing Department averring to the operation of this procedure within the Department."

25. In her affidavit sworn on the 28th March, 2013, Maria Treacy, manager of the plaintiff (in special liquidation) states as follows:-

> "4. I say that I have worked in the Leasing Department of the Plaintiff since 1995. I say that for all of the time that I have worked in the Leasing Department in the Plaintiff and internal compliance procedure has been in operation whereby, in respect of any credit agreement executed by a customer, following execution of that agreement, the details of the agreement are entered into the computer system by a member of the team and the account is activated on the computer system. Thereafter, but within 10 days of the execution of the agreement, either a carbon copy attached to the agreement is detached or the agreement is photocopied and the copy sent by ordinary pre-paid post to the customer for their records in accordance with the requirements under s. 58 of the Consumer Credit Act.
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> 5. I say that I have reviewed the Plaintiff's computer system and I have printed off copies of the account details of four of the agreements regulated by the Act entered into by the Defendant with the Plaintiff, which each show the date of activation of that account being within 10 days of the date of execution of that agreement and I say that as was the usual practice within the Leasing Department, a copy of the agreement would have been sent to the Defendant by ordinary pre-paid post thereafter but within 10 days of the execution of the agreement. I beg to refer to copies of those account statement upon which marked 'MT1' if have signed my named prior to the swearing hereof.
>
> 6 I say that in respect of agreement 2321084 and 2320176, a carbon copy was detached from the original agreement and sent to the Defendant and in respect of agreement number 5524113, this agreement did not include a carbon copy, but rather a photocopy would have been made and sent the Defendant instead."

26. I am satisfied that leave should not be granted to the defendant to defend the plaintiff's proceedings on this ground. I am satisfied that the averment of the defendant, "in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence" (see *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, per. McKechnie J. at 8). Between 24th July, 2007, when he drew down the €20,000, and the 30th March, 2012, when Arthur Cox, Solicitors, sent the Letter of Demand, during which period he had made a number of instalment repayments amounting to approximately €6,172.24, the defendant did not assert that this Agreement was unenforceable by reason of the fact that he had not been given or sent a copy. I find it significant that now for the first time during the course of these proceedings, he alleges that this occurred not just in the case of one, but in the case of three separate agreements and pursuant to which the plaintiff is seeking to recover sums advanced to him and not repaid; that is, under the Agreement of the 23rd July, 2007, a Hire Purchase Agreement made on the 16th October, 2008, and a further Hire Purchase Agreement made on the 17th October, 2008. In my judgment, all reasonably prudent and honest persons would be very concerned to be furnished by a financial institution with the copy of such an agreement and would complain volubly if it was not forthcoming. Of further significance is the fact that the defendant does not exhibit comprehensive and complete records of these transactions save for the absence of a copy of the Agreement itself. In argument, the defendant told me that if permitted to defend the plaintiff's claim on this ground, he would prove through discovery of documents and by cross examining any witnesses that the plaintiff might call in evidence that he was not given or sent a copy of any of these three agreements.

27. I am satisfied on the exhibited documents that this Consumer Credit Agreement No. 5524113 was a straightforward loan of money by the plaintiff to the defendant. The Agreement does not, nor does any prior or contemporaneous document state the purpose of the borrowing which is not shown by the defendant to have been spent on the purchase of shares in the plaintiff. The Agreement makes no reference to any form of security and does not require the provision of any such. The Agreement is not shown to have been made in consideration of any indemnity or guarantee or undertaking to deposit share certificates or any other securities.

28. I am satisfied that the plaintiff is entitled to judgment in the sum of €22,404.15 against the defendant on foot of this item of its claim.

29. Following discussions, by a Facility Letter and Credit Agreement dated the 24th January, 2008, the plaintiff made available to the defendant, "a bespoke/tailor made Loan Facility" of €50,000 to enable him to purchase shares in the plaintiff, "on the terms and conditions set out in the Credit Agreement, the General Conditions and in the Facility Letter", provided that if there was any conflict between the terms in the Facility Letter and the General Conditions, the terms in the Facility Letter would prevail. The particulars required to be given by the Consumer Credit Act 1995 are set out on the front page of the Credit Agreement. In his written acceptance dated the 28th January, 2008, the defendant waived the 10 day reconsideration period and his rights to withdraw from the Agreement under s. 30 and s. 50 of the Act of 1995. Paragraphs 3, 7 and 6 of the Facility Letter provides as follows:-

> "3. SECURITY
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> A first legal charge over the shares purchased by the Borrower under this facility and over the shares purchased by the Borrower from own funds of €25,000 (the "Shares") in the issued shared capital of Anglo Irish Bank Corporation plc. The Shares shall be transferred into the name of Anglo Irish Bank Nominees.
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> The security set out above and any other security provided by the Borrower to the Bank from time to time shall secure all sums now or from time to time due or owing by the Borrower to the Bank whether such liabilities arise from the Borrower's own borrowings or from its liabilities as guarantor of other borrowings from the Bank and shall secure all facilities howsoever arising including, without limitation, its indebtedness in relation to any bonds, guarantees, indemnities or other instruments entered into by the Bank for it or at its request or its liabilities to the Bank in connection with any interest rate or foreign currency hedging facility or any swap or other form of treasury facility.

7. REPAYMENT DATE

The Facility is repayable on demand which demand may be served at any time by the Bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the Facility shall be repaid by way of approximately 60 monthly capital and interest payments of €986.46 commencing 31st January, 2008. The Bank reserves the right to adjust the amount of such monthly payments should the Facility Interest Rate vary.

6. FACILITY INTEREST RATE

Interest on all amounts outstanding under the Facility will accrue daily and be calculated by the Bank at the annual rate equivalent to the aggregate of 2% (the "Margin") above THREE Month euribor plus RAC and will be debited to the Borrower's account at the end of each calendar month. The Borrower may request the Bank to fix EURIBOR on the Facility (or part thereof) for such period (each a "fixed period") as the Borrower and the Bank may agree. At the end of a Fixed Period the Facility Interest Rate shall accrue and be payable at a rate in accordance with the Agreement."

30. Clause 8 of the Facility Letter provided for an arrangement fee of €500 and Clause 9 for various costs, charges and expenses including default interest on unpaid amounts at the rate set out in condition 5 of the General Conditions. Condition 5 of the General Conditions Personal Loans under the caption, "Default Charges", provides as follows:-

"Any monies due by the Borrower to the Bank and for the time being unpaid will bear surcharge interest at the rate of 4% over the Facility Interest Rate or at the Bank's discretion at a rate equivalent to the aggregate of 4% over the Facility Interest Rate on the due date calculated on a daily basis from the due date to the date of actual payment after as well as before any demand is made, any judgment obtained hereunder or the bankruptcy or insolvency of the Borrower."

31. At paras. 5.9 and 5.10 of his affidavit sworn on the 20th March, 2013, the defendant avers as follows:-

"5.9 The Plaintiff limited its recourse to the security of both the shares purchased with the facility of €50,000 and further purchases of shares by me from my own funds of €25,000 giving the Plaintiff security for the facility of €75,000 value in shares. The security for the facility was strictly limited to this. The plaintiff did not specify that I would be personally liable for the facility should the shares decline (or ultimately prove worthless). The second paragraph further underpins this by specifically stating that the security is limited to the security as set out and any other security provided by the borrower to the bank from time to time. I provided no other security to the Plaintiff at any time and the plaintiff's recourse is limited to the shares. Furthermore, the shares purchased were held in a Davys Nominees Account on my behalf and the Plaintiff was informed of this and waived the requirement to hold the shares in an Anglo Nominees account. This is evidenced by the fact that they never at any time sought to put this requirement into effect.

