

THE HIGH COURT

[2014 No. 1908 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

MICHAEL MCPHILLIPS

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 12th day of May, 2016**The Plaintiff's Case**

1. In this application, the plaintiff seeks summary judgment in the sum of €3,758,973.43, against the defendant in respect of sums allegedly due under five loan agreements.

2. It is alleged that the indebtedness of the defendant arises under the loan agreements in the following way: the defendant, by fixed interest rate DIBOR Loan made in writing on or about 16th December, 1998, agreed for value received, to pay to the plaintiff the sum of IR£220,000, together with interest thereon repayable over a three hundred month period. There was a capital interest moratorium for the first 24 months of the said agreement. The value received by the defendant was an advance of IR£220,000, the purpose of which was to purchase two apartments in Salthill, Galway. The plaintiff exhibited a copy of the loan agreement.

3. It is alleged that the defendant made default in the payments due under the said agreement and by notice in writing dated 13th November, 2013, the plaintiff demanded the sum of €139,822.70, due and owing to the plaintiff, together with interest accruing on a daily basis at a rate of €4.94.

4. It is alleged that the defendant by a Housing Loan Facility made in writing on or about 28th February, 2001, agreed for value received, to pay to the plaintiff the sum of IR£260,000, together with interest thereon repayable by way of 180 monthly instalments of IR£2,242.26, comprising interest and capital. The plaintiff exhibited a copy of the said loan facility letter.

5. It is alleged that the defendant made default in the payments due under this agreement and by notice in writing dated 13th November, 2013, the plaintiff demanded the sum of €172,647.01, together with interest accruing on a daily basis at a rate of €45.80. The plaintiff exhibited a true copy of the said notice of termination.

6. It is alleged that the defendant by credit facility made in writing on or about 5th February, 2002, agreed for value received, to pay to the plaintiff the sum of €97,000, together with interest thereon repayable by way of 180 monthly instalments of €810.55, comprising interest and capital. The plaintiff exhibited a true copy of the said credit facility letter.

7. It is alleged that the defendant made default in the payments due under the said agreement and by notice in writing dated 13th November, 2013, the plaintiff demanded the sum of €88,081.53, together with interest accruing on a daily basis at the rate of €6.33. The plaintiff exhibited a copy of the said notice of termination.

8. It is alleged that by facility letter made in writing on or about 30th August, 2006, the defendant agreed for value received, to pay to the plaintiff two loans making in total the sum of €2,588,636.44, together with interest thereon repayable within a 24 month period. The second loan of €2,500,000 was to enable the defendant to produce a 25% share of a site on Tuam Road, Galway, owned by AOC and JMcN. The value received by the defendant was an advance of €2,588,636.44. A copy of the said facility letter was exhibited.

9. It is alleged that the defendant made default in the payments due under the said agreement and by notice in writing dated 13th November, 2013, the plaintiff demanded the sum of €2,904,993.46, together with interest accruing on a daily basis at a daily rate of €192.52. A copy of the said notice of termination was exhibited by the plaintiff.

10. It is alleged that by facility letter made in writing on or about 5th December, 2006, the defendant agreed for value received to pay to the plaintiff the sum of €400,000, together with interest thereon repayable within a 96 month period. The value received by the defendant was an advance of €400,000. A copy of the said facility letter was exhibited.

11. It was alleged that the defendant made default in the payments due under the said agreement and by notice in writing dated 13th November, 2013, the plaintiff demanded the sum of €453,368.83, together with interest accruing on a daily basis at a daily rate of €41.27. A copy of the notice of termination was exhibited.

12. In the grounding affidavit sworn on behalf of the plaintiff by Mr. David Nolan on 21st November, 2014, it was alleged that by letters dated 13th November, 2013, the plaintiff wrote to the defendant demanding payment of the aforesaid sums of €139,822.70; €172,647.01; €88,081.53; €2,904,993.46; and €453,368.83, making in aggregate the sum of €3,758,973.43. Mr. Nolan averred that notwithstanding the said demand, the defendant has failed, refused and neglected to discharge the said sum, or any part thereof. He stated that the said sum remains due and owing by the defendant to the plaintiff over and above all just credits and allowances. He averred that no payments had been made by the defendant to the plaintiff since the date of commencement of these proceedings.

