

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

MOHAMMED NAWAZ AND NUSSRAT MUNIR

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 14th day of January 2019

1. The plaintiff seeks judgment against the defendants for in the amounts said to be due and owing by the defendants to the plaintiff on foot of a Commercial Mortgage, Account Number 66472908 under which the plaintiff claims the principal sum of €684,912.86 together with continuing interest and Loan Account Number 64645553 for the principal sum of €120,444.84 together with continuing interest. The second named defendant is sued in her capacity as Administratrix of the estate of her husband, Mr. Mohammed Munir, who passed away on 4th April 2008.

The Loans

2. In a Facility Letter dated 3rd September 2003 (Facility Letter 1), the plaintiff agreed to make available to the borrowers a loan facility of €910,000.00 subject to terms and conditions. The purpose of this facility was to assist in the purchase of a warehouse at Unit 13 Fashion City, M50 Business Park, Ballymount, Dublin 22. It provides for an indicative interest rate of 3.91% with the actual interest rate to be determined with reference to the market on the date of draw down. Repayment of the loan was to be made over a period of 15 years in instalments of €6,684.44 per month (including principal and interest) commencing 1 month from draw down. A further Facility Letter issued on 26th July 2006 (Facility Letter 2), providing access to €787,736.00 to the borrowers by way of Term Loan. The purpose of this facility was the "[c]ontinuation of existing facilities on terms and conditions previously accepted by Mr. Mohammed Munir & Mr. Mohammed Nawaz". The indicative interest rate stated on this facility letter was 4.25%. This facility was to be repaid over 148 months in the amount of €6783.97. These Facility Letters related to loan account number 64645553.

3. In a subsequent Facility Letter dated 9th February 2007 (Facility Letter 3), the plaintiff offered to make available to the first named defendant and Mr. Munir the sum of €700,000.00 by way of Commercial Mortgage Account Number 66472908, the purpose of which was to assist with the purchase of Unit 7, Longford Shopping Centre, Longford Town. This Facility Letter was accepted by Mr. Nawaz and Mr. Munir on 14th February 2007. The sum of €700,000.00 was drawn down on 26th April 2007 and was due to have been repaid over a period of 180 months.

4. In an affidavit sworn on 11th July 2014, Mr. Roderick Scott, Senior Business Manager of the plaintiff, avers that it is provided in the terms and conditions of Facility Letter 2 and Facility Letter 3 that should one or more events of default occur as specified in Clause 12 thereof, the plaintiff would be entitled to repayment of the loan. It is said that the first named defendant and the deceased failed to make payments in respect of the two loans in accordance with the terms and conditions thereof, amounting to a default in accordance with Clause 12(iii) of both Facility letters, therefore giving rise to the entitlement of the bank to demand repayment of the monies drawn down on foot of the loans, plus any interest accrued.

5. Formal letters of demand dated 1st March 2013 and 9th January 2014, were sent to the defendants by the plaintiff or its agents.

Legal Principles

6. The legal principles applicable to an application for summary judgment are well established. *In Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 McKechnie J. stated:-

"9. 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."

7. In *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607 Hardiman J. stated at p. 623:

"... 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?"

As regards the approach the court must adopt regarding assessment of facts deposed to on affidavit, Clarke J., delivering the judgment of the Supreme Court in *IBRC Ltd. v. McCaughey* [2014] 1 I.R. 749, stated:-

"22. It is important, therefore, to re-emphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta v. Ryanair Ltd.* ... 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 ...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 v. Durkan New Homes* [2010] IESC 22,

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* 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."

In *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, Murphy J. endorsed the principle established in *Banque de Paris v. Naray* [1984] 1 Lloyd's Law Rep. 21 that:-

"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."