5.10 The Anglo Nominees requirement denotes the intention of the initial set up of the account. This was in effect a margin account. The shares to be purchased were €75,000 at the current market price. The funding from the bank (which they initiated) was €50,000 with the remaining €25,000 being provided by the defendant. This effectively meant that the transaction was to reflect a 33% margin account with the bank exposed to 67% of the shares value (€50,000) and the holder exposed to 33% (€25,000) if the value of the total shares fell below their strike value of €75,000 the holders equity would be reduced continuing until the value reached €50,000 or under, at which time the bank now became at risk. The fact that the bank stipulated the holding of the shares in its Nominee Account meant that bank would have control over the shares and crucially, when to sell. Normally, in the circumstances that followed, the bank would sell the shares at some point before they fell below the €50,000 value and recovered their funding leaving the holder with a €25,000 loss. This is the reason the Letter of Offer required the shares to be held by Anglo Nominees. It is also the reason the Letter of Offer required no other security. For whatever reason that only the Plaintiff can explain to the Court it failed to protect its customer (Defendant) from losses or itself from losses. While this was negligent, they have no recourse to the Defendant. They had no tools to recover any loss from this account, but all the tools to limit or exclude losses before they happened (Read: the share price approaching a figure of 67% of their prior value at the time of the transaction). Accordingly, the plaintiff has no claim against the defendant in this matter, but the Defendant has a clear claim of breach of duty, negligence, misrepresentation and undue influence against the plaintiff."

32. In his affidavit sworn on the 30th April, 2013, the defendant exhibits a letter dated the 11th February, 2008, to him from an Assistant Manager of Lending Ireland, (name redacted), which states:-

"Following on from our conversation, please find enclosed a Letter of Pledge to be signed and returned, relating to the shares to be held as security by the Bank.

I trust that this is in order. Should you have any queries, please do not hesitate to contact me at 6162198."

33. The defendant further exhibits a Letter of Pledge which was executed by him on the 14th February, 2008. This Letter of Pledge provides as follows:-

"In consideration of your agreeing to grant banking facilities (the 'facilities') to ----------

I/we have deposited or cause to be deposited with or transferred to you (hereinafter referred to as 'the Bank') or your Nominees Company/Securities Custodial Certificates or other documents of title to or representing the Stocks, Shares and Securities mentioned in the Schedule hereto or the Script relating thereto as the case may be (hereinafter described as 'the Scheduled Securities') together with the instrument of transfer in respect of the Scheduled Securities in favour of the Bank, its Nominee Company/Securities Custodian or such other person as the Bank may decided and hereby Agree with the Bank as follows:-

1. On demand to pay to the Bank:

(a) All my/our present and future indebtedness to the Bank whether as principal or as surety on any current or other account with interest and Bank charges, and

(b) All my/our other liabilities whatsoever to the Bank direct or indirect and whether present, future actual or contingent, and

(c) all costs, charges and expenses howsoever incurred by the Bank in relation to this security or such indebtedness or liabilities on a basis of full indemnity.

And to pay interest thereon from date of demand until discharged in full at the Default Rate set out in the Bank's General Conditions applicable to the Facilities

3. The Bank shall hold the Scheduled Securities by way of a continuing security for the discharge of my/our liabilities to the Bank under Clause 1.

4. In case I/we fail to discharge on demand all my/our liability to the Bank under Clause 1, the Bank shall have an immediate and unrestricted power of sale over the Scheduled Securities."

34. By Clause 5 of the Letter of Pledge, the secretary for the time being of the Bank is appointed attorney to carry out a sale of the Scheduled Securities or any part thereof. Clause 6 provides that on discharge of the security or on the release to the defendant of the Scheduled Securities, the bank is not obliged to return the identical stocks, shares or securities and the defendant will accept stocks, shares or securities of the same class or denomination or any other stocks, shares or securities which then represent the Scheduled Securities. By Clause 6(b) the bank is empowered without notice to the defendant to vary the nominees or securities custodian by whom any of the Scheduled Securities might be held on their behalf from time to time.

35. At the hearing of this application it was common case between the plaintiff and the defendant that the plaintiff did not, despite the failure of the defendant to make any payment after the 5th September, 2008 (prior to which it may be inferred from the Letter of Demand, approximately six repayment instalments had been paid by the defendant), seek to realise its security. This Letter of Demand dated the 30th March, 2012, from Arthur Cox, Solicitors, on behalf of the plaintiff, demanded payment in full from the defendant within 21 days of €44,519.56 for principal and €6,568.48 for interest, then claimed due and owing by the defendant to the plaintiff on foot of the Loan Facility of the 24th January, 2008. It is averred at para. 21 of the affidavit sworn by Ciaran McAreavey on behalf of the plaintiff on the 8th August, 2012, that no payments have been made by the defendant and as of that date a sum of €44,519.56 for principal and a sum of €7,214.36 for interest was due and owing by the defendant to the plaintiff.

36. The defendant claims that he was an existing customer of the plaintiff in 2008 and that early in that year the plaintiff was actively encouraging customers to acquire shares in the bank. He claims that officers of the plaintiff, whom he named in the course of argument before me, orally represented to him and agreed that there would be no recourse to him personally for repayment of the loan or any part of it, for which, the plaintiff would look solely to the shares in the plaintiff purchased by him for €75,000 derived from the loan facility sum of €50,000 and €25,000 of his own funds and given by him as security for the borrowing in accordance with the requirements of Clause 3 of the Facility Letter.

37. The plaintiff's action in making some of the 60 monthly repayment instalments between the 28th January, 2008 and the 5th September, 2008, is entirely inconsistent and irreconcilable with this assertion. The bank security documents – the Credit Agreement document, the Loan Facility Letter and the Letter of Pledge (the latter two signed by the defendant) – do not contain any such agreement and, if the defendant is correct in his assertion, do not reflect the true agreement of the parties and would have to be "torn up or ignored" (see *Irish Life and Permanent plc trading as Permanent TSB v. Ronald Hudson and Miriam Hudson* [2012] IEHC 1 (Unreported, High Court, Ryan J., 13th January, 2012). There was no evidence before the Court that the defendant protested that these bank security documents did not reflect the true agreement between him and the plaintiff and he did not take proceedings to have them rectified to reflect what he now claims was the true agreement between them. The defendant has produced no documentary evidence at all to contradict the case advanced by the plaintiff based on clear commercial documentation.

