Neutral Citation: [2017] IEHC 626

THE HIGH COURT

[2014 No. 3083 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

MICHAEL KELLY

AND

WILLIAM SULLIVAN

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 3rd day of October, 2017

1. This matter comes before the court by way of application by the plaintiff for summary judgment against the second named defendant.

2. The within proceedings issued on 15th December, 2014, wherein the plaintiff sought an order granting judgment against the defendants in the sum of €5,508,731.48 being the amount claimed by the plaintiff as due and owing on foot of two facilities, hereinafter referred to as "the First Facility" and "the Second Facility". In the Special Indorsement of Claim to the Summary Summons, the sum said to be due and owing in respect of the First Facility was €2,926,942.10 and in respect of the Second Facility the sum said to be due and owing was €2,581,789.38.

3. The first and second named defendants entered their appearances to the proceedings on 11th November, 2015 and 20th November, 2015, respectively.

4. By notice of motion dated 4th December, 2015 before the Master of the High Court, the plaintiff sought an order granting liberty to enter final judgment as against the first named defendant and the second named defendant in the sum of €5,617,930.84, grounded on an affidavit of Cormac Veale, bank official, sworn 30th November, 2015.

5. A replying affidavit was sworn by the second named defendant on 8th February, 2016 and by the first named defendant on 7th March, 2016.

6. In response thereto, Mr. Veale swore a second affidavit on 27th April, 2016. The first named defendant swore a second affidavit on 24th May, 2016 and this was responded to by way of affidavit sworn by David Coleman, bank manager with the plaintiff, on 19th July, 2016.

7. Corrective affidavits were sworn by Mr. Veale and Mr. Coleman on 11th November, 2016, to expand on the deponents' means of knowledge, as required by the Master of High Court.

8. Following the transfer of the within proceedings from the Master's Court to this Court, a supplemental affidavit was sworn by the second named defendant on 25th April, 2017, to which the plaintiff formally objects. The Court was satisfied to admit the said affidavit.

9. At the commencement of the hearing before this Court, counsel for the plaintiff advised that, at this juncture, the plaintiff was seeking judgment as against the second named defendant only and on foot of the First Facility only. Counsel outlined that the plaintiff was currently engaged in reviewing a proposal from the first named defendant but that it had not entered into any arrangement, or agreement, with the first named defendant which discharged or reduced the outstanding liability of either defendant in accordance with s. 17 of the Civil Liability Act 1961. Accordingly, as the First Facility provides for joint and several liabilities on the part of the borrowers the plaintiff determined to seek judgment against the second named defendant.

10. The Court has also been advised, via the affidavit sworn by Mr. Coleman on 19th July, 2016, that as a result of a receivership sale in connection with secured properties, net proceeds in the sum of €3,330,879.78, together with net rental income in the sum of €115,825.10, were applied in reduction of the debt due and owing on foot of the First Facility and the Second Facility. Mr. Coleman avers that as at 12th July, 2016, there are no monies due and owing by the first and second named defendants to the plaintiff on foot of the Second Facility.

11. Counsel for the second named defendant disputes the plaintiff's entitlement to summary judgment against the second named defendant and, *inter alia*, puts in issue the manner in which the plaintiff has sought to streamline the within application by proceeding only in relation to the First Facility. This issue is addressed later in this judgment.

The First Facility

12. By Letter of Sanction dated 25th August, 2006 the plaintiff offered to make available to the first and second named defendants a loan facility in the sum of €3,600,000 on terms and conditions. The terms and conditions were as set out in the Letter were subject to the plaintiff's general terms and conditions governing business lending which were enclosed with the Letter of Sanction of 25th August, 2006.

13. The Letter of Sanction provided, *inter alia*, that the purpose of the loan was "to release equity of €1m to cover €500k investment purposes, €500k to complete retail warehouse unit at Manor Park and €500k reduce the interest only loan." The Letter provided that the repayment schedule was as follows:

> "Over 16 years by consecutive repayments of EUR 78,533.65 per quarter by way of standing order commencing 29/09/2006. Any residual balance will be repayable at the end of the repayment period".

The Letter described the First Facility as "loan account 1". It also referred to the Second Facility described as "Loan Account 2" in

the amount of "EUR 1,500,000.00". The purpose of this loan was "to extend existing loan facility for a further 12 months". The Letter also referred to "Facility 3" described as "Bank Guarantee in favour of Kerry County Council" in the amount of "EUR 635,000". No issue arises in the within proceedings in relation to "Facility 3".