Proposed points of defence of Mrs Munir

8. In an affidavit sworn on 13th November 2014, the second named defendant made a preliminary objection that the proceedings were not instituted in accordance with the Rules of the Superior Courts insofar as the title of the proceedings names the second named defendant in her personal capacity, rather than in her capacity as a legal representative of her late husband's estate and should therefore be dismissed. This is wholly unsustainable as a point of defence. The claim against the second named defendant is clearly brought in her capacity as administratrix of her late husband's estate as set out in the Special Indorsement of Claim on the Summary Summons under Order 15 rule 8 of the Rules of the Superior Courts.

9. Mrs. Munir raises a number of other proposed points of defence. She avers that there is no reference in the affidavit of Roderick Scott to a cooling-off period which is a general requirement in loan agreements pursuant to the Consumer Credit Act 1995. The argument relating to a cooling-off period and receipt of independent legal advice in relation to the loans were not pressed in the course of the hearing.

10. She states that the facility letters exhibited in the plaintiff's affidavit refer to a number of preconditions, in particular precondition number 6 which is said to require written confirmation that independent legal advice has been received by the First Named Defendant and his wife, Naheed Nasreen Nawaz. However, it is claimed there is no similar reference in any of the facility letters that the second named defendant and/or the deceased were informed of his right to seek independent legal advice.

11. Mrs. Munir also states that the plaintiff held security in the form of a Friends First life policy (number 50193707) in respect of the lives of the deceased and the first named defendant in the amount of €500,000.00. It is said that this security ought to be exhausted prior to the plaintiff seeking judgment against the defendants. However, a life policy in that amount was encashed following Mr. Munir's death and lodged to the credit of Account Number 64645553 on 24th July 2009 in partial repayment of the monies drawn down on that account as notified in the Letter of Variation of 28th July. I am satisfied that this is not an arguable point.

12. Ms. Maria McNamara, a Business Manager employed by the plaintiff, states in an affidavit sworn on 13th February 2015 that the loans the subject matter of the proceedings do not constitute consumer lending but rather commercial facilities as stated in the grounding affidavit of Mr. Roderick Scott and the facility letters exhibited. It is further stated that at all material times the borrowers were dealing with the plaintiff's business banking department and as such the Consumer Credit Act had no application to the loans the subject matter of the proceedings. I am satisfied that this is clearly so and that the defendants have no arguable ground of defence under the Consumer Credit legislation.

13. Ms. McNamara also avers that precondition number 6 in Facility Letter 1 is not of assistance to the second defendant as her late husband was "at all material times an experienced businessman, borrowing in his own right and consequently did not require to be advised of an entitlement or right to seek and obtain independent legal advice in the context of borrowings with the plaintiff". It is stated that this condition arose in circumstances where a letter of guarantee was to be provided by the first named defendant's wife which included a charge over the residence of the first named defendant and his wife. It is stated that this matter is not of any

relevance to the second defendant's liability and cannot avail. I am satisfied that this is so.

14. Counsel for the second named defendant submitted that her defence is prejudiced and/or hampered because she does not have access to documentation pertaining to her husband's dealings with the bank and that a defence may only become clear if access is obtained to these records and documentation. The documentation and/or records said to be required were not specified or particularised in submissions save for a document refusing Mr. Munir additional life insurance cover on health grounds of which (counsel submitted) Mrs. Munir had no knowledge. The issues such records or documents might raise by way of an arguable or *bona fide* defence were not specified or particularised in submissions. Nevertheless, it is submitted that she is prejudiced in her defence and that the case should therefore be sent forward for plenary hearing so that discovery may be obtained which may possibly give rise to an arguable defence.

15. In an affidavit dated the 30th July 2015 Ms. Pauline Brady, solicitor for the second named defendant avers that she made a number of requests for documentation relating to the account of Mohammed Munir and a further request under the Data Protection Act 2003 on 25th March 2015 with which the plaintiff has refused to comply. Ms. Brady states that as the personal representative of the deceased, the second named defendant is entitled to disclosure under the data protection request. In a letter dated 25th March 2015, the solicitors for the second defendant requested discovery of "all correspondence or communication or other documents memorandum, notes or attendances with regard to the loan account and the repayment history thereof including any letters of demand or otherwise issued to the account holder deceased". Ms. Brady further states that it is "necessary that the second named defendant has access to the files which the bank seeks to rely on" and that in the absence of such access it is "impossible for the second named defendant to give full instructions" in relation to the defence of the case.