38. Despite the Letter of Demand dated the 30th March, 2012, and the meetings and the extensive correspondence between the 18th December, 2011, and the 1st June, 2012, the first time this claim is made was at para. 6 of the replying affidavit sworn by the defendant in these proceedings in the 19th November, 2012. At para. 6 of this affidavit he avers as follows:-

"6. NON RECOURSE Term Loan Agreements

6.1 The bank sought a security for the alleged facility a first legal charge over the shares and no other security was sought or given. Recourse to the bank was to the shares alone, which were to be held by the bank in an Anglo Nominees Account. The bank had no recourse whatsoever to your deponent and the shares were subsequently vested in the Minister for Finance. The bank made clear when contacting me that the facility was for the purpose of shares and that no recourse was intended against me in the event that losses were incurred. It was pointed out to me that the security for the loans as set out in the letter of offer was strictly limited to the shares. Believing the bank and accepting their assurances I proceeded on this basis. The letter of offer clearly outlines this understanding with the security clause clearly indicating that recourse was to the shares alone.

6.2 As a result of the activities of the plaintiff and by reason of its failure to notify or disclose them, the plaintiff has been guilty of deceit and/or fraudulent misrepresentation. Such deceit and fraudulent misrepresentation was intended to induce and did, in fact, induce the defendant to enter into the agreements in suit. Accordingly the agreements are void and invalid and have no effect and ought to be set aside or rescinded.

6.3 I say and believe that the Court will take issue with the context and intent of the parties when the alleged agreement was made."

39. This is clearly a misinterpretation on the part of the defendant of Clause 3 of the Facility Letter which, *inter alia*, provides that:-

"The security set out above and any other security provided by the Borrower to the Bank from time to time shall secure all sums now or from time to time due or owing by the Borrower to the Bank."

40. The defendant also disregards the other provisions of the Facility Letter to which I have already adverted, in particular the provisions of Clause 7 which provides that the facility is repayable on demand, but without prejudice to that, by approximately 60 monthly capital and interest payments of €986.46 commencing on the 31st January, 2008. The sole purpose of Clause 3 of the Facility Letter is to assure the debt owed by the defendant to the plaintiff. It does not in any way exclude the personal liability of the defendant. It does not specify that payment was to be made solely out of a fund provided by the sale of the shares.

41. I am satisfied that it is very clear that the defendant has no defence to the plaintiff's claim based on these assertions and that

his affidavits do not disclose an arguable defence on this ground.

42. The defendant claims that despite non payment, the plaintiff negligently and in breach of a duty of fairness owed to him, acting exclusively in its own interests in accordance with a policy decision to avoid public sales of its shares, opted to take no action to realise its security and stood by while the shares, of which it had total control and in respect of which it had an express right and power of attorney to sell under the Letter of Pledge, fell to a zero value. In such circumstances he claims that it would be unjust and unconscionable to permit the plaintiff to pursue a remedy against him personally, particularly as the shares which he would be entitled to have returned to him are now worthless. At paras. 3.1 and 3.10 of his affidavit sworn on the 20th March, 2013, the defendant avers as follows:-

> "3.1 . . . The plaintiff has no recourse to the remaining two facilities other than the underlying security, which is clearly set out in the Letters of Offer. The security sought for these facilities was limited only to the shares being purchased and this was clearly put to the defendant at the time of entering into the alleged agreements. There is no circumstance where the Defendant would enter into any such agreements were this not the case. No other security was sought and no other security was given. Furthermore, in all of such transactions the bank includes what is known as 'Trigger Mechanism'. This means that the bank will sell the shares, being held in their nominee's account (unknown to the holder) and pay down any facility to recover their exposure. The holder will lose his or her equity unless the holder provides additional security to the bank to cover the loss on the value of the shares, ie. their security. This was effectively a margin account. The bank did nothing while its shares continued their slide to worthless indicating their negligence and their lack of duty of care to the Defendant."

> "5.10 . . . The fact that the bank stipulated the holding of the shares in its Nominee Account meant that the bank would have control over the shares and crucially, when to sell. Normally, in the circumstances that followed, the bank would sell the shares at some point before they fell below the €50,000 value and recover their funding leaving the holder with a €25,000 loss. This is the reason the Letter of Offer required the shares to be held by Anglo Nominees. It is also the reason the Letter of Offer required no other security. For whatever reason that only the Plaintiff can explain to the Court it failed to protect its customer (Defendant) from losses or itself from losses. While this was negligent, they have no recourse to the defendant. They had no tools to recover any loss from this account, but all the tools to limit or exclude losses before they happened (Read: the share price approaching a figure of 67% of their prior value at the time of the transaction". Accordingly, the plaintiff has no claim against the defendant in this matter, but the Defendant has a clear claim of breach of duty, negligence, misrepresentation and undue influence against the plaintiff."

43. It is arguable that the Letter of Pledge dated the 14th February, 2008, amounted to an equitable mortgage or at least to an agreement to execute a transfer of the shares in question by way of mortgage. It is arguable (and it has elsewhere been decided) that an equitable mortgagee owes the same duty to the mortgagor as a legal mortgagee, but that such duty arises in equity rather than in tort.

44. The decision in *China and South Sea Bank Limited v. Tan* [1989] 3 All. E.R. 839, is particularly in point in the present case. That decision has been repeatedly cited and followed in reported decisions. It was referred to in Governor and Company of the *Bank of Ireland v. Flanagan* [2012] IEHC 197 (Unreported, High Court, Ryan J.,14th May, 2012), but not considered as Ryan J. held that the facts of the case before him were entirely distinguishable from those in that case. In *China and South Sea Bank Limited v. Tan*, an advance of HK$30 million was secured by a mortgage of shares in a company and a deed of guarantee executed by Tan whereby he undertook as surety to repay the principal and interest. The debtor defaulted at a time when the shares were at least worth the amount of the loan. They subsequently became worthless. The bank made a claim against Tan as surety. He contended that he was not liable on the grounds that the bank ought to have known that the value of the shares was declining and it owed him a duty of care to exercise the power of sale conferred on it by the mortgage before the shares became worthless. Summary judgment in favour of the bank was given by the High Court of Hong Kong. The Court of Appeal of Hong Kong reversed this decision and granted Tan unconditional leave to defend the action. The matter was appealed to the Privy Council. The judgment of the Board was delivered by Lord Templeman (Lord Keith of Kinkle, Lord Ackner, Lord Oliver of Aylmerton and Lord Goff of Chieveley concurring). The judgment of the Privy Council is thus stated in the headnote of the report:-

> "The tort of negligence had not supplanted the principles of equity, nor did it contradict contractual promises or complement the remedy of judicial review or supplement statutory rights. Since the rights of a surety continued to depend on the principles of equity it followed that unless the security was surrendered, lost, rendered imperfect or altered in condition by reason of what had been done by the creditor the surety remained liable under his contract to pay the creditor if the debtors failed to do so, and the creditor was entitled to sue him instead of pursuing his claim against the debtor or selling the mortgage securities. Moreover, the creditor was not obliged to do anything and was not under a duty to exercise his power of sale over the mortgage securities at any particular time or at all and did not become a trustee of the mortgage securities and the power of sale for the surety unless and until he was paid in full. It followed therefore that since the bank did no act injurious to the surety or inconsistent with his rights and did not omit any act which its duty enjoined it to do the surety was liable under the contract of guarantee to pay the bank the principal sum advanced with interest. The appeal would therefore be allowed."

45. At p. 842 of the Report, paras. E. to H., Lord Templeman held as follows:-

> "The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock C.B. in *Watts v. Shuttleworth (1860*) 5 H. & N. 235 at 247-248, 157 E.R. 1171 at 1176, it appears to their Lordships that in the present case the creditor did no act injurious to the surety, did no act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all."