14. In his affidavit sworn 30th November, 2015, Mr. Veale avers as follows with regard to the First Facility:

> "By Letter of Sanction dated 25th August 2006 the Plaintiff offered to make available to the First and Second Named Defendants, and each of them, a loan facility in the sum of €3,600,000 on terms and conditions. The Letter of Sanction provided *inter alia* the loan was repayable over 16 years by consecutive repayments per quarter and further provided *inter alia* applicable interest rate. On 6th September 2006 the said offer was accepted the First and Second Named Defendants, and each of them, by signing the Letter of Sanction."

He further avers that "the monies were drawn down and assigned to account number 13052669."

15. Mr. Veale goes on to aver that in breach of the agreement, the defendants failed, refused or neglected to comply with the terms of the First Facility and that on 10th June, 2014, the plaintiff made demand of each of the defendants for €2,918,587.67, being the sum said to be due and owing as of that date. The letter addressed to the second named defendant was headed, *inter alia*, "Loan account … 13052669 ("Facility 1")". It demanded payment in the above sum. In his affidavit, Mr. Veale exhibits a statement of account in respect of loan account number13052669 setting out that as of 18th November, 2015, the amount due and owing was €2,963,644.56.

The Second Facility
16. In his affidavit, Mr. Veale avers that with regard to the Second Facility, as of 18th November, 2015, the first and second named defendants owed the plaintiff €2,654,286.28. As with the First Facility, a demand for payment of the Second Facility had been sent to both defendants on 10th June, 2014. The Court has already referred to the plaintiff's evidence that the defendants' indebtedness in respect of the Second Facility has been discharged.

17. In his replying affidavit of 8th February, 2016, the second named defendant avers, *inter alia*, with regard to the First Facility:

> "6. …I say that the purpose of the First Facility was to complete a retail warehouse unit at Manor Park. I say and accept that I endorsed my name on the Letter of Loan Sanction dated 06th September, 2006 concerning, *inter alia*, a loan facility in the sum of €3,600,000. I do [not] accept however that the monies were drawn down and assigned to account number 13052669 in the manner sworn by Cormac Veale. In that regard I say … that as and at the date of the Letter of Loan Sanction, the said account had an existing debit balance of €2,083,269.70. Further I say that the loan account records a draw down of €1,250,000 on the 03rd October, 2006. I say that no further draw downs are evidenced within the statement of account.
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> 7. Without prejudice to the foregoing I say and believe that it was agreed between the Defendants that the rental income achieved from the Manor Park commercial premises was to be designated to discharge the necessary loan repayments. It appears from the said statement of account that a default occurred in respect of the quarterly direct debit on the 29th June, 2011. I say that Plaintiff herein failed to advise and/or notify your Deponent in respect of the said default. Further I say that the Plaintiff failed to advise and/or notify your Deponent of the continued default thereafter of the said account and the first notification that your Deponent received was by way of letter of Formal Demand dated 10th June, 2014."

18. In essence, in his affidavit of 8th February, 2016, and in his later affidavit sworn on 25th April, 2017, the second named defendant raises four defences to the plaintiff's claim on foot of the First Facility. These are, in summary;

> •The second named defendant does not accept that the loan monies in respect of the First Facility were in fact drawn down and assigned to account no. 13052669;
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> • The plaintiff failed to identify the default and to particularise the terms and conditions which entitled it to demand repayment;
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> • The second named defendant observes that default occurred in 2011 but that the plaintiff failed to advise or notify him in respect of the said default. He further avers that as a result of a course of dealing between himself and personnel in the plaintiff bank, the plaintiff is, effectively, estopped from pursuing him in respect of the First Facility or the Second Facility; and
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> • The second named defendant makes complaint in relation to his signature on a mortgage deed for a property which was given as security for the Second Facility.

The first defence
19. In essence, the second named defendant does not accept that, with regard to the First Facility, that the monies were drawn down and assigned to account number 13052669 in the manner sworn by Mr. Veale. The second named defendant's contentions, as set out in his affidavit sworn 8th February, 2016, were addressed by Mr. Veale in the affidavit sworn by him on 27th April, 2016. Mr. Veale sets out what is said by the plaintiff to be the history of the defendants' borrowings on loan account number 13052669. This history shows that loan account number 13052669 was opened in 2001 and that periodically new facilities were sanctioned to renew, replace or restructure the existing facilities. It is averred that this process concluded when the existing borrowings on loan account number 13052669 were renewed and restructured by the First Facility. Specifically, Mr. Veale explains that by Credit Agreement dated 11th December, 2001, the plaintiff agreed to make available a loan facility in the sum of £1,441,000 (€1,826, 693) to the defendants. On foot of the said Credit Agreement dated 11th December, 2001, the sum of €1,829,600 was drawn down to account number 13052669. In his affidavit, Mr. Veale sets out how those monies were applied by the defendants.