16. In response, Ms. McNamara states, in an affidavit dated 19th January 2016 that Ms. Brady does not state how without the discovery sought the second named defendant will be unable to provide full instructions, or provide any explanation as to how it is impossible to obtain sufficient instructions from her client. Ms. McNamara submits that the pleadings and affidavits contain detailed information concerning the background to the loan advances, the amounts and the method of interest calculation. Additionally, copies of the Facility Letters have been exhibited and full and detailed particulars of default are also provided in the pleadings. It was submitted that the second named defendant is in no better or worse position than the first named defendant and is in possession of all information relevant to the plaintiff's claim. It is also noted that although Ms. Brady refers to a data protection request and to previous correspondence exchanged with the plaintiff's solicitors, these documents are not exhibited.

17. In a further affidavit dated 22nd January 2016 Ms. Brady states that "[t]here are cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like". She avers that the present case "is one of those cases in circumstances where the second named defendant was not a party to the loan agreement and she should not be expected to defend such an action in the absence of full disclosure and not having direct evidence of matters pertaining to the loan agreement within her possession". Ms. Brady then states that "in the interest of justice and to ensure that said defendant's constitutional right of access to the court is maintained, this matter should be transferred to plenary hearing which would allow the defendant to procure the documentation required to defend the claim by way of discovery and interrogatories".

18. I am satisfied that the affidavits on behalf of the second defendant do not advance any point of defence to which the issue of disclosure or discovery of documents could be reasonably or possibly relevant. The documents relevant to the case have been exhibited. It is asserted that other relevant documents may exist which are possibly relevant to defence points whether set out in the affidavits or not but it is not suggested how that might be. It is not suggested that the relevant agreements were not made or that the monies were not advanced and not repaid or that the money was not advanced for the purpose stated. The proposed point is based on a vague general assertion of hypothetical relevance and is not a basis upon which to send the matter for plenary hearing.

19. I am not satisfied that the second defendant has raised any arguable grounds of defence save for the issue of whether the agreement under Facility Letter 2 is void because of the absence of or past consideration which I consider to have been raised by both defendants and which I address below.

Proposed points of defence of Mr. Nawaz

20. In an affidavit sworn on 13th April 2015, the First Named Defendant, Mr. Mohammed Nawaz claims that the Facility Letter 2, dated 26th July 2006 is void and of no effect because it was not supported by consideration. It is stated that loan account 64645553 was made available to the borrowers pursuant to the Facility Letter 1 dated 3rd September 2003 for the purpose of purchasing a warehouse unit at Ballymount, Dublin. The purchase was completed in 2003 and no new monies were made available in 2006 on foot of Facility Letter 2.

21. Mr. Nawaz also maintains that Facility Letter 3, dated 9th February 2007 in respect of loan account 66472908 is also void as it purports to create a mortgage to secure lending conditional on the assignment to the plaintiff of an additional life policy in respect of himself and Mr. Munir in the amount of €500,000.00 which was never procured. In fact the first defendant procured additional cover of €350,000.00 but the second defendant was unable to procure any further cover. It is alleged that the plaintiff acted negligently and in breach of duty insofar as it permitted monies to be drawn down on foot of the said facility letter in circumstances where the agreed condition precedent to draw-down was not fulfilled. It is said that had this condition been fulfilled the liability of the defendants would have been substantially diminished and the indemnity provided under the additional life policy if applied in addition to the proceeds from the sale of properties would have produced an amount in excess of the sum due.