46. I was not referred to any case in this jurisdiction, nor am I aware of any, in which this issue has been examined and determined. I find the proposition that if the mortgagee exercises his rights he must act fairly towards the mortgagor, but in deciding not to

exercise those rights and to sit back and do nothing, he can entirely ignore the interests of the mortgagor, somewhat disconcerting. In *Palk and Another v. Mortgage Services Funding plc* [1993] 2 All. E.R. 481 at 487, paras B. to E., Sir Donald Nicholls V.C. held as follows:-

> "I have given two examples where the law imposes a duty on a mortgagee when he is exercising his powers: if he lets the property he must obtain a proper market rent, and if he sells he must obtain a proper price. I confess I have difficulty in seeing why a mortgagees duties in and about the exercise of his powers of letting and sale should be regarded as narrowly confined to those two duties. In addition to the mortgaged property, a mortgagee normally has a right of recourse against the borrower personally. He may also have the benefit of a guarantee from a third party. There is no problem when the borrower or guarantor can raise the necessary money, or the security available is adequate and readily realisable. Then the borrower should arrange to pay off his debt in full. The difficulty arises when that is not possible. Then the borrower is in the mortgagee's hands. Whether in that situation a mortgagee is at liberty to exercise his rights of leasing and sale in a way that in all likelihood will substantially increase the burden on the borrower or guarantor beyond what otherwise would be the case is not a question I need decide on this appeal, for a reason I will mention later. That he can act in such a cavalier fashion is not a proposition I find attractive. That is a question which may call for careful examination on another occasion."

47. In *Standard Chartered Bank v. Walker* [1982] 1 W.L.R. 1410 at 1415, Lord Denning considered that it was at least arguable that in choosing the time of sale a mortgagee must exercise a reasonable duty of care. It has been suggested, (*Fisher and Lightwood's Law of Mortgage,* (Butterworths, 11th Ed., 2002) pp. 571-572, note 2) that this is incorrect as the mortgagee is entitled to put his own interest first in realising his security.

48. In my judgment it could not reasonably be said that the defendant does not even have an arguable case on this alleged ground of defence. I will therefore give the defendant unconditional leave to defend this claim of the plaintiff for judgment for €51,733.92 on this ground.

49. The defendant also claims that this Agreement is unenforceable by virtue of the provisions of s. 38 of the Consumer Credit Act 1995, by reason of the failure of the plaintiff to comply with the mandatory requirements of s. 30(1)(a) of that Act in not handing to him at the making of the agreement or delivering or sending to him within ten days thereof a copy of the agreement. I have already addressed this ground of defence in dealing with the plaintiff's claim pursuant to Agreement No. 5524113 of the 23rd July, 2007 and I reject this submission as failing to disclose even an arguable defence for the reasons there stated.

50. The defendant asserts that he has a further *bona fide* defence to the plaintiff's claim. He says that the sum claimed for interest is miscalculated and is not due and owing by him to the plaintiff as alleged or at all. He asserts that the plaintiff's claim to interest is unenforceable, because the plaintiff fraudulently and consistently overcharged interest on his and thousands of other customer accounts for 15 to 20 years by illegally tampering with and manipulating LIBOR and EURIBOR cost-of-funds rates. He claims that this and other loan and mortgage accounts which he had with the plaintiff between 1993 and 2008 "are likely to have been affected by this". In addition to this alleged defence to the plaintiff's claims in the present proceedings, the defendant asserts that he has a *bona fide* counterclaim against the defendant for this alleged fraudulent overcharging of interest which, "once proven will be far in excess of any claim made herein by the bank" and also for damages for, *inter alia*, misrepresentation and undue influence.

51. At para. 10 of his affidavit sworn on the 19th November, 2012, the defendant states as follows:-

> "While I understand that a counterclaim alone may not provide a defence, I say and believe that damages arising from a successful counterclaim will underpin the unenforceable nature of contracts and agreements made with fraudulent intent and subsequently fraudulent practice."

52. At para. 17 and 18 of his affidavit sworn on the 23rd November, 2012, on behalf of the plaintiff, Ciaran McAreavey avers as follows:-

> "At para. 9 of his affidavit, the Defendant introduces a proposed counter-claim which he intends to make by reference to alleged overcharging by the Plaintiff on his accounts. No details of any wrongdoing are provided, except in the form of broad allegations of fraud and breach of contract in relation to interest over-charging arising from alleged Libor/Euribor manipulation. By way of explanation EURIBOR is a cost-of-funds rate which is used as a reference for the vast majority of the loans denominated in Euro which the Plaintiff provides to its customers. It is a matter of public record that the Plaintiff announced in September 2010, that it had determined that there had been some overcharging in relation to Libor/Euribor rates on certain variable rate loan agreements in the period from the 1st January, 1990 to 31st July, 2004. The Plaintiff has engaged in a rigorous process of quantifying the amount of overcharging in respect of each individual loan account and refunding any identified overcharging to each affected customer. I can confirm that the Defendant was not one of the affected customers identified. The defendant's claim that the particular amounts in respect of which the Plaintiff is seeking judgment are overstated is also refuted on the basis that:
>
> > '17.1 All of the agreements between the Plaintiff and the Defendant in respect of which the Plaintiff is seeking judgment, with the exception of the Credit Agreement/Term Loan No. 377257 dated the 24th January, 2008, were Hire Purchase Agreements or Credit Agreements in which the rate of interest was fixed rather than variable. Accordingly, the potential for any mis-statement of variable rates of interest does not arise; and
> >
> > 17.2 With respect to the sole variable rate agreement in respect of which the Plaintiff is seeking judgment (Credit Agreement/Term Loan No. 377257 dated the 24th January, 2008) This agreement commenced after the end of the period during which the Plaintiff has advised that overcharging occurred on certain Euribor-based variable interest rate loan agreements.
> >
> > 18. The Defendant does nonetheless acknowledge at para. 10 that an unrelated counterclaim does not provide a defence to a particularised claim for sums owing under an enforceable agreement when the Defendant is in default. I would agree with the Defendant in this aspect of his Affidavit. This unsubstantiated broad allegation cannot provide a defence in this case."

53. At para. 8 of the affidavit sworn by him on the 20th March, 2013, the plaintiff asserts that overcharging of interest by the plaintiff in relation to LIBOR and EURIBOR rates was not disclosed by the plaintiff in any public statement whatsoever and was not a matter in the public domain. At para. 8.3 of this affidavit the plaintiff avers as follows:-

> "The manipulation of LIBOR was known to the bank as the TIBOR rate. I intend to call as a witness Mr. Tiernan O'Mahony, the banks treasurer during the relevant period, to confirm my claims and to give an account as to how this practice affected all of the customer of the bank in all their dealing and how this effects the banks claims against me, the subject facilities of these proceedings, and all prior facilities."

54. The plaintiff's claim in this application is on foot of five separate and specific contractual agreements. It is not based on an account arising from a general course of dealing between the plaintiff and the defendant as banker and customer. The plaintiff is correct in its assertion that this Agreement alone (No. 377251 of the 24th January, 2008), provides for a variable rate of interest. Clause 6 of the Agreement states as follows:-

> "Interest on all amounts outstanding under the facility will accrue daily and be calculated by the Bank at an annual rate equivalent to the aggregate of 2% (the 'margin') above THREE MONTH EURIBOR plus R.A.C. and will be debited to the Borrower's account at the end of each calendar month.
>
> The Borrower may request the Bank to fix EURIBOR on the Facility (or any part thereof) for such period (each a 'Fixed Period') as the Borrower and the Bank may agree. At the end of a Fixed Period the Facility Interest Rate shall accrue and be payable at a rate in accordance with the Agreement."