20. Mr. Veale goes on to aver that by 14th August, 2003, the defendants had reduced the amount outstanding on loan account number 13052669 down to in excess of €1.6m. By letter of Sanction dated 7th August, 2003, the plaintiff agreed to make available a loan facility in the sum of €2.4m to the defendants. He avers that on foot of the said letter of Sanction the loan monies outstanding on account number 13052669 were renewed and that further monies were drawn down in the manner set out in Mr. Veale's affidavit.

21. Mr. Veale avers that by 16th February, 2005, the defendants had reduced the sum outstanding on loan account no. 13052669 to

€1,936,026.53. By Letter of Sanction dated 17th February, 2005, the plaintiff agreed to make available a loan facility in the sum of €2,248,062.09 to the defendants. Mr. Veale avers that on foot of the said letter, the loan monies outstanding on account number 13052669 were renewed and further monies were drawn down to a current account in the name of the defendants.

22. Mr. Veale goes on to aver that by the Letter of Sanction dated 25th August, 2006, the plaintiff agreed to make available the loan facility of €3,600,000 to the defendants. He avers that "this is the First Facility, the subject of the proceedings herein". He avers that on foot of the Letter of Sanction, the loan monies outstanding on account number 13052669 were renewed and further monies were drawn down as follows: 3rd October, 2006- €500,000 lodged to a loan account in the name of the defendants. This is said by Mr. Veale to be a payment into the loan account for the Second Facility; 3rd October, 2006- €750,000 lodged to a current account in the name of the defendants; and 10th January, 2007- €289,858.50 lodged to a current account in the name of the defendants.

23. It is averred by Mr. Veale that this brought the amount due and owing on foot of loan account number 13052669 to €3,556,646.30. He goes on to state by 30th December, 2010, the defendants had reduced the amount outstanding down to €2,807,241.20 and that the defendants made no payments towards capital since that date.

24. According to the affidavit of Mr. Coleman sworn on 19th July, 2016, as of 12th July, 2016, the sum of €2,510,082.95 was due and owing by the defendants jointly and severally in respect of the First Facility. This is the sum in respect of which the plaintiff seeks liberty to enter final judgment against the second named defendant.

25. In his supplemental affidavit sworn 25th April, 2017, the second named defendant avers that Mr. Veale's grounding affidavit is "entirely disingenuous and misleading" in that it creates "the false impression" that the relationship between the plaintiff and the defendants commenced in August, 2006. The second named defendant repeats his assertion that contrary to the evidence of the plaintiff, while the Letter of Sanction dated 25th August, 2006, refers to a First Facility in the sum of €3,600,000, such a sum was neither offered by the plaintiff nor drawn down by the defendants. The second named defendant repeats his assertion (as set out in his first affidavit) that the Letter of Sanction only offered a facility of €1.5m and that in fact only €1m was drawn down with regard to the First Facility. It is further averred that the plaintiff acknowledges that €681,412.40 was paid by the defendants between September, 2006 and June, 2014. Accordingly, the second named defendant avers that the sum of €318,587.60 only was due and owing on foot of the First Facility when the plaintiff made its demand on 10th June, 2014. The second named defendant goes on to aver as follows:

> "21.I beg to refer to the Second Affidavit of Mr. Veale when produced. Mr. Veale avers in paragraph 3 of his Second Affidavit that the 'First Facility restructured and renewed existing borrowings drawn down to loan account number 13052669 and made further loan monies available for draw down'. I say that this averment flies in the face of the averment made by Mr. Veale in his Grounding Affidavit that the Plaintiff offered to make available to the Defendants a loan facility in the sum of €3,600,000 that was drawn down. I say and believe that the Plaintiff couched the Special Indorsement of Claim and Mr. Veale's Grounding Affidavit in the terms it did in an attempt to circumvent the Statute of Limitations. The plaintiff is aware that any claims (which are denied) on foot of a Credit Agreement dated 11th December 2001, a Letter of Sanction dated 7 August 2003 and a Letter of Sanction dated 17 February 2005 were statute barred when these proceedings issued in December 2014."