22. It is also claimed that the letters of demand of the 1st March 2013 are ineffective insofar as they refer to Facility Letter 2 of 2006, which is said to be void, and a Letter of Variation dated 28th July 2009, of which he states he has no record. Mr. Nawaz states that in any event no valid variation of the mortgage loan would have been possible in 2009 as Mr. Munir died in April 2008. It is claimed that the letters of demand referring to monies advanced under loan account 66472908 are ineffective as Facility Letter 3 is also void. I do not accept that these points concerning the letters of demand are arguable grounds of defence.

23. In her second affidavit sworn on 6th May 2015, Ms. McNamara states that the assertion of the first named defendant that Facility Letter 2 was void for want of consideration is misconceived because it is clear from the terms of the letter that the agreement amounted to the continuation of existing facilities on terms and conditions previously accepted by the borrowers. It is submitted that the plaintiff's agreement to continue to provide funds to the borrowers amounted to consideration.

24. It is also stated that the failure of the plaintiff to insist on the implementation of the alleged conditions precedent requiring an additional life policy on the lives of the borrowers for an amount of €500,000.00 was a matter for the discretion of the plaintiff. It is said that the first named defendant effected additional cover of €350,000.00 but additional cover for Mr. Munir was declined. Ms. McNamara avers that in these circumstances the plaintiff waived the necessity for cover of €500,000.00 in respect of each borrower.

25. Ms. McNamara states that the Letter of Variation dated 29th July 2009 did not alter the nature or substance of the loan facilities advanced or the relationship between the bank and the borrowers. The letter addressed two matters, namely the confirmation of, and a statement showing the application of the proceeds of the Friends First policy on the life of Mr. Munir who died on the 4th April 2008; and the relevant monthly payment amount and the relevant interest in respect of Loan Account 64645553. The Letter of Variation is exhibited to the affidavit and addressed to the first and second named defendants. It states:

"Please see the attached statement showing the application of the proceeds €507,305.50 of the Friends First policy to the listed loan 64645553. I am advising you that the loan repayments to clear the loan in the original time frame calculated today will be €1697.03 per month (On the basis that you will be coming off a fixed rate in December I have approximated the rate to what the variable rate will be using an estimate) and this will be the payment required by the bank for August."

The letter is signed by a Tom Reynolds, Business Manager.

26. A further affidavit was sworn by the first named defendant on the 2nd July 2015 in which he avers that the assertions made by Ms. McNamara are inconsistent insofar as she states firstly that Facility Letter 2 amounted to a continuation of an existing facility and then secondly states that the variation of the original contract is supported by consideration. Mr. Nawaz further states that if the first averment of Ms. McNamara is accepted, the Facility Letter 2 of the 26th July 2006 is by her own admission of no effect as any contract between the parties had been completed in September 2003 and no further monies were made available on foot of the second facility letter. Mr. Nawaz then reiterates that the letters of demand dated the 1st March 2013 are ineffective as they relate to funds which were said to be made available pursuant to Facility Letter 2, and the fact that any variation of the mortgage on foot of the Letter of Variation of 28th July 2009 could not have been valid, Mr. Munir having died on 4th April 2008. I am satisfied that the contents of the Letter of Variation did not give rise to any unilateral change of conditions as alleged and does not give rise to an arguable defence. It is clearly a letter which updates the defendant as to the state of the account having regard to the reduction of the amount outstanding following the application of the proceeds of the insurance policy and the consequential reduced monthly repayments required.

27. Counsel for the first named defendant submitted that Facility Letter 2 is also void for lack of consideration in circumstances where no additional funds were drawn down on foot of that letter. Insofar as Facility Letter 2 states that the purpose of the loan facility was the "continuation of existing facilities" to the borrowers, counsel submits that the bank was obliged to continue the terms of the original loan pursuant to Facility Letter 1 of 3rd September 2003 in circumstances where there had been no question of a default on the part of the borrowers at that time. It is submitted that the change in interest rate and the instalments required to repay the monies drawn down under Loan Account 64645553 specified in Facility Letter 2 did not amount to fresh consideration as the change in interest rate was not a change of condition.