55. In each of the other agreements the rate of interest stipulated is a fixed rate which was accepted by the defendant by executing the particular agreement.

56. Agreement No. 377257 also, in fact, provides for fixed monthly payments of €986.46 commencing on the 31st January, 2008. The variable rate only applies to "amounts outstanding". It is pleaded in the special endorsement of claim and stated at para. 19 of the grounding affidavit of Ciaran McAreavey sworn on the 8th August, 2012, and, not denied by the defendant that, "despite repeated requests no further payments have been made since the 5th September, 2008". No interest at this variable rate has therefore in fact been paid by the defendant. On receipt of the letter of demand dated the 30th March, 2012, (which is not denied), the defendant did not challenge or request a breakdown of the sum of €6,587.48 then claimed due for interest. Despite the assertion by Ciaran McAreavey on affidavit to which I have already referred, that no over charging in relation to LIBOR or EURIBOR rates took place after the 31st July, 2004, the defendant has never, even in these proceedings, sought a breakdown of the sum of €7,214.36 now claimed due for interest. I am satisfied that the defendant has not shown even an arguable defence on this particular ground.

57. I find that the counterclaim which the defendant maintains he has against the plaintiff, based on alleged overpayments of interest by him on, "other loan and mortgage accounts" from 1993 to 2008, does not, and for the reasons I have already given, cannot stem from the agreements upon which the plaintiff's claim is based in the present proceedings but from an alleged, albeit unidentified, series of, "other loan and mortgage accounts" between the defendant and the plaintiff. I am satisfied that this is an independent claim against the plaintiff. It does not afford the defendant a defence to the instant claim (*Moohan and Bradley t/a Bradley Construction v. S. and R. Motors (Donegal) Limited* [2008] 3 I.R. 650 at 655/656 *per*. Clarke J.).

58. There remains the issue of whether execution of any judgment in favour of the plaintiff in this action should be stayed to see if the alleged counterclaim is successful as the defendant may be able to set-off some or all of any judgment obtained on such counterclaim against the plaintiff's claim in these proceedings. This is a matter for the discretion of the Court to be exercised in accordance with the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle* (Unreported, Supreme Court, 31st July, 1957) where (p. 25) he held as follows:-

> "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 until after the counterclaim had been heard, for the plaintiff having received payment but used 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 exercise of this discretion."

59. There is no evidence that this particular plaintiff would be unable to satisfy in full any judgment which the defendant might obtain on the alleged counterclaim. In the course of argument the defendant accepted that the total amount of any such overpayment of interest made by him to the plaintiff would not be greater than approximately one quarter of any LIBOR or EURIBOR based interest paid by him on these, "other loan and mortgage accounts". Further, it cannot be inferred (as evidenced by the provisions of Agreement No. 377257 of the 24th January, 2008) that all interest paid by the plaintiff to the defendant on foot any such, "other loan and mortgage accounts" was based on variable interest rates calculated by reference to LIBOR or EURIBOR rates.

60. Not even one such "other loan or mortgage account" in the period 1993 to 2008 which was subject to variable interest rates calculated by reference to LIBOR or EURIBOR rates has been identified by the defendant even without reference to the actual sum paid by him to the plaintiff by way of interest on any such account. In particular, having regard to what is stated on oath at para. 17 of the affidavit of Ciaran McAreavey sworn on the 23rd November, 2012, which I have cited earlier in this judgment, no such "other loan and mortgage accounts" between 1993 and 31st July, 2004, have been identified by the defendant. In this para. 17 of his affidavit Ciaran McAreavey accepts that there had been some overcharging by the plaintiff on certain variable rate loan agreements between the 1st January, 1990 and the 31st July, 2004. However, he goes on to state that:

> "The Plaintiff has engaged in a rigorous process of quantifying the amount of overcharging in respect of each individual loan account and refunding any identified overcharging to each affected customer. I can confirm that the Defendant was not one of the affected customers identified."

61. By way of reply, in an affidavit sworn by him on the 30th April, 2013, the defendant states, at para. 15, that "the Bank has made no reply to the allegation that its treasury department referred to the fraudulent rate as the TIBOR rate, - meaning the banks fraudulent version of EURIBOR". He further exhibits a para. 16 of this affidavit, a letter dated the 30th April, 2013, from a director of Acquiring Solutions Limited incorporating Bank Check-searching-solving-saving, of Suite 409, City East Business Centre, 68-72 Newtownards Road, Belfast, which states as follows:-

> "Dear Ken
>
> I write to confirm that my company has been involved in the investigation of interest charges to customer bank accounts

since 1997.

During this time we have extensively audited a large number of Anglo Irish Bank accounts and found interest overcharging in every account. Please note that the claims made extend to accounts not only in but beyond the jurisdiction of Ireland.

Should you require clarification on the above please do not hesitate to contact me.

Yours sincerely."

62. At para. 16 of his affidavit sworn on the 30th April, 2013, the defendant avers as follows:-

> "I am informed that the results of this extensive audit were sent to the bank directly and the bank has possession of it. I have also received confirmation from Bank Check that they will provide me with a one hundred and fifty page report detailing EURIBOR, LIBOR and 360/365 day fraud in the bank which I will exhibit to the Court when received shortly. If established, no account or loan issued by the plaintiff bank to any client is enforceable including your deponents and a significant counterclaim is inevitable and will arise."

63. Significantly, in my judgment, there is no evidence that this company, incorporated in Northern Ireland, has investigated or been asked to investigate any such, "other loan and mortgage accounts" of the defendant with the plaintiff from 1993 onwards. As is plain from the terms of para. 17 of the affidavit sworn by the defendant on the 30th April, 2013, this letter to the defendant from Acquiring Solutions Limited, also dated the 30th April, 2013, was written after the first hearing of this application by me following referral to this Court by the Master of the High Court. Apart from contesting the statement made by Ciaran McAreavey at para. 17 of his affidavit sworn on the 23rd November, 2012, that:-

> "It is a matter of public record that the Plaintiff announced in September, 2010, that it had determined that there had been some overcharging in relation to LIBOR/EURIBOR rates on certain variable loan agreements in the period from the 1st January, 1990, to the 31st July, 2004."

the defendant offers no explanation why this claim of overcharging of interest was only first raised by him in his replying affidavit sworn on the 19th November, 2012, to the grounding affidavit of Ciaran McAreavey sworn on the 8th August, 2012, even though the Demand Letter is dated the 30th March, 2012, and there had been extensive communications between him and plaintiff over the previous twelve months.

64. The basis of the alleged counterclaim appears to be that the plaintiff overcharged interest on a large number of accounts from at least 1993 onward and therefore, despite what is stated by Ciaran McAreavey at para. 17 of the affidavit sworn by him on the 23rd November, 2012, the defendant is likely to have been affected by this overcharging and to have overpaid interest on "other loan and mortgage accounts" with the plaintiff and, that even if this does not transpire to be the case, because the plaintiff overcharged interest to other customers by reference to an alleged fraudulent TIBOR rate, "no account or loans issued by the plaintiff bank, to any client, is enforceable including your deponents."