26. With regard to the first defence raised by the second named defendant, his counsel submits that the issue for the Court is whether the Letter of Sanction of 25th August, 2006, as referred to in the Special Indorsement of Claim and as exhibited in Mr. Veale's grounding affidavit, grounds the plaintiff's claim with regard to the First Facility in circumstances where the second named defendant avers that only €1m was drawn down on foot of the First Facility, and in circumstances where the Letter of Sanction itself, crucially, allows for, at most, a draw down of three tranches of €500,000. Counsel thus submits that while there is reference to an amount of €3.6m in the Letter of Sanction, there was no provision to draw down that sum. It is further submitted that Mr. Veale's second affidavit sworn 27th April, 2016, completely changes the plaintiff's claim in respect of the First Facility. While Mr. Veale refers to restructuring and to a 2001 Credit Agreement as regards the First Facility, counsel contends that there is no reference in the Letter of Sanction of 25th August, 2006 to either refinancing or to a 2001 Credit Agreement.

27. Counsel thus submits that as there is dispute between the parties as to the amount of monies advanced by the plaintiff to the defendants on foot of the First Facility, and in circumstances where the second named defendant avers that only €1m was advanced to the defendants on foot of the Letter of Sanction of 25th August, 2006, this matter is not suitable for summary judgment.

28. It is thus submitted that by virtue of what is set out in the second named defendant's affidavits, he has met threshold for the within matter not being determined by summary judgment. In this regard, counsel refers to the dictum of Laffoy J. in *Promontoria Aran Limited v. Tiernan* [2016] IESC 67, which sets out the applicable test.

> *"36. As is pointed out in Delany and McGrath Civil Procedure in the Superior Courts 3rd Ed., (Dublin, 2012) (at para. 26 – 44), the test for deciding whether liberty to enter judgment or leave to defend should be granted are essentially the same because if judgment is not granted upon the motion, leave to defend is impliedly given to the defendant. The authors then outline a number of authorities decided over the last twenty years in which the test was considered including, what they describe as a 'clear and helpful synthesis of the principles to be applied' as provided by McKechnie J. in the Harrisrange Limited v. Duncan [2003] 4 I.R. 1 . One of the principles set out by McKechnie J. is that leave to defend should be granted unless it is very clear that there is no defence.*
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> *37. More recently, the test was analysed in judgment delivered in this Court in Irish Bank of Resolution Corporation (in Special Liquidation) v. McCaughey [2014] 1 I.R. 749 (the IBRC case). In a judgment delivered by Clarke J., with which the other judges concurred, it was stated as follows (at para. 19 et seq.):*
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> > *'The underlying test is as set out in the judgment of Hardiman J., speaking for this Court, in Aer Rianta c.p.t. v. Ryanair Limited [2001] 4 I.R. 607. As Hardiman J. pointed out, at p.623:-*
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> > *"… the fundamental question to be posed on an application such as this remains: is it "very clear" that the Defendant has no case?; Is there either no issue to be tried or only issues which are simple and easily determined?; Do the Defendant's affidavits fail to disclose even an arguable defence?"*
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> *[20] It is also important, as Finlay Geoghegan J. pointed out in Bank of Ireland v. Walsh [2009] IEHC 220 (Unreported, High Court, Finlay Geoghegan J., 8th May, 2009), to keep clearly in mind that the use of the term "credible" in relation to*

a defence has, for the reasons also addressed by Hardiman J. in Aer Rianta v. Ryanair [2001] 4 I.R. 607, a very narrow meaning. The issues of credibility, which had formed the basis of a conclusion that a defendant had not put forward an arguable defence, in cases such as National Westminster Bank v. Daniel [1993] 1W.L.R. 1453, Banque de Paris v. de Naray [1984] 1 Lloyds Rep. 21 and First National Commercial Bank v. Anglin [1996] 1 I.R. 75 , arose, as Hardiman J. put it, "rather starkly". In National Westminster Bank v. Daniel, the defence affidavits were mutually contradictory. In Bancque de Paris v. de Naray, there was clear evidence, not challenged, from a private detective, which flatly contradicted the plaintiff's case. In First National Commercial Bank plc v. Anglin, the chronology asserted was entirely inconsistent with commercial documentation which was not, in itself, disputed.

[21] Denham J., speaking for this Court in Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes [2010] IESC 22 (Unreported, Supreme Court, 22nd April, 2010), also approved a passage from a judgment which I delivered in the High Court in McGrath v. O'Driscoll [2007] I.L.R.M. 203 , where, at p. 210, I said the following:-

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

Hardiman J. had expressed a similar view in his judgment in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607 , in the passage already cited, where he made reference to issues which were simple and easily determined.