28. The original facility was for a period of fifteen years with repayments of 6,6894.44 to commence one month from the date of draw-down of the principal sum: the loan originally provided was for the purpose of purchasing a retail unit in the M50 Business Park, Ballymount, Dublin. The purpose of Facility Letter 2 (Loan Account 64645553) was to provide a Term Loan Renewal in the amount of €787,736.00 and the provision of a "continuation of existing facilities on terms and conditions previously accepted" by Messrs Munir and Nawaz. The same security was maintained by the lender. The lesser sum claimed is in respect of the balance due on this account which as of 25th May 2017 was 130,178.83.

29. It is accepted that no further draw-down of funds occurred under Facility Letter 2 and that essentially it operated under the same terms and conditions as Facility Letter 1. A default in repayment relied upon by the plaintiff is said to have occurred under Facility Letter 2 but it is claimed that this agreement is void because there was no consideration underpinning it. There is no reference to forbearance to sue in relation to any default by the defendants because there was no such default at that time. Indeed the plaintiff does not seek to rely upon forbearance to sue as the consideration for Facility Letter 2. I am satisfied that in respect of this loan both defendants have raised an arguable defence in respect of this issue.

30. Facility Letter 3 dated 9th February 2007 in the amount of €700,000.00 was to assist in the purchase by the two businessmen of Unit 7 Longford Shopping Centre. It was drawn down on the 26th April 2007 and was to be repaid over 180 months. The amount outstanding on this account (Commercial Mortgage Account 66472908) as of 25th May 2017 was €670,033.74.

31. Mr. Nawaz claims that Ms. McNamara's contention that the condition precedent requiring the borrowers to hold a life insurance policy contained in Facility Letter 3 is a "matter for and at the discretion of the plaintiff" is untenable. He asserts that this cover would have provided him with considerable protection in terms of discharging any liabilities under the loan and would have "informed the decision to consider the mortgage".

32. It is therefore submitted that the bank was not entitled to unilaterally waive the condition contained in Facility Letter 3 that required as additional security to the loan "Assignment to the Bank of an additional life policy on the lives of Mr. Mohammed Munir & Mr. Mohammed Nawaz for an amount of €500,000.". Mr. Nawaz deposed that he obtained an additional life insurance policy for €350,000.00 but was not informed by the plaintiff that Mr. Munir failed to obtain additional life policy and only became aware of this fact following his death. It is stated that the agreement was in some way altered without notice to the first named defendant by a waiver of this condition and for this reason the loan agreement on foot of Facility Letter 3 is void. Counsel relies on the decision of McGrath J. in *Stapleford Finance D.A.C. v. McEvoy and Butler* [2018] IEHC 99 in which counsel for the second named defendant, a guarantor, successfully raised grounds amounting to a *bona fide* defence including a ground that the bank was not entitled to waive a condition requiring certain security for the loan. It was noted by counsel that the averments contained in the affidavits of Mr. Nawaz in respect of his lack of knowledge of the refusal of additional coverage for Mr. Munir were not contradicted in the affidavits sworn on behalf of the plaintiff and that should the credibility of the first named defendant be in issue in this regard, that is something that ought to be ventilated at plenary hearing. In response, counsel for the plaintiff submitted that the present case was distinguishable from *Stapleford Finance D.A.C.* because it concerned a guarantor as opposed to a borrower - a guarantor necessarily being further removed from the negotiations between a lender and a borrower. It is pointed out that Mr. Nawaz was happy to proceed without himself complying with the condition in that he was only able to obtain life coverage in the amount of €350,000.00. Counsel also submits that as a matter of contractual construction the bank was entitled to waive at its discretion any condition precedent. Counsel points to the conditions precedent to drawdown in the appendix to Facility Letter 3 which states:

"1. The Bank will not be obliged to perform its obligations under this offer letter unless the bank at the time of so doing it is, in its absolute discretion satisfied that

(i) Security/drawdown requirements as outlined herein have been completed and executed in a form, or manner and content acceptable to the Bank and its legal advisors".

and the section entitled "Conditions Precedent to Drawdown" in the facility letter which states:

"In addition to the Conditions Precedent to drawdown contained in the Appendix, the Bank shall not be obliged to allow any drawdown of the above facilities unless at the time of so doing it is satisfied that:

1. Security as outlined above to be in place in a manner acceptable to the Bank and its legal advisors prior to the drawdown facility."