13. Mr. Nolan averred that an appearance had been entered by the defendant to the proceedings solely for the purposes of delay and that the defendant did not have a *bona fide* defence in law or on the merits to the plaintiff's claim herein.

The Defendant's Case

14. The defendant has filed a number of affidavits in response to the plaintiff's claim. The first two affidavits set out the defendant's

case that the plaintiff had not furnished him with data and records pursuant to a request made by him under the Data Protection Acts 1988 and 2003. Some documentation had been furnished in response to such request, but the defendant was of the opinion that the bank had not furnished all the data in its possession relating to the defendant. The defendant lodged a complaint with the Data Protection Commissioner. As a result, further documentation was furnished to the defendant. However, the defendant's complaint remains live, as the defendant maintains that there are further documents held by the plaintiff which should be released to him.

15. The main substance of the defendant's defence is set out in his affidavit sworn on 27th July, 2015. In order to understand the defendant's defence, it is necessary to set out some background to the loan given by the plaintiff in the sum of €2,500,000 to the defendant in the letter of sanction dated 30th August, 2006. The purpose of the loan was to enable the defendant to purchase a 25% unencumbered interest in a 4.5 acre site on Tuam Road, Galway, which was owned by two gentlemen, AOC and JMcN.

16. In his affidavit, the defendant explained that in or about July 2006, he had been approached by two developers, AOC and JMcN, to see if he was interested in going into partnership with them and investing in the Tuam Road site. The site had been zoned residential and it was expected that planning permission would be obtained to build approximately 86 houses on the site. The defendant agreed that he would invest in the partnership and would take a 25% unencumbered interest in the site.

17. The defendant states that he approached the plaintiff, with whom he had banked for the previous 20 years, seeking finance to invest in the partnership. He explained that he needed €2.5m to buy a 25% unencumbered share in the 4.5 acres and pay his share of the stamp duty.

18. The defendant states that at the time of negotiating the loan with the plaintiff, he was not aware that AOC and JMcN had already borrowed from the plaintiff to purchase the Tuam Road site. Nor was he aware that the plaintiff was entitled to a charge over the entire property.

19. The plaintiff agreed to lend the defendant the money to purchase a 25% unencumbered interest in the property, as per the terms of the letter of sanction dated 30th August, 2006. The security required by the plaintiff included a legal charge over a property owned by the defendant at 11 Lower Abbey Gate Street, Galway. The defendant states that at that time, the property was valued at approximately €8m and (for the purpose of security) the plaintiff had put a more conservative valuation of €4m on the property. The defendant states that it was, *inter alia*, a condition precedent to draw down of the loan of €2.5m as contained in the letter of sanction, that the plaintiff would obtain a copy of the partnership agreement between the defendant, AOC and JMcN.

20. The defendant states that his counterclaim against the plaintiff arises out of the manner in which the funds, the subject matter of the facility agreed on 30th August, 2006, in the sum of €2.5m, were lent and released by the plaintiff, its servants or agents, to third parties otherwise than for the defendant's benefit and against his interests. He states that unbeknownst to him, when he approached the plaintiff seeking to borrow to invest in the Tuam Road site, the plaintiff had already lent money to AOC and JMcN to purchase the site and was entitled to security over those lands. The defendant maintains that at the time that the plaintiff agreed to lend him the sum of €2.5m to purchase a 25% unencumbered share in the Tuam Road site, a conflict of interest existed between the plaintiff's interests and his own. Specifically, the plaintiff's security could not be perfected without a substantial payment of the stamp duty due by AOC and JMcN on the purchase of the site.

