Neutral Citation: [2014] IEHC 668

HIGH COURT

[2012] No.219 S

STAPLEFORD FINANCE LIMITED

PLAINTIFF

AND

PETER COURTNEY

DEFENDANT

JUDGMENT of Mr Justice Bernard Barton delivered the 14th day of October 2014

1. These proceedings were instituted by Irish Bank Resolution Corporation [herein after the bank] by way of Summary Summons dated the 25th January, 2012 and by which the bank claimed the sum of €117,666.80 being the balance of monies payable by the defendant to the bank by way of a loan comprised in two loan accounts numbers 02225435 and 02399895 respectively together with interest thereon until payment or judgment.

2. By way of legal assignment made subsequent to the date of issue of these proceedings the bank assigned its interests in this action to Stapleford Finance Limited. By order of the court made the 28th July 2014, after the hearing of the motion herein that company was given liberty to carry on these proceedings as Plaintiff.

3. The motion for liberty to enter a final judgment against the defendant was issued by the bank on the 30th June, 2012. A number of affidavits have been sworn on behalf of the bank in respect of its claim and to which the defendant has delivered replying affidavits.

4. At the time when this matter came before the court the bank claimed that the amount due in respect of principle and interest was €123,709.59.

5. As required by the Rules of the Superior Courts for the purpose of obtaining liberty to enter summary judgment, the bank asserts, amongst other things, that there is no *bona fide* defence to the bank's claim.

6. In response the defendant maintains that not only has he got a bona fide defence but that he has a counter claim against the bank for damages and to which I will return later in this judgment.

7. At the outset, however, I consider it useful to set out the legal principles to be applied on an application for liberty to enter a summary judgment.

The Law

8. It is now well settled that the modern law as to the principles to be applied by the Court on an application for liberty to enter a summary judgment on a Summary Summons commences with the decision of the Supreme Court in *First National Commercial Bank PLC. v. Anglin* (1996) 1 I.R. 75.

9. In that case Murphy J. stated that;

> *"For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action…..*
>
> *In my view the test to be applied is that laid down in Banque de Paris v. de Naray (1984) 1 Lloyds Law Reports 21 which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank PLC v. Daniel (1993) 1 W.L.R. 1453. The principle laid down in the Banque de Paris case was summarised in the head note thereto in the following terms:*
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> *"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."*
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> *In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows*
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> *'I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, "is there a fair or reasonable probability of the defendants having a real or bona fide defence?'*
>
> *The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (civil division), transcript number 699 of 1990 is what the defendant says credible?, amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence."*

10. This statement of the principles was followed by the Supreme Court in *Aer Rianta C.P.T. v. Ryanair Ltd.* (2001) 4 I.R. 607. In her judgment, McGuinness J., endorsed the test laid down in the *First National Commercial Bank PLC. v. Anglin* and summarised it as follows

> *"Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence…the court does not ask whether Mr O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr Byrne's account of events is more likely. The question is rather whether the proposed event is so far fetched or so self contradictory as not to be credible."*

11. Hardiman J. delivered a concurring judgment in which he engaged in a comprehensive review of the authorities relating to the jurisdiction to grant summary judgment. Having reviewed the case law he expressed his own view in the following terms

"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?."

12. In *Harrisrange Ltd. v. Duncan* (2003) 4 I.R. 1, McKechnie J. enunciated the principles to be applied by a court in deciding whether to grant summary judgment or give a defendant leave to defend in the following way

"(i) the power to grant summary judgment should be exercised with discernable 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 defendants 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 not be 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 that 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 finality,

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

13. This enunciation of the approach to be taken by the court, when considering an application for liberty to enter a summary judgment, was cited with approval by Finlay Geoghegan J. in her judgment in Bank of Ireland v. Walsh delivered on the 8th of May, 2009. In relation to the test to be applied she observed:

"As appears in sub paragraph (vii) above, the threshold is one of an arguable defence and is, in relative terms, a low threshold. However, in making that determination, the court should have regard to whether what the defendant is saying is mere assertion and whether the proposed defence is credible in the sense explained by Hardiman J. in Aer Rianta c.p.t. v. Ryanair Ltd. (2001) 4 I.R. 607".

14. With regard to the approach to be adopted in relation to factual issues, Clark J. in *McGrath v. O'Driscoll* (2007) 1 I.L.R.M. 2003, referring to the decision in *Aer Rianta v. Ryanair* stated at paragraph 3.4

"So far as factual issues are concerned it is clear, therefore that a mere assertion of a defence is insufficient when any evidence or fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved."