65. This is a claim by the plaintiff for the repayment of €44,519.45 being the balance outstanding of a sum of €50,500 lent by the plaintiff to the defendant on the 24th January, 2008, together with a sum of €7,214.36 for interest. In my judgment the suggested counterclaim based on alleged overcharging of interest to the defendant is founded on conjecture and, even if totally successful would result in the sum claimed for interest being reduced by not more than a quarter.

66. In my judgment the remedy for overcharging of interest calculated by reference to the EURIBOR rate, where right to charge to such interest is reserved to the plaintiff by the agreement, is damages at common law for breach of an implied term that the EURIBOR rate would be properly applied by the plaintiff. I am satisfied that this is so, even if the behaviour of the plaintiff could properly be described as cynical and deliberate. Such a breach if the agreement was not yet fully performed would not relieve the defendant of further performance. However, it is a reasonable inference that the agreements entered into between the plaintiff and the defendant with regard to the, "other loan and mortgage accounts" to which he refers and, in respect of which he now alleges overcharging of interest by the plaintiff and consequently overpayment of interest by him, have all been fully performed. Subject to any limitation issues as might arise, the defendant, if overcharging of interest by the plaintiff were to be established, would be entitled to be placed in the same position, so far as money compensation can, as if the plaintiff had properly assessed the rate of interest. The defendant would be entitled to the return of any money overpaid by way of interest to the plaintiff and perhaps also to simple interest for loss of use of this money. However, on the affidavit evidence before the Court on this application I could not be satisfied that the defendant has established even a reasonable possibility of succeeding in this alleged counterclaim.

67. The defendant and the plaintiff entered into two Hire-Purchase Agreements, (each regulated by the Consumer Credit Act 1995); No. 2321076, made on the 17th October, 2008, and No. 2321084, made on the same date. In Agreement No. 2321076, the hire goods was initially a BMW 535 motor car, but a Mercedes CLS350 was substituted for this by agreement of the parties on the 22nd May, 2009. In Agreement No. 2321084 the hire goods was a VW Toureg motor car.

68. By Notice dated the 30th March, 2012, Arthur Cox, solicitors on behalf of the plaintiff, notified the defendant that Agreement No. 2321076 provided that he would make 36 monthly repayments of €976.41 each, followed by a final instalment of €20,000 equivalent to the total hire purchase price of €55,322.17 and, that as he had made no repayment since the 18th February, 2010, a sum of €53,398.12 together with contract interest at 2% per month on all overdue instalments, then amounting to €7,213.80, was due to the plaintiff. This notice further stated that the plaintiff regarded the hire purchase agreement as terminated by repudiatory breach on the part of the defendant. This notice further stated as follows:-

> "You are obliged to return the vehicle to the bank forthwith but you have informed a representative of the Bank verbally that the BMW 535 [sic] which is the subject of the Hire Purchase Agreement has been sold to a third party. Pursuant to the terms of the Hire Purchase Agreement, you are not the owner of the vehicle and the vehicle remains the property of the Bank. The Hire Purchase Agreement expressly prohibits the sale or an attempt to sell or dispose of the vehicle. To date, despite requests, you have refused to provide the Bank with any detail of this purported sale of the vehicle to a third party. In that regard, please provide in writing a response to the matter set out below, and subject to that response, the Bank's position is fully reserved in relation to seeking an order for possession and/or report in the matter to the relevant authorities:-
>
> 1. Was the vehicle sold to a third party?

2. If so, when was the vehicle sold and how much was paid for the vehicle?

3. What is the name and address of and/or any other contact details of that third party?"

69. A similar notice of equal date was sent by these solicitors to the defendant in respect of Agreement No. 2321084, save that the monthly repayments in this case were €815.66 with a final instalment of €8,000, equivalent to the total hire purchase price of €37,363.76 and the amount claimed due and owing was €36,045.23 together with interest of €6,216.08 on overdue instalments since the 18th February, 2010. In both notices the interest is referred to as "penalty interest".

70. At paras. 17 and 18 of his affidavit sworn on the 30th April, 2013, during the course of this application, the defendant states as follows:-

> "17. Finally, the plaintiff confirmed in direct evidence to the Court at the hearing on the 8th April, 2013, that the disputed HP accounts are in fact not terminated and still in force. The plaintiff again, when the Court queried this, clearly and unambiguously confirmed that the Plaintiff had terminated none of the disputed accounts. No termination has been exhibited by the plaintiff in its pleadings and no termination is in force.
>
> 18. Accordingly, as per the terms of the Statutory Notice to Hirer Section 5 of the agreements 2321076 and 2321084 I have sent formal notification to the Plaintiff bank and to Arthur Cox, Solicitors for the plaintiff of Termination of the agreements effective as on the 18th February, 2010, or if directed by the Court, as of the date of the Notice being the 30th April, 2013. The terms of Section 5 are now applicable and my defence remains in place for any claim the Plaintiff bank may wish to bring on foot of these terminations. . . ."

71. In each case the exhibited document, served by registered post, refers to the relevant hire purchase agreement and, under the caption, "TERMINATION NOTICE" states as follows:-

> "Dear Sirs,
>
> I hereby issue a Notice of Termination in respect of the above numbered and dated Hire Purchase Agreement pursuant to Clause 5 of the agreement and/or pursuant to the Consumer Credit Act 1995.
>
> The date of Termination is 18th February, 2010, and is effective as of this date or at the latest the date of this notice herein.
>
> Signed
>
> Ken Drumm
>
> 18/02/2010
>
> Effective Date."

72. Clause 7.1 of each hire purchase agreement under the caption, "Termination by Owner" provides as follows:-

> "Subject to Section 54 of the Consumer Credit Act 1995, the Owner may terminate the Agreement or treat any other right conferred on the Hirer as determined restricted or d--------- if the Hirer breaks any of the terms of this Agreement or defaults in prompt payment of --------- payable or if any of the information provided by the Hirer is incorrect or untrue." [The absent words are not legible in the photocopy agreements exhibited in the Affidavit of Ciaran McAreavey sworn on the 8th August, 2012].

73. Section 54(2)(a) of the Consumer Credit Act 1995, provides that an owner shall not, by reason of any breach by a consumer of an agreement, determine that agreement unless he has served on the consumer not less than 10 days before he proposes to take any action a notice specifying *inter alia* the following:-

> "(v) the nature of alleged breach, [and,]
>
> (v) either –
>
> (I) if the breach is capable of remedy, what action is required to remedy it and the date before which that action is to be taken, which date shall be not less than 21 days after the date of the service of the notice, or
>
> (II) if the breach is not capable of remedy, the sum, if any, required to be paid as compensation for the breach and the date before which it is to be paid, which date shall be not less than 21 days after the date of service of the notice; and
>
> (vi) information about the consequences of failure to comply with the notice."

The section goes on to provide that if the consumer takes the action specified before the date specified for that purpose in the notice, the breach shall be treated as not having occurred in any records maintained for information.