21. The defendant alleges that the plaintiff failed to disclose to him that it had an interest in the property. Moreover, the plaintiff failed to disclose that it had not perfected its security at that time, as a result of stamp duty being outstanding on the property. Critically, the plaintiff was in possession of information from which it knew that the defendant could not obtain a 25% unencumbered interest in the property, because it was already charged in favour of the plaintiff. The defendant alleges that the plaintiff either intentionally refused to disclose this information to him, or was reckless as to the consequences of not doing so.

22. In his affidavit, the defendant states that it is his belief that a named employee of the bank was involved in the finance of the purchase of the Tuam Road site by AOC and JMcN. He had grave reservations concerning the participation of this man, who held a senior position in the plaintiff bank. The plaintiff stated that it was his belief that this man was involved in sanctioning the loan of €2.5m and he had since discovered that the man also had dealings with AOC and JMcN in relation to financing the purchase of the site. The defendant went on in the affidavit to state that it was a matter of public knowledge, having been widely reported in the media, that the named individual was the subject of an inquiry by the plaintiff into controversy concerning his business dealings. The defendant stated that while he suspected that the man assisted AOC and JMcN to act to his detriment, at the time of swearing the affidavit, he did not have evidence of any specific wrongdoing on the part of this man and that was one of the reasons why he would require discovery of documents relating to the financing of the site and the participation of the plaintiff in that deal.

23. The defendant stated that he gave security over his property at 11 Lower Abbey Gate Street in consideration of the entire sum of €2.5m. However, €575,000, was released directly by the plaintiff to Mr. Donal Downes of O'Dea & Co. Solicitors, who were the solicitors acting on behalf of AOC and JMcN. The defendant believes that Mr. Downes used these monies to pay the entirety of the stamp duty due on the purchase of the site by AOC and JMcN. This, in turn, allowed the perfection of the plaintiff's security.

24. The defendant pointed out that the condition that the plaintiff should be furnished with a copy of the partnership agreement with the defendant and AOC and JMcN, was not complied with at the time that the plaintiff wrongfully released the funds to Mr. Downes. The defendant states that the plaintiff was indifferent to compliance with this condition, because it stood to benefit from payment of the stamp duty on the site, which would, in turn, allow it to perfect its security. The defendant stated that whether intentionally or recklessly, the plaintiff thereby assisted in the fraud of AOC and JMcN. Having paid the stamp duty, this allowed AOC and JMcN to refinance the site with Ulster Bank and repay the plaintiff in full.

25. The defendant states that he is advised by his lawyers and believes that the plaintiff, in its dealings relating to the Tuam Road site, owed him both a duty of care and a fiduciary duty. It was his belief that at the time that the plaintiff agreed to lend him the sum of €2.5m to purchase a 25% unencumbered share in the site at Tuam Road, a conflict of interest existed between the plaintiff's interests and his own.

26. The defendant states that as a consequence of the wrongful acts of the plaintiff, not only has he lost all of the funds, but he has lost a valuable property at 11 Lower Abbey Gate Street, worth at least €4m, which he gave as security to the plaintiff. He intends to seek a declaration that the security over the Abbey Gate Street property is void in circumstances where the plaintiff wrongfully released some of the monies to a third party.

27. The defendant went on to state that the property at Abbey Gate Street was sold by a receiver appointed by the plaintiff, and the plaintiff and/or the receiver has yet to account to him as to what the net proceeds of sale were. He states that because of the failure on the part of the plaintiff to make full disclosure (in this instance documents relating to the receivership), he has been

prejudiced in putting forward this aspect of his claim.

28. The defendant goes on to state that separately, the balance of the funds were released to his former solicitors, who in turn transferred the monies to the solicitors acting for AOC and JMcN, without obtaining any interest in the Tuam Road site, or any consideration whatsoever. The defendant has instituted proceedings against AOC and JMcN for fraud and against his former solicitors in relation to the negligent manner in which they handled his affairs, resulting in the release of €1,925,000 without receiving any consideration.