15. In applying the test the court must be mindful that the completeness of the defence available to a defendant may only be available as a result of the adoption of certain court procedures such as discovery, inspection or interrogatories. However, a general assertion that the defence may well become available as a result of the adoption of these procedures would clearly be insufficient. In GE Capital *Woodchester Ltd. v. Aktiv Kapital Asset Investments Ltd*. (2009) I.E.H.C. 512, Clarke J. observed

"However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again be emphasised that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of a motion for summary judgment, possible to put before the court f the assertion concerned."

16. The approach which is required to be adopted by the court in relation to legal issues on a motion for summary judgment was described by Clarke J. in McGrath and O'Driscoll in the following terms

"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 straight forward 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."

17. Although it is open to a court on a motion for summary judgment to resolve a question of law or to construe a document there is in fact no obligation on the court to do so rather the question is whether the defendant has established an arguable defence. See

Danske Bank v. Durkin New Homes (2010) 1 E.S.C. 22 and *Bussoleno Ltd. v. Kelly* (2011) I.E.H.C. 220.

18. Where the defence to a claim is in the nature of a counter claim and set off the court is required to take into account a number of matters in the exercise of its discretion as to whether or not summary judgment should be granted.

19. In *Prendergast v. Biddle* (unreported, S.C. 31.7. 1957 Kingsmill Moore J. stated the principles upon which the discretion of the court should be exercised as follows :

> *"It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counter claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant can show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim until the after the counter claim had been heard, for the plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counter claim would be fruitless. I mention only some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion."*

20. This decision was considered and followed by Clarke J. in *Moohan v. S. & R. Motors (Donegal) Ltd* (2008) 3 I.R. 650. where he summarised the issue for consideration in the following terms

> *"Where the nature of the defence put forward amounts to a form of cross claim slightly different considerations may apply. 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 to 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 defended 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. What the position is to be in the intervening period creates a difficulty as explained by Kingsmill Moore J. in Prendergast v. Biddle.*

21. The difficulty alluded to in the judgment of Kingsmill Moore J. was enunciated by him as follows :

> *"On the one hand it may be asked why a plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of judgment on his claim because the defendant asserts a plausible but unproved and contested counter claim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiff's demand when he asserts and maybe able to prove that the plaintiff owes him a larger amount."*

23. Having regard to the principle set out by Kingsmill Moore J. in his judgment Clarke J. stated

> *"On that basis the overall approach to a case such as this (involving, as it does, a cross claim) seems to me to be the following*
>
> *(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off;*
>
> *(b) If and to the extent that a prima facie case for such a set off arises, the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate portion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);*
>
> *(c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgments should be stayed must be determined in the discretion of the court by reference to the principle set out by Kingsmill Moore J. in Prendergast v. Biddle …"*

24. It is not in every case, however, where a defendant establishes a defence by way of counter claim giving rise to a set off that the defendant will be given liberty to defend the proceedings. This is best illustrated by a claim arising on foot of a contract by which the parties have agreed that there is to be no counter claim or set off or at least that any payments to be made under the contract are to be made without set off or counter claim. As to whether or not the parties have made such an agreement is a matter of construction of the contract as a whole.

25. Clarke J. in Moohan v. S & R Motors (Donegal) Ltd gave as an example of a party entitled to a set off in equity in relation to any cross claim arising out of the same contract that of a builder owed money on foot of a construction contract where the defence of the employer was by way of a counter claim in respect of defective works arising from the same contract. In those circumstances it is said that the employer is in principle prima facie entitled to a set off in equity for such amount as may be found to be due in respect of any defective works. That prima facie position, however, may be displaced by the terms of the contract. As a matter of contract law the parties were free to agree whether or not there should be a set off with the only question then for determination being whether or not they had in fact done so.

Summary of the Bank's case

26. Affidavits in this case were sworn on behalf of the bank by Barry Casey and Conor Nestor both of whom are employed as bank managers. Elizabeth Quinn, solicitor for the bank also swore an affidavit to prove the special resolution order made by the Minister for Justice on the 7th February, 2013 in accordance with s.4 of the Irish Bank Resolution Corporation Act 2013 for the purposes of winding up the bank and confirming the instructions of the special liquidator to continue to progress these proceedings on behalf of the bank.

27. The bank, formerly Anglo Irish Bank, provided a number of loan facilities to the defendant for the purposes of enabling the

defendant to make personal investments. The monies advanced were comprised in two loan accounts the first of which was initially on foot of a facility letter dated the 6th May, 1999 which in turn was amended by way of two supplemental facility letters dated the 23rd September, 2003 and 6th November, 2003. The loan facility advanced to the defendant in accordance with the 1999 facility letter was in the principle sum of £300,000. The second loan account, number 02399895, comprised a loan facility up to a maximum amount of €100,000 on foot of a facility letter dated the 6th February, 2006.