74. As no prior notice in compliance with the provisions of s. 54(2) of the Act of 1995 was served by the plaintiff on the defendant, these notices dated the 30th March, 2012, cannot constitute a valid termination of the hire purchase agreements by the plaintiff pursuant to this contractual right. Section 63 of the Consumer Credit Act 1995, makes provision for the termination of a hire purchase agreement by the hirer by a notice in writing given at any time before the final payment under the agreement falls due. However, subs. (5) of s. 63 further provides that, "Nothing in this section shall prejudice any right of a hirer to determine a hire purchase agreement otherwise than by virtue of this section". Clause 7.2 of the terms and conditions in each of the hire purchase agreements expressly provides that the hirer at any time before the final payment falls due may determine the agreement (subject to certain payments) by, "delivering up the goods to the owner's place of business or by surrendering the goods to the owner's authorised agent."

75. The defendant claims at para. 5.4 of his replying affidavit sworn on the 19th November, 2012 and at para. 4 of his supplemental

affidavit sworn on the 20th March, 2013, that in April 2010 and thereafter, he endeavoured unsuccessfully to terminate these agreements by surrendering and returning the goods to the plaintiff. He asserts that when he complained that he had received no response to this offer (which he accepted at the hearing of this application before me, had been made orally), Mr. Anthony Burke, a manager of the plaintiff, had orally responded, "Its crazy in here – we'll get back to you". He claims that the plaintiff never got back to him. In support of this averment he contends that the plaintiff had never sought to terminate the hire purchase agreements in accordance with Clause 7.1 of the terms and conditions of those agreements. The plaintiff avers at paras. 6 and 7 of the affidavit of Ciaran McAreavey sworn on the 28th March, 2013, that the defendant never sought to terminate these two hire purchase agreements in accordance with the provisions of Clause 5 of those agreements.

76. It was submitted by counsel for the plaintiff that the detailed record of communications (including telephone attendances), between the plaintiff and the defendant in the period 20th May, 2011, to the 30th March, 2012, exhibited in the affidavit of Ciaran McAreavey sworn on the 8th August, 2012, is entirely inconsistent with any such alleged oral offer to surrender the goods the subject matter of these two hire purchase agreements on or after April 2010. In brief summary, these communications record as follows:-

> "On the 8th June, 2011, the defendant was seeking the consent of the plaintiff to substitute an Audi 2.1L motor car for the Mercedes Benz CLS 350 motor car, claiming that the running costs of the latter were too expensive and he was driving a lot trying to drum up business.
>
> On the 20th September, 2011, the plaintiff informed the defendant that it would not agree to this substitution as he was in default with the repayments. The defendant indicated that he should be in a position to commence repayments that month.
>
> On the 3rd February, 2011, the plaintiff noted that the defendant wished to make a voluntary surrender of the Landrover motor vehicle, (subject to hire purchase agreement No. 2318652, 23rd June, 2006), and forwarded to him a template for a voluntary surrender letter which he should complete, sign and hand over with the vehicle. The plaintiff noted the defendant's statement that he had disposed of the Mercedes Benz CLS 350 and the VW Touareg motor cars in early January 2012, for approximately €8,000, and sought information not later than the close of business on Monday the 6th February, 2012, confirming the date of disposal and the identity of the person or company that took possession of the vehicles. The plaintiff requested that the defendant forthwith remit to the plaintiff the gross amount of money received by the defendant which, "we will apply as a payment against the asset finance on these vehicles".
>
> On the 6th February, 2012, the plaintiff repeated this request.
>
> On the 6th February, 2012, the defendant replied that he had sought advice from a solicitor who insisted that any proceeds of sale be lodged to that solicitor' client account for transmission to the plaintiff, 'once all matters are agreed'.
>
> On the 6th February, 2012, the plaintiff requested that this solicitor write to the plaintiff without further delay and stated:-
>
> > 'You have made requests to the Bank to permit you to switch the asset finance onto other vehicles that might be cheaper for you to run. The Bank has engaged in consideration of these requests and declined them as you are making no servicing payments on any of your loans or Hire Purchase Agreements from IBRC. Accordingly, I consider that it is not correct to say that the Bank has "refused all engagement" with respect to your loans.
> >
> > Refusal of your substitution request by the Bank does not entitle you to 'sell' the vehicles in question given that under the Hire Purchase Agreements the ownership of the vehicles vests in the Bank. I have set out in my previous e-mails the Bank's requirements and your solicitor should consider these requirements and respond accordingly.'
>
> On the 10th February, 2012, the plaintiff wrote to the defendant in more extensive but similar terms, concluding as follows:-
>
> > 'Finally, no repayments have been made by you in relation to any of your outstanding loans to the Bank for some considerable time and given the recent developments in relation to the apparent disposal of the Bank's assets without its prior knowledge or consent, the Bank is fully reserving its rights to take whatever action is necessary against you including issuing legal proceedings seeking Judgment for the outstanding debt, the enforcement of that judgment and seeking the legal costs of taking such action.
> >
> > This correspondence should be brought to the immediate attention of your solicitors and we are seeking your immediate response to the matters set out therein.'
>
> On the 28th February, 2012, 28th March, 2012 and the 30th March, 2012, the plaintiff sent further communications to the defendant. The communication of the 30th March, 2012, contains the following statement:-
>
> > 'Given your failure to substantively engage with the Bank despite frequent requests, I note that we have instructed our solicitors to issue demand letters in respect of the loan agreements and asset finance agreements.'
>
> On the 30th March, 2012, 'letters of demand' of equal date were sent by Arthur Cox, solicitors on behalf of the plaintiff to the defendant."

77. Having regard to this documentary evidence, which has not been brought into question by other affidavit evidence, I am satisfied on the balance of probabilities and I find that the defendant did not seek to determine these hire purchase agreements by delivering up the goods to the plaintiff's place of business or by surrendering the goods to the plaintiff's authorised agent in accordance with the provisions of Clause 7.2 of the terms and conditions of the agreements. I am satisfied that the failure of the defendant to pay so many instalments which he was contractually required to pay promptly, and for such a long period of time and his dealing with the goods in breach of the provisions of Clause 6(e) of the terms and conditions of the agreements, amounted to a repudiation by him of the agreements and therefore entitled the plaintiff to terminate the agreements without having to resort to the provisions of Clause 7.1 (note) or Clause 2 thereof. Clause 2 provides that any failure by the hirer to make payment of any instalment or any other sum of

money or part thereof to the owner on the due date for the payment of the same may subject always to the provisions of the Consumer Credit Act 1995, be treated by the owner as a repudiation by the hirer of the agreement. However, even in the case of a repudiation by the defendant of the agreements, termination of the agreements was achieved by the act of the plaintiff in accepting that repudiation. Regardless of the employment of the words, "we are instructed to notify you that the Bank considers that the Hire Purchase Agreement has been terminated", I am satisfied that these letters of the 30th March, 2012 were a termination by the plaintiff owner of the agreements by accepting the repudiation of the defendant.