29. The defendant states that, having regard to the conduct of the plaintiff, and in order to save costs and the resources of the court, it would be more appropriate that the different cases be heard at the same time. He further stated that over and above the documentation that he had received in the course of the Data Protection request, he had no doubt but that this was a case in which discovery of documents will be required. He stated that it was imperative that he would discover what information the plaintiff was in possession of at the relevant time, in order to ascertain the relationship between the parties and the plaintiff's state of knowledge and its participation in the transaction. He stated that it was his intention to counterclaim in these proceedings, seeking damages from the plaintiff for, *inter alia*, negligence, breach of duty, misrepresentation and breach of fiduciary duty.

30. The defendant stated that in these circumstances, he believed that he had a *bona fide* defence to the claims of the plaintiff by way of an equitable set off. He stated that he was at the loss of the value of the property at 11 Lower Abbey Gate Street. He submitted that it was clear from the foregoing, that the counterclaim would greatly exceed the plaintiff's claim herein. He denied that an appearance had been entered for the purposes of delay. He had been advised by his lawyers and believed, that having regard to the matters set out in his affidavit and in particular, the necessity to obtain discovery and information from the plaintiff, this was not an appropriate case for summary judgment. He submitted that the case should be remitted to plenary hearing.

31. In his submissions, counsel for the defendant submitted that it was noteworthy that none of the allegations made by the defendant in his replying affidavit, had been contradicted or challenged by means of any further affidavit from the plaintiff.

32. Counsel submitted that the partnership agreement provided that the defendant was to get a 25% unencumbered interest in the site. The defendant was not aware that AOC and JMcN had borrowed from AIB in relation to purchase of the site, or that they had charged it in favour of AIB. He stated that this was not denied by the bank. This established a conflict of interest on the part of the plaintiff. He further submitted that it was highly relevant that at the time that the plaintiff dealt with the defendant, stamp duty was outstanding from AOC and JMcN in relation to their purchase of the Tuam Road site. If that was not paid, the bank would not have been able to perfect its security. By lending the money to the defendant and by releasing the sum of €575,000 to the solicitor acting for AOC and JMcN, the bank were acting in their own interests, in ensuring that the stamp duty was discharged and their security was thereby perfected.

33. It was submitted that the statements of fact set out by the defendant at paras. 15 – 17 of his affidavit, were not denied by the plaintiff. This raised a question of conflict of interest and non-disclosure on the part of the bank. The bank knew that he could not get title, because there was no equity in the site, as it had been charged in favour of the bank. The bank knew that there was money outstanding in respect of stamp duty due on the site. The sum of €575,000 was given from the defendant's loan to the solicitor acting for AOC and JMcN, who paid the stamp duty, thereby allowing for perfection of the bank's security. This was not denied by the bank. It was pointed out that in December 2009, the defendant had issued proceedings against AOC and JMcN for fraud. The defendant stated that they had received €2.5m from him with assistance from the bank. The defendant believed that he would get a 25% unencumbered interest in the site but he never got it. He got no value for his €2.5m borrowed from the bank. The bank had a charge on the Tuam Road site for the €6m they had lent to AOC and JMcN. It was pointed out that the letter of sanction said nothing about the payment of stamp duty. If the loan had been intended for the purpose of payment of stamp duty, the agreement would have said so. The payment of stamp duty allowed AOC and JMcN to refinance with Ulster Bank and they could repay the plaintiff.

34. It was submitted that a fiduciary duty arose by virtue of the background outlined and there was a conflict of interest, thereby giving rise to the fiduciary duty. It was submitted that the fiduciary duty also arose due to the fact that the bank got security in respect of a loan for the purchase of an interest in the site by the defendant, when the bank knew that the defendant could not get an unencumbered interest, due to the fact that they held a charge on the property. It was alleged that the bank should have disclosed this to the defendant.

35. It was submitted that as a result of the wrongful acts of the plaintiff, the defendant had lost all of the funds and the property at Abbey Gate Street, which was valued in excess of €4m. It was significant that this was not denied by the bank. These allegations were crucial to the defendant's defence and had not been contradicted.