28. Clause 3 of the 1999 facility letter provided that security for the loan was to be a first legal charge by way of transfer into the bank's nominee company, Pegasus Nominees Ltd, over shares/cash to the minimum value of £137,000 and a first legal charge by way of transfer to Pegasus Nominees Ltd over the additional shares purchased with the proceeds of the loan facility. The facility letter together with a letter of pledge was dated the 18th June, 1999.

29. By the letter of pledge the defendant deposited or caused to be deposited with or transferred to the bank or its nominees the stocks, shares and securities mentioned in the schedule to the letter of pledge. This schedule identified the shares in question as all shares purchased on the defendant's behalf and registered in the name of Pegasus Nominees Ltd. It was a term of that letter that all monies lent were payable on demand together with interest and bank charges. Clause 3 of that letter provided that the bank would hold the scheduled securities by way of a continuing security for the discharge of the defendant's liability to the bank. With regard to the realisation of securities clause 4 provided that the bank would have an immediate and unrestricted power of sale over those securities. As to the exercise of the power of sale, the defendant agreed to and appointed the secretary of the bank to be his attorney in his name for the execution all documentation necessary to enable the bank or its nominees to carry out a full or partial sale of the securities.

30. Apart altogether from the fact that the loan facilities were repayable on demand in accordance with the general conditions set out in the credit agreement and facility letter,clause 12.1 of the general conditions provided that

> *"All repayments and payments by the borrower hereunder shall be made, without set off or counter claim, in the currency of the facility to such account as the bank may from time to time notify to the borrower"*

31. The supplemental facility letters of the 23rd September and 6th November, 2003, the first of which was to a maximum amount of €150,000 and the second of which was to a maximum amount of €160,000, also provided for a legal charge over all shares held in the name of the bank's nominee company or securities custodian on behalf of the defendant save that such shares were required to have a minimum value of €215,000 and that the total value of the security held by the bank would not be less than 133 % of the total amount outstanding to the bank.

32. The 2003 facility letter provided that in the event of the security falling below the specified levels then the defendant would immediately provide the bank with additional securities acceptable to the bank, or cash, or otherwise ensure that the security cover was maintained at the agreed level. In default it was agreed that in the event of the defendant failing to provide the bank with additional securities, when requested, in order to maintain the agreed percentage security cover, the bank reserved the right to sell all of the assets comprised in the security and to use the net proceeds to repay the facility.

33. The 2006 facility letter provided that the total value of security held by the bank would not be less than 1.25 times the amount outstanding to the bank as well as similar provisions to those of the 2003 facility letter enabling the bank to sell all securities held by it and to use the net proceeds to repay that facility.

34. Subsequent to the drawing down of funds on foot of these facilities the value of these securities fell below the minimum levels provided for in the facility letters. The bank made several requests of the defendant to provide further securities in order to maintain the minimum value to debt ratio. A number of meetings took place between the bank and the defendant together with correspondence also being exchanged particularly between August 2010 and March 2011 but by which date the loan facilities had expired. In meetings with the bank between the 31st March, 2011 and the 21st July, 2011 the defendant indicated that he was not in a position to fund either the capital or interest payments due on foot of the loan facilities.

35. On the 4th October, 2011 the bank's solicitors demanded repayment of the sum due and owing on foot of the loan account amounting to €128,156.25. The defendant responded to that letter of demand by letter dated the 6th October, 2011 in which he made a number of proposals which were not acceptable to the bank.

36. In November, 2011 the bank, exercising its rights under the facility letters and the letter of pledge, disposed of the shares purchased on behalf of the defendant, and registered in the name of Pegasus Nominees Ltd, realising a total sum of €108,476.23 which together with dividends amounted to a sum of €109,140.71 The proceeds of sale were applied in discharge of the sums due on account number 2225435 leaving a balance due on the 11th November, 2011 of €20,039.22. This was all confirmed to the defendant by letter dated the 18th November, 2011 which also requested proposals from the defendant to repay the total net balance outstanding on both accounts in the sum of €116,533.96. The bank's solicitors by letter of the 21st December, 2011 wrote to the defendant indicating that the bank was prepared to allow the defendant to make payments on an interest only basis of 10%. This letter was responded to by the defendant by letter dated the 5th January, 2012 in which he indicated that he would not be making any payments either of interest or capital and would only engage in further discussions on the matter as and when the bank restored the share portfolio to its previous position. This was followed by a letter of demand dated 19th January, 2012 for the amount the subject matter of the Summary Summons. The defendant responded by letter dated the 31st January, 2012 making clear his intention to resist the claim and maintain a counter claim.