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

[23] Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607. It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant.'"

29. Counsel for the second named defendant submits that, in the present case, the second named defendant has a clear defence given that while the Letter of Sanction of 25th August, 2006 refers to a sum of €3.6m, the said letter also states that the purpose of the loan which was the subject of First Facility was to release to the defendants at most €1.5m in three tranches and for specific purposes. Accordingly, it is submitted that the second named defendant has an arguable defence on this basis – namely on the construction to be put on the Letter of Sanction of 25th August, 2006, in respect of which oral evidence would be required and cross-examination engaged in.

30. In response to the second named defendant's submission, counsel for the plaintiff urges on the Court that it is clear from Mr. Veale's affidavits that the plaintiff's claim arose on foot of loan account number 13052669 which was opened on 11th January, 2002. It is further submitted that the letter of demand of 10th June, 2014, to the second named defendant in respect of the First Facility specifically referred to "loan account … 13052669 (Facility 1)". Counsel further submits that contrary to the averment made by the second named defendant, no issue arises as regards the Statute of Limitations. In the first instance, the monies advanced the defendants were governed by a mortgage and accordingly the requisite period for the purpose of the statute was twelve years. Furthermore, and more particularly, demand was made on foot of the First Facility on 10th June, 2014. Accordingly, no issue can arise with regard to the Statute.

31. I am persuaded by the plaintiff's submissions in this regard. I am satisfied that no question of the Statute arises in the present case.

32. The issue thus centres on the second named defendant's contention, namely that all that was ever drawn down with regard to the First Facility were two tranches of €500,000. The second named defendant, effectively, pins his colours on his claim that what was drawn down was €1m and in respect of which he avers that €681,412.40 has been repaid. It is clear that the second named defendant gleans the figure of €1m from the contents of the Letter of Sanction dated 25th August, 2006, and not by reference to any other document. He avers to the amount of €681,412.40, said by him to be repayments of the €1m he says was drawn down on foot of the Letter of Sanction, by reference to payments which were made to loan account number 13052669 between September, 2006 and June, 2011. In his first affidavit, he refers to €1,250,000 having been drawn down to loan account number 13052669 on 3rd October, 2006. This undoubtedly occurred (drawn down in two tranches of €500,000 and €750,000, as is clear from the bank statements exhibited by Mr. Veale), in addition to a further sum of €289,858.50 drawn down to loan account number 13053669 on 10th January, 2007. However, other than acknowledging that loan account number 13052669 had an existing debit balance of €2,082,000.70 as of the date of the Letter of Sanction of 25th August, 2006, the second named defendant does not in any substantive regard address this salient fact. Counsel for the plaintiff submits that, at its height, the second named defendant's case is that the monies claimed by the plaintiff to be due and owing as of July, 2016, are not due and owing because no reference was made in the Letter of Sanction of 25th August, 2006, to the sum of €3.6m being in essence a sum referable to the renewal and restructuring of existing borrowings in respect of loan account number 13052669 and to provide further finance. The plaintiff submits that there is no merit in the second named defendant's argument regarding the phraseology used in the Letter of Sanction in circumstances where the plaintiff has exhibited loan account number 13052669 in the within proceedings and referred to that loan account in the letter of 10th June, 2014. I accept the plaintiff's contention in this regard.

33. Given the documentation put before the Court, I accept that, in essence, the Letter of Sanction of 25th August, 2006, with regard to the First Facility was, by that date, the latest instalment of a history of borrowings by the first and second named defendant on foot of loan account number 13052669. Counsel for the plaintiff submitted that it is not the plaintiff's case that the entire of the First Facility (€3.6m) was drawn down by the defendants subsequent to 25th August, 2006, albeit that the plaintiff has sued for the sums said to be due and owing on foot of loan account number 13052669 pursuant to the First Facility which was contained in the Letter of Sanction dated 25th August, 2006. I accept this to be the case, albeit that a reading of the Special Indorsement of Claim to the Summary Summons does suggest that the sum of €3.6m was advanced to the first and second named defendants by Letter of Sanction of 25th August, 2006, as opposed to the said Letter of Sanction being, in effect, with regard to the First Facility, a mechanism to restructure existing borrowings on loan account number 13053669, and to advance further monies, as deposed to by Mr. Veale in his second affidavit, and which the Court accepts to be the case.