78. The letter dated the 10th February, 2012, from the plaintiff to the defendant may not comply with the provisions of s. 54(2)(v)(2) of the Consumer Credit Act 1995, in that it does not specify the sum required to be paid as compensation for the irremediable breaches of the agreement (the failure of the defendant to make repayments for a considerable time and his disposal of the hire goods in early January, 2012, for an alleged sum of €8,000 without the prior knowledge or consent of the plaintiff) or the date before which such compensation was to be paid being not less than 21 days from the receipt of the letter. The final two paragraphs of the letter states as follows:-

> "Finally, no repayments have been made by you in relation to any of your outstanding loans to the Bank for some considerable time and given the recent developments in relation to the apparent disposal of the Bank's assets without its prior knowledge or consent, the Bank is fully reserving its rights to take whatever action is necessary against you including issuing legal proceedings seeking Judgment for the outstanding debt, the enforcement of that judgment and seeking the legal costs of taking such action.
>
> This correspondence should be brought to the immediate attention of your solicitors and we are seeking your immediate response to the matters set out therein."

79. It may well be that the provisions of s. 54(2) of the Consumer Credit Act 1995, do not apply to a situation where the hirer has repudiated the agreement and the owner accepts that repudiation in exercise of its contract law right in that behalf and not relying upon any right contained in the agreement and thereby terminates the agreement. However, I am satisfied that the letter of the 10th February, 2012, complied very substantially with the provisions of s. 54(2) of the Consumer Credit Act 1995, and that the defendant was not placed at any disadvantage as a consumer by reason of the indicated non compliance. The affidavits filed by the defendant in this application demonstrated that the defendant was fully alert to his rights under the hire purchase agreements and under the Consumer Credit Act 1995, and additionally, had sought advice from a solicitor in that regard prior to the 6th February, 2012. In these circumstances I am satisfied that it would be just and equitable to dispense with the provisions of s. 54(2)(v)(II) of the Act of 1995, in accordance with the provisions of s. 54(4) of that Act.

80. I do not accept that counsel for the plaintiff accepted in argument that the hire purchase agreements had not been terminated. Such a statement would run contrary to the express notification to the defendant in the letters of the 30th March, 2012, that, "the Bank considers that the Hire Purchase Agreement has been terminated", and would be of no effect. I understood counsel to be making the case that the hire purchase agreements had been repudiated by the defendant and that the plaintiff terminated the agreements but only by accepting that repudiation.

81. All sums due on foot of each hire purchase agreement were due prior to the termination of the agreements on the 30th February, 2012. Section 62(1)(d) of the Consumer Credit Act 1995, provides that any provision in any hire purchase agreement whereby a hirer, after the determination of the hire-purchase agreement or the bailment in any manner whatsoever, is subject to a liability which accedes the liability to which he would have been subject if the agreement had been determined by him under Part VI of the Act shall be void.

82. Section 63(2), (3) and (4) provides as follows:-

> "(2) Where a hire-purchase agreement has been determined under this section, the hirer shall, without prejudice to any liability which has accrued before termination, have the option to either –
>
> (a) pay the amount, if any, by which one-half of the hire-purchase price exceeds the total of the sums paid and the sums due in respect of the hire-purchase price immediately before termination, or such less amount as may be specified in the agreement, or
>
> (b) purchase the goods by paying the difference between the amount already paid under the agreement and the hire-purchase price after the latter amount has been reduced in accordance with section 52 or 53 , or such lesser amount as may be specified in the agreement.
>
> (3) Where a hire-purchase agreement has been determined under this section, the hirer shall, if he has failed to take reasonable care of the goods, be liable to pay for the failure.
>
> (4) Where a hirer, having determined a hire-purchase agreement under this section, wrongfully retains possession of the goods, then in any action brought by the owner to recover possession of the goods from the hirer, the court shall, unless it is satisfied that having regard to the circumstances it would not be just and equitable so to do, order the goods to be delivered to the owner, without giving the hirer the option to pay the value of the goods."

83. Clause 7.3 of the Terms and Conditions of each of the Hire Purchase Agreements under the caption, "Entitlement of the Owner on Termination" provides as follows:-

> "(a) On termination of this Agreement subject to the rights of the Hirer as set out in the Statutory Notices contained herein, the Owner is entitled to immediate return of the goods and the Hirer shall pay to the Owner:
>
> (i) all rental payments then due to the date of termination;
>
> (ii) interest due on any rental payments not paid on their due date;
>
> (iii) damages for damage suffered by the Owner by reason of the failure of the Hirer to take reasonable care of the goods;
>
> (iv) the amount, if any, by which one half of the Hire Purchase Price exceeds the total of the sums paid together

with the sums immediately due before the date of termination

(b) the provisions of this clause have no relevance to the facts of the instant case."

84. These provisions do not, in my judgment, conflict with the provisions of s. 62(1)(d) of the Act of 1995, which in any event may not have any application on the facts of the present case.

85. In the present case, the plaintiff claims the balance of rental payments due at the date of termination (€53,398.12 on Agreement No. 2321076 and €36,045.23 on Agreement No. 2321084) together with interest on those rentals at the rate provided for in Clause 2 of the terms and conditions of the agreements as follows:-

> "The Hirer shall pay interest at the rate of 2% per month on all overdue instalments from the due date until payment thereof . . ."

86. The plaintiff's right to rental instalments due and in arrears at the date of termination remains unaffected by the acceptance by the plaintiff of the defendant's repudiation of the hire purchase agreements and such instalments are recoverable by an action for breach of contract. Though the form of the plaintiff's claim in the instant case is merely for instalments in arrears, I am satisfied that in substance it is a claim for a like amount of money by way of damages for breach of contract. No issue was raised in this application or during the course of these proceedings as to whether the plaintiff's claim in this regard is a debt arising upon a contract and so within the provisions of O. 2 r. 1 of the Rules of the Superior Courts.

87. I am satisfied that while the plaintiff is entitled to judgment for €53,398.12 and for €36,045.23 judgment cannot be entered for the plaintiff's claim for interest, un the sum of €7,213.80 on Hire Purchase Agreement No. 2321076, 17th October, 2008 and in the sum of €6,216.08 on Hire Purchase Agreement No. 2321084, 17th October, 2008, and that this aspect of the claim must be referred to a plenary hearing together with the other issues hereinbefore identified.

88. Accrued interest, pursuant to the provisions of Clause 2 of the terms and conditions of each hire purchase agreement, up to the date of termination on the 30th March, 2012, would be a sum due and payable by the defendant to the plaintiff. Clause 2 provides as follows:-

> "The Hirer shall pay interest at the rate of 2% per. month on all overdue instalments from the due date until payment thereof. . . ."

89. To this extent it could constitute part of a claim for damages for the defendant's repudiation of the agreements. As already indicated I am satisfied that the plaintiff's claim in this application is in substance a claim for such damages. The fact that this interest is described in each of the letters dated the 30th March, 2012, which I have found to be letters of termination, as "penalty interest", is not conclusive that it is in fact a penalty and not a *bona fide* attempt to compensate the plaintiff, without the difficulty and costs of proving actual damage, for loss arising due to late payment of instalments. However, it does place the onus on the plaintiff to demonstrate that it is not in fact a penalty clause. If the Court were to be satisfied that it was a penalty clause it would not allow the claim, but might well allow so much of the claim as it was satisfied by evidence represented the actual loss to the plaintiff for non payment of each of the instalments from due date to the 30th March, 2012.

90. There will therefore be judgment in favour of the plaintiff in the sum of €167,843.87 together with interest pursuant to statute. The plaintiff's other claims will be remitted for hearing by way of plenary proceedings. The Court will hear the parties on the issue of directions and costs.