37. Documentary evidence to support and vouch the bank's claim was exhibited in the bank's affidavits.

Summary of the Defendant's case

38. At the outset it is to be observed that the defendant appeared personally and without the benefit of legal advice or legal representation.

39. Both in his affidavits and at the hearing of the motion, the defendant accepted that he had signed the facility letters and the letter of pledge, that the bank provided the agreed facilities by way of the loan accounts and that these had been drawn down by him.

40. The defendant also accepted that the purpose of the facilities was to enable him to make provision in an investment portfolio consisting in the main of what were once described as Irish blue chip shares. That the value of his shareholdings fell as a consequence of the failure of the financial system and the property market with the result that his portfolio fell under the loan value was also accepted. At the same time the defendant's own business suffered with his property assets going into negative equity.

Consequently the defendant also accepted that he was unable to keep up payments of principal or interest on the loans from the bank.

41. In a letter dated the 6th December, 2011, sent by the defendant to the bank's solicitors, the defendant intimated his intention to counterclaim for damages in any proceedings brought by the bank. He particularised his counterclaim under a number of headings in the following terms:

> *"1. Your client is itself responsible for the position I find myself in. My portfolio was mostly Irish bank shares (Anglo, Bank of Ireland and AIB) and your client's reckless lending practices were the main reason why the Irish banking system collapsed. Your client is the market leader in Irish property lending and forced its competitors down the same path of bad practices and over reliance on the sector, leading to grossly inflated property values and a Ponzi-style collapse.*
>
> *2. Your client engaged in illegal market manipulation of its share price by making very large loans to customers and staff for the acquisition of its own shares.*
>
> *3. Your client misstated the figures in its accounts and created artificial transactions for the purposes of misleading the market as to its true financial position.*
>
> *4. The above actions caused me losses, as I would have behaved differently if these actions had not taken place. Specifically, I would not have invested the EUR80K as I did in April 2008.*
>
> *5. Your client has behaved unreasonably in its dealings with me and not properly considering my business plan, in ignoring reasonable work out proposals and in taking unilateral actions that make it as difficult as possible for me to make further repayments.*
>
> *6. I would require full discovery of all documents and reports relevant to the above matters."*

42. The defendant does not contest the right of the bank to exercise its power of sale of the share portfolio under its security. His complaint, however, is that the drop in value of his investment portfolio was attributable to the actions of the bank in leading the Irish banking system on a path of reckless lending and in manipulating the market. Specifically, in April 2008, having remortgaged his home for the purposes of raising additional funds, and which he maintains was at the request of the bank, he made a further investment in the sum of €80,000 of which €50,000 was invested in the three bank shares, already referred to. He claims that he would not have made that investment had he known that the bank was engaged in what he alleges were unlawful practices carried out by the bank and that as a result of the complete collapse of the share prices of the three banks in question, he lost at least €50,000, moreover, and to make matters worse, the bank, on the 4th November, 2011, exercised its right to sell his share portfolio at the worst possible time in the economic cycle. In this regard he maintains that the value in shares comprised in his portfolio, including Ryanair and CRH, together with the dividends subsequently declared on those shares, rose significantly with the result that the benefit which might otherwise have accrued on a disposition later in time was lost injuring not only the interest of the bank in securing repayment, but also injuring the defendant by leaving him with a liability greater than that which would otherwise have been the case. In short, the bank went to the market at absolutely the wrong time and did so without taking reasonable care in choosing the time of sale of either its own interests or those of the defendant. He maintains that at the time of the disposition all market indications were that the shares with value, such as Ryanair and CRH, were forecasted to rise and that this view of the market was proved by subsequent performance of those shares to be correct.

43. In addition to the foregoing, the defendant contends that had he known of the true state of affairs back in 2008, he could have sold his shares and repaid the loans and have had a surplus which he estimated in the amount of €107,000.

44. In this regard, it is to be observed that the defendant was not an advisory client of the bank, but rather his relationship with the bank in relation to the dealing in shares was on an execution only basis as provided for by an investment execution terms of business agreement made between the bank and the defendant on the 14th October, 2002.