36. The defendant had also instituted proceedings against his former solicitor arising out of the circumstances in which the €2.5m was handed over without getting any consideration therefore.

The Plaintiff's Response

37. Counsel for the plaintiff referred to the decision in *Allied Irish Banks plc v. Taylor* [2016] IEHC 121, where it was held that a mere assertion by a defendant of a state of affairs, was not sufficient to enable him to have the matter remitted to plenary hearing. In that case, the defendant had sworn an affidavit, which simply said as follows:-

"The said amounts are in dispute and the defendants intend to call a financial expert should this matter go to a plenary hearing..."

38. McGovern J. held that other than that mere assertion, the defendant had not sought to adduce any evidence that the figures claimed were incorrect. He had the following to say in relation to the purported defence put up by the defendant:-

*"20. No meaningful attempt has been made by the defendants to engage with figures showing the extent of the defendants' debt other than the statement in para. 37 of the second defendant's affidavit of 5th February, 2016, where he states 'the said amounts are in dispute and the defendants intend to call a financial expert should this matter go to a plenary hearing'. Such a bare assertion goes nowhere near meeting the test required to establish a defence to an application for summary judgment. See *First National Commercial Bank p.l.c. v. Anglin* [1996] 1 I.R. 75, where Murphy J. cited with approval at p. 79, the following summary of the tests set out in *Banque de Paris v. Naray* [1984] 1 Lloyd's Law Rep. 21:-*

"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the

defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."

39. The plaintiff also referred to the decision in *Allied Irish Banks plc v. Whelan* [2015] IEHC 135, where it was held that an issue as to whether negligent investment advice had been given by the bank, was a separate question to the issue of what was owed under the various loan agreements. In the course of his judgment, McGovern J. held that the defendants had not made out any arguable defence against the sums claimed to be due and owing. However, they alleged that they had suffered losses as a result of receiving negligent investment advice from the plaintiff. In these circumstances, the judge had to consider whether that afforded them a defence to the application for summary judgment, or whether that claim should be taken into account at that stage of the proceedings.

40. McGovern J. referred to the decision of Clarke J. in *Moohan v. S&R Motors (Donegal) Limited* [2008] 3 I.R. 650. There the trial judge had to consider the question of whether the nature of the defence put forward amounted to a form of cross claim. The judge said that different considerations may apply than when considering whether the defendant had an arguable defence to an application for summary judgment. He referred to the following portion of the judgment of Clarke J. in the *Moohan* case:-

"In those circumstances the court has a wider discretion, where the defendant does not establish a bona fide defence to the claim as such, but maintains that he has a cross-claim against the plaintiff, then the first question which needs to be determined is as to whether that cross-claim would give rise to a defence in equity in the proceedings. It is clear from Prendergast v. Biddle (Unreported, Supreme Court, 31st July, 1957) that the test as to whether a cross-claim gives rise to a defence in equity depends on whether the cross-claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross-claim may be made out.

On the other hand if the cross-claim arises from some independent set of circumstances then the claim (unless it can be dependant on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part be set against the claim."

41. Counsel for the plaintiff submitted that in this case if the defendant had a counterclaim, this was separate to the claim made by the plaintiff on foot of the loan agreements. It was submitted that judgment should be awarded to the plaintiff and the counterclaim could then be pursued by the defendant at a later stage.

42. It was submitted that the bank did not engage with the allegations made by the defendant in his affidavit, as the onus rested on the defendant to establish an entitlement to defend the action. It was submitted that in this case the defendant had not reached the low threshold for leave to defend. The plaintiff further submitted that the outstanding request for Data Protection material, or the outstanding appeal in relation thereto, was not a bar to the plaintiff obtaining judgment in these proceedings.

43. Finally, the plaintiff submitted that even if the court were to hold that the defendant had raised an arguable defence in relation to the loan for €2.5m, he had not raised any defence to the other loans. In these circumstances, it was submitted that if the court were to remit the claim in respect of the loan of €2.5m to plenary hearing, judgment should be granted to the plaintiff in respect of the other loans.