34. Accordingly, while I accept that the threshold for the second named defendant to have this matter go to plenary hearing is very low, in my view, the second named defendant has not put forward any credible basis upon which to say that the monies in loan account number 13052669 (the account referred to, inter alia, in the summary proceedings) are not owed by the second named defendant on a joint and several basis to the plaintiff.

35. I note that on 22nd June, 2014, the second named defendant wrote to the plaintiff giving an update on his progress and the efforts and financial contributions he had made and was still making with regard to his indebtedness to the plaintiff. This letter is significant given that some eight days earlier, on 14th June, 2014, the plaintiff had made demand of the second named for the repayment of €2,918, 587.67 in respect of loan account number 13052669. This sum is not challenged by the second named defendant in his letter of 22nd June, 2014.

36. Counsel for the plaintiff submitted that the second named defendant's contentions with regard to the level of his indebtedness amount, in the words of Clarke J. in *Aer Rianta cpt v. Ryanair,* to a "*mere assertion unsupported either by evidence or any realistic suggestion that evidence might be available*" to counter the plaintiff's claim on foot of loan account number 13052669. I am constrained in all the circumstances of this case to agree. I find that as regards the second named defendant's first defence, he has not surmounted the low hurdle as set by the case law already referred to.

The second defence
37. In his affidavit sworn 8th February, 2016, the second named defendant avers, *inter alia*, that the plaintiff has not provided any evidence that it was entitled to demand repayment in full of the monies the subject matter of the First Facility.

38. I am satisfied that the second named defendant has not met the low threshold to refute the plaintiff's claim for summary judgment on this ground of defence. I note that the Letter of Sanction dated 25th August, 2006 provided, *inter alia*, for the repayment of the monies advanced over a period of sixteen years by consecutive repayments of €78,533.65 per quarter by way of standing order commencing 29th September, 2006, with any residual balance to be repayable of the end of the repayment period. The First Facility was also subject to the plaintiff's General Terms and Conditions, as advised to the defendants. Clause 4.2 thereof provided that the plaintiff may demand early repayment on the recurrence of events including "the failure by the Borrowers to make any repayment of principle or interest on the date it is due".

39. The plaintiff's evidence is that on 29th March, 2011, the defendants failed to make the quarterly repayment which they were contractually obliged to do pursuant to the First Facility. As appears from the bank statement for loan account number 13052669, on 29th March, 2011, the quarterly repayment was recorded as "UNPD SO". I note that the second named defendant, in his first affidavit, avers that "a default occurred in respect of the quarterly direct debit", albeit he states it occurred in June, 2011 as opposed to March, 2011. It is also the case that the second named defendant expressly acknowledges that he received the plaintiff's letter of demand dated 10th June, 2014. The second named defendant has not made the case that he ever replied to the letter of demand wherein he denied that the monies were not due. In all the circumstances I find that there can be no dispute but that default occurred and that a demand for repayment was made. There is also no dispute but that the second named defendant received the plaintiff's letter of 10th June, 2014, in respect of loan account number 13052669. It is noteworthy that he did not reply to same to seek to deny the bank's claim, as at 10th June, 2014, for just in excess of €2.9m, which was said to be due and owing on loan account number 13052669.

40. Counsel for the plaintiff cited the *dictum* of Charleton J. in *Ulster Bank Ireland Limited v. O'Brien [*2015] IESC 96 where the learned judge states:

> *"17. Of themselves, the documents exhibited in the affidavit of Mary Murray carry indications of reliability. These are bolstered by her sworn evidence coming, as it does, from a position where she has had the means of knowledge to support what she says. Of those documents, perhaps the most important is the letter of demand. That letter was sent to the defendants/appellants and it was never replied to. The sworn affidavit was furnished to the legal representatives of the defendants/appellants and it was never replied to. Both the sworn and the unsworn documents amount to the same thing: a party is making an allegation that money has been borrowed and that a debt has not been repaid, which is now due for payment. Depending upon the particular circumstances, an inference can be drawn, where a reasonable person would feel compelled to issue some form of denial, whereby the absence of contradiction can amount to the acceptance of the contrary case; in other words, an admission against interest. This principle is based on sound authority. It is also one of the primary exceptions to the rule against hearsay".*

41. In all the circumstances, I am satisfied that the plaintiff has provided sufficient and incontrovertible evidence of the event of default which gave rise to the demand for repayment of the First Facility and that no arguable defence arises on foot of the second defendant's contentions, as set out above.