45. The defendant further maintains that at all times the bank acted in total disregard to his interests, of his circumstances and, in particular, his ability to repay the loans. He contends that in executing its security and liquidating the defendant's share portfolio when it did the bank failed to comply with the requirements of the Consumer Protection Code and was also in breach of the Investment Intermediaries Act 1995, as an investment intermediary. In this regard the defendant relied specifically on the requirement of Regulation 76(1) of the European Communities (Markets and Financial Instruments) Regulations, S.I. No. 60/2007, which provides:-

> *"When providing investment services or, where appropriate, ancillary services to its clients, an investment firm shall –*
>
> *(a) act honestly, fairly and professionally in accordance with the best interests of its clients, and*
>
> *(b) comply with the principles set out in paragraphs (2) to (6) of this Regulation and in Regulation 98."*

46. The defendant maintains that having regard to the matters deposed to in his affidavits and the copious correspondence which was exhibited, that the bank failed to act either honestly, fairly ,or professionally in accordance with the best interests of the defendant.

47. The defendant also challenges the adoption by the bank of the Summary Summons procedure. He maintains that this was inappropriate and that proceedings ought to have been brought by way of Plenary Summons. He also maintains that having regard to his defence and counterclaim of which notice was given in prelitigation correspondence, that an affidavit could not have been properly sworn on behalf of the bank that in the belief of the deponent there was no bona fide defence to the bank's claim.

48. In addition, the defendant relied upon what he alleges were breaches by the plaintiff of the Companies Acts, as well as breaches of the Code of Conduct and the European Communities (Markets and Financial Instruments) Regulations. He made oral and written submissions in relation to all of these matters and sought to rely upon public knowledge in relation to the affairs of the bank emanating from newspaper reports and other media reporting relating to both criminal prosecutions and civil proceedings involving the bank.

49. Finally ,the defendant submitted that the evidence contained in the bank's affidavit sworn by Conor Nestor was inadmissible as hearsay on the grounds that he had no personal involvement in any of the dealings between the bank and the defendant.

Summary of the Bank's reply
50. In reply to the defendant's submissions, Counsel for the bank contended that nothing advanced by the defendant constituted a defence to the bank's claim, rather, insofar as the defendant may have a claim against the bank in relation to the matters about which he complains, that was a matter for the defendant to be pursued by him in whatever proceedings he thought or might be advised were appropriate.

51. In relation to the alleged failure to comply with the Code of Conduct by the bank, it was submitted that any alleged breaches of that Code could not and do not amount to a defence: in this regard he submitted that that matter had already been considered and definitively decided in *Zurich Bank v. McConnon* [2011] IESC 75 and *McCaughey v Anglo Irish Bank Corporation Limited* [2011] IEHC 546, *AIB v Smith* [2012] IEHC 381, *Friends First Finance v. Cronin* [2013] IEHC 59.

52. With regard to the defendant's submission that he had a bona fide defence by way of counterclaim and set off, counsel submitted that even if the court considered that the case made by the defendant could constitute a counterclaim with a right to a set off that did not entitle the defendant to an order giving him liberty to defend the bank's claim since the defendant and the bank had entered into a binding agreement that all repayments and payments to be made by him on foot of the facilities would be made without set off or counterclaim and cited in support of that submission *Moohan v. S. and R. Motors (Donegal) Limited, infra*.

53. In relation to the disposal of the share portfolio, it was submitted that by virtue of the provisions of the letter of pledge the bank was entitled to realise its security and to apply the net proceeds in discharge of the loan accounts since it was clear to the bank at that time that the defendant was not in a position to service or otherwise repay the loans.

54. As to the defendant's submission that the bank had acted wrongfully in disposing of the share portfolio at the time it did in November 2011, it was submitted that the bank was not required to gamble on the market and wait to see whether the market would improve. In support of that submission *Bula Limited (In Receivership) v Crowley* [2003] 2 I.R. 430, and *China and South Sea Bank Limited v. Tan Soon Gin* [1990] 1 A.C. 536 were cited.

55. With regard to the defendant's submission that the bank had acted in breach of the Investment Intermediaries Act 1995, as amended, the bank submitted that it was not acting as an investment business firm because s. 2(6) (h) of the 1995 Act, as substituted by s. 16(2) of the Insurance Act 2000, specifically provided that an investment firm shall not include credit institutions which provide investment business services or investment advice. Accordingly, the bank was expressly excluded from the scope of the Act. In any event it was submitted that as the defendant had signed an execution only mandate with the bank on the 10th December, 2002, his was an execution only account and the terms of the letter of pledge entitled the bank to sell the portfolio when it did.

56. In relation to the contention of the defendant that the bank was not entitled and ought not to have utilised the Summary Summons procedure to pursue its claim against the defendant, it was submitted that having regard to the nature of the bank's claim that this came within the provisions of Order 2 of the Rules of the Superior Courts, moreover, it was clear from the defendant's own affidavits, and