The Law

44. The law in relation to the test which should be applied when considering whether to grant summary judgment has been set out in a number of well known cases. In *First National Commercial Bank plc v. Anglin* [1996] 1 I.R. 75, Murphy J. adopted the principles laid down in *Banque de Paris v. Naray* [1984] 1 Lloyd's Law Rep. 21 and in particular to the following portion which was taken from the head note to the case:-

"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."

45. In *Aer Rianta v. Ryanair Limited* [2001] 4 I.R. 607, Hardiman J. stated as follows at p. 621:-

"More recent Irish authority, in my view, supports the impression gleaned from authorities from the early days of the summary judgment jurisdiction, that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is one to be used with great care."

46. Having reviewed certain Irish authorities, Hardiman J. continued as follows:-

"In light of these authorities, I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in First National Commercial Bank plc. v. Anglin [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The 'fair and reasonable probability of the defendants having a real or bona fide defence', is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable."

47. Further on, Hardiman J. stated as follows at p. 23:-

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

48. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J. commented on the conclusions reached by Hardiman J. in the *Aer Rianta* case and stated as follows at p. 7:-

"In his analysis of the law, Hardiman J. surveyed what might be described as the historical cases as well as the most modern authorities on this topic. His conclusion was, I think, that leave to defend should be granted unless it was 'very clear' that the defendant had no defence, not even one which could be described as arguable.

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

(i) the power to grant summary judgment should be exercised with discernible caution;

(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

Conclusions

49. The defendant has asserted that a named individual in the plaintiff bank had had dealings with Messrs. AOC and JMcN in relation to the purchase of the Tuam Road site, before the defendant approached the bank looking for a loan to purchase a 25% unencumbered interest in the site. The defendant says that he dealt with the same individual in the bank.

50. The defendant contends that this individual knew that the bank's security over the Tuam Road site was not, at that time, perfected, due to there being a sum of €575,000 owing in respect of stamp duty. It is further submitted that this man knew that the defendant could not get an unencumbered 25% interest in the site, because the bank had been given a charge over the entire site. The defendant alleges that this information was kept from him.

51. When the loan was given, the sum of €575,000 was paid to the firm of solicitors acting for AOC and JMcN, who paid the stamp duty and then refinanced with Ulster Bank, meaning that the plaintiff got repaid its loan.

52. In addition, the plaintiff obtained security over the defendant's property at 11 Abbey Gate Street, Galway. The plaintiff sent in a receiver and the property was sold. The defendant says that the plaintiff has not accounted for the proceeds of sale.

53. The defendant has put in a Data Protection Act request and has been provided with some documentation. However, he maintains that he will need discovery of documents to enable him to properly mount his defence. In all these circumstances, I am of opinion that the defendant has raised an arguable defence, and has satisfied the tests laid down in the *Aer Rianta and Harrisrange* cases.

54. In addition, I am satisfied that the defendant has established an arguable defence in equity arising out of the facts outlined above. This is more than a mere assertion of the type found in the *AIB v. Taylor* case. His counterclaim arises out of the same transaction, which gives rise to the plaintiff's claim in these proceedings. Accordingly, if he is successful in the counterclaim, he will be entitled to an equitable set off as against the sums claimed by the plaintiff.

55. The defendant's defence only relates to the loan for €2.5m. He has not contested the amounts due under the other loans. In these circumstances, I will remit that part of the plaintiff's claim as relates to the loan agreement dated 30th August, 2006, to plenary hearing. The plaintiff is entitled to judgment in respect of the remaining loans, which amounted to €139,822.70, €172,647.01, €88,081.53 and €453,368.83 on 13th November, 2013.

56. The plaintiff can opt to have judgment for that amount now, in the sum of €853,920.00, or the figures can be updated either by agreement, or by the filing of an affidavit, in order to fix the correct sums due as of the date of this judgment.