The third defence
42. In his affidavit of 8th February, 2016, the second named defendant alleges that the plaintiff failed to notify him in respect of the default alleged in respect of the First Facility and that the first notification he received was by way of letter of Formal Demand dated 10th June, 2014.

43. In response, Mr. Veale avers as follows in his affidavit of 27th April, 2016:

> "16. Following the default events, the Bank did not demand repayment immediately and instead exercised forbearance while engaging with the Defendants. The Bank requested that the Defendants to provide financial information (such as net worth statements) to enable the Bank to carry out a full review. At all material times, for the purposes of these discussions, William Sullivan and Michael Kelly accepted that the loans were in default and did not dispute their

indebtedness. The records show that William Sullivan and Michael Kelly were directly involved in the discussions with the Bank and appeared to have a working relationship. However, ultimately, the Bank and the Defendants were unable to agree a refinancing or re-structuring arrangement for the First and Second Facilities. Thereafter, the Bank demanded payment by letters of demand dated 10th June 2014.

17. I beg to refer to a booklet of documents related to the discussions between the Bank and the Defendants upon which marked with letters CV7 and I have signed my name prior to the swearing hereof."

44. The letters referred to by Mr. Veale show that on 14th March, 2011, the first named defendant wrote to the plaintiff referring, *inter alia*, to loan account number 13052669 and loan account number 13052743 and requesting that "for the next 12 month period we will meet interest obligations only on both loans". Mr. Veale exhibits also a number of letters written to the second named defendant requesting financial information from him and responding to proposals from the second named defendant. Specifically, the plaintiff wrote to the second named defendant on 6th March, 2012, 16th July, 2012 and emailed the second named defendant on 16th August 2012. On 5th February, 2014, the plaintiff wrote to the second named defendant stating that his proposal to restructure his liabilities was not acceptable to the bank. On 13th March, 2014, the plaintiff wrote to him advising that it had met with the first named defendant and the defendants' advisor and stating that the bank were seeking a "consensual asset disposal strategy" and requested personal financial information from the second named defendant. On 11th April, 2014, the plaintiff wrote to the second named defendant stating that his failure "to provide the information required to assess the restructure of [his] facilities is unacceptable to the Bank" and warned of the issuance of debt recovery proceedings. On 22nd June, 2014, the second named defendant wrote to the plaintiff giving an update on his progress and the efforts and financial contributions he had made and was still making.

45. From the correspondence exhibited in Mr. Veale's affidavit, I am satisfied that the second named defendant was aware of the default with regard to the First and Second facilities. Moreover, it appears to be implicitly acknowledged by the second named defendant, in his affidavit's sworn 25th April, 2017 (at para. 14), that he was aware at least by 15th August, 2012, that the defendants were in default in respect of the monies which the plaintiff had advanced.

46. In his second affidavit (at para. 14 to 18 thereof), the second named defendant avers that the plaintiff was not entitled to demand payment of, *inter alia*, the First Facility in June, 2014, in circumstances where the second named defendant had been assured by Ms. Susanne Cahalane of the plaintiff bank at a meeting on 15th August, 2012, that the second named defendant would be allowed to trade out of the recession. It is essentially the second named defendant's claim that the plaintiff is estopped for calling in the debt in respect of the First Facility (and the Second Facility) because of representations made to the second named defendant by Ms. Cahalane.

47. On behalf of the plaintiff, it is submitted that the second named defendant does not meet the test for promissory estoppel as set out in *The Barge Inn Limited v. Quinn Hospitality Ireland Operations 3 Limited* [2013] IEHC 387. In particular, counsel for the plaintiff submits that the second named defendant has not shown or identified an unambiguous representation on the part of the plaintiff or any understanding on the second named defendant's part beyond the assertion made in his affidavit. Counsel submits that the correspondence engaged in by the plaintiff with the second named defendant (and which predates the letter of demand of 10th June, 2014) belies the second named defendant's assertion that the plaintiff gave assurances that he would not be pursued for the debt. In particular, counsel for the plaintiff points to the letter sent to the second named defendant on 11th April, 2014, which states, *inter alia*, as follows:

"I refer to previous correspondence dated 05/02/2014 and 13/03/2014 sent to you regarding provision of information to progress a review of your AIB facilities, which are in default, to explore the possibilities around restructuring same to a sustainable basis.

Your failure to engage and to provide the information required to assess the restructure of your facilities is unacceptable to the Bank. Accordingly, we are not in a position to offer you an alternative repayment arrangement as you have not engaged with us, or, you have not provided us with all of the information we have requested.

I must inform you that if you do not respond to the Bank within 7 business days of the date of this letter, with the required information, AIB may have no option but to take whatever steps are deemed necessary to recover these facilities including, but not limited to, issuing legal proceedings and/or realising any security we may hold."

48. It is argued that this correspondence flies in the face of the second named defendant's assertion that he had an understanding with the plaintiff. Counsel also points to the letter sent by the second named defendant to the plaintiff on 22nd June, 2014, which was subsequent to the plaintiff's Formal Demand Letter of 10th June, 2014. Counsel for the plaintiff submits that in that letter the second named defendant does not make any reference to any alleged understanding with the plaintiff. Counsel thus submits that contrary to the assertion made by the second named defendant in his affidavit, his letter of 22nd June, 2014, specifically refers to the plaintiff having found the second named defendant's efforts and contributions "irrelevant". Counsel contends therefore that the second named defendant has not shown that he has any defence to the within proceedings arising from any claim of estoppel.

49. In aid of the second named defendant's assertion that the plaintiff is estopped from pursuing him in relation to the First Facility, his counsel referred the Court to the holding of the High Court in *Truck and Machinery Sales Limited v. Marubeni Komatsu Limited* [1996] 1 I.R. 12, as follows:

"That where parties to a contract entered into a course of negotiations had the effect of leading one of the parties to suppose that the strict rights arising under the contract would not be enforced, or would be kept in suspense, the person who might otherwise have enforced those rights would not be allowed to enforce them where it would be inequitable have regard to the dealings that had taken place between the parties". [at para. 6]

50. Counsel for the second named defendant submits that, as deposed to in his affidavit of 25th April, 2017, the second named defendant injected monies into his businesses in 2009 and re-mortgaged his family home in London in 2010 and that this had been explained to Ms. Cahalane of the plaintiff bank and accepted by her as having occurred.

51. While I accept that the second named defendant may indeed have injected monies into his business ventures in the manner described in his affidavit, that does not, to my mind, even on the arguable basis threshold which is all that the Court is concerned with at this juncture, provide a sufficient factual matrix to found the second named defendant's claim that he had been advised either expressly or impliedly by the plaintiff that it would not pursue him in relation to the First Facility. Nor, to my mind, can it be said that it is arguable that there was any course of dealing between the plaintiff and the second named defendant such as would, in equity,

preclude the plaintiff from pursuing the second named defendant with regard to the First Facility. Accordingly, the Court does not find, even on the arguable basis threshold which is all that is required to let this matter go to plenary hearing, that the second named defendant has met that threshold with regard to the third defence.

The Fourth defence
52. In his first affidavit, sworn 8th February, 2016, the second named defendant disputed the plaintiff's entitlement to summary judgment in respect of loan account number 13052743 (the Second Facility) on a number of grounds, including that the plaintiff had not provided evidence of the breakdown of the amount claimed or established whether the amount said to have been advanced was in fact drawn down. It was also averred that that the plaintiff had not established, if the monies were drawn down, that they had not been discharged in full. He further avers that his signature to a deed of mortgage which was given as security for the Second Facility was forged. For all of those reasons the second named defendant's contention was that the subject matter of the Second Facility would require detailed investigation.

53. Subsequently, Mr. Coleman, on behalf of the plaintiff, averred on 16th July, 2016, that the indebtedness of the first named defendant and the second named defendant with regard to the Second Facility had been discharged in full as of 21st March, 2016, by virtue of the appointment of a Receiver and the sale of the charged properties and by rental income obtained in respect of the said secured properties. As already stated, the plaintiff advised that it was not pursuing the second named defendant in respect of the Second Facility, as no indebtedness now arises.

54. Counsel for the plaintiff submits that as there is no longer any claim for summary judgment as regards the Second Facility, the second named defendant's contentions are not germane to the present application which relates solely to the First Facility and that accordingly, the matters raised by the second named defendant cannot establish a defence to the plaintiff's claim for summary judgment. I am satisfied that counsel is correct. The Second Facility is not now before the Court. Accordingly, if it arises, any claim the second named defendant may have in relation to the Second Facility will have to be pursued by him otherwise than in the context of the within proceedings.

Summary
55. In all of the circumstances of this case, the Court deems it appropriate to give the plaintiff leave to enter judgment against the defendant in the sum of €2,510,082.95, being the sum due and owing as of 12th July, 2016, as deposed to in the affidavit of Mr. Coleman sworn on 19th July, 2016.