It is submitted therefore that the additional security requirement for the loan in the form of life insurance cover in the amount of €500,000.00 was, on the basis of contractual interpretation, a matter for the sole discretion of the bank and having agreed to the loan agreement, the borrowers agreed to the bank's entitlement to unilaterally waive the said additional security requirement. I am not satisfied that an arguable defence arises on this point. The borrowers were clearly satisfied to proceed on the basis that the additional cover had not been obtained. The first defendant and his late partner clearly knew that they were not compliant with the term at least in respect of their respective failures to obtain the cover required and notwithstanding that fact, were satisfied to receive the amount borrowed and purchase the unit for which it was advanced. I am also satisfied that that it was within the discretion of the bank to waive this term (*Ulster Bank v. Moyne* [2015] IEHC 483): the only discretion vested under the relevant condition lies with the bank for the benefit of which the clause was inserted.

33. In his third affidavit dated 29th May 2017, Mr. Nawaz reiterates his submission that the letters of demand dated 1st March 2013 are void and of no effect for reasons already stated in previous affidavits of the defendants dated 13th April 2015 and 13th November 2014. Mr. Nawaz also states, somewhat belatedly, that even if the letters of demand were valid when issued, the plaintiff is no longer entitled to rely upon them because, subsequent to their issue, the plaintiff entered into negotiations with the defendants which led to a fresh loan offer on 16th July 2013, which was signed by the defendants on 30th August 2013. If this agreement had been implemented the plaintiff would have refinanced the defendants outstanding loans and liabilities under account numbers 64645553 and 66472908 by replacing them with a new loan facility in the sum of €800,000.00. The letter was signed by the defendants. As such, Mr. Nawaz submits that the original letter of demand having predated the new loan agreement, is no longer of any effect having been overtaken by the refinancing agreement.

34. In her fifth affidavit dated 23rd January 2018, Ms McNamara states that the averments made by Mr. Nawaz are of no assistance to him because the Facility Letter of 16th July 2013 was never implemented due to the inability of the defendants to address the necessary security conditions relating to the facility, which formally lapsed. She states "[B]ecause the facility was never implemented, it forms no part of the herein proceedings, as the Plaintiff could not sue on the basis of a Loan Facility Letter, the terms and conditions of which were never implemented or acted upon".

35. The Bank was not obliged to perform the obligations set out in the new facility letter unless the security conditions were fulfilled to the bank's satisfaction within sixty days from the date the offer was accepted. In those circumstances the offer was deemed to be withdrawn without liability or commitment on the part of the Bank. I am not satisfied that this point is an arguable ground of defence.

Decision

36. For the reasons set out above the court is not satisfied that the defendants have raised any arguable or *bona fide* defence in respect of the plaintiff's claim based on Facility Letter 3 and accordingly, the plaintiff is entitled to judgment in the amount of €670,033.74 in respect of Account Number 66472908 inclusive of principal and interest due to 25th May 2017 together with such further interest as has accrued to date.

37. I am also satisfied that the defendants have established an arguable or *bona fide* basis upon which to defend the plaintiff's claim in respect of Loan Account Number 64645533 having passed the very low threshold required on the ground only that the agreement for the said loan under Facility Letter 2 is allegedly void for past or a failure of consideration. It seems to me the case made by the defendants on that basis is at least arguable. I do not accept that any of the other points raised give rise to an arguable or *bona fide* ground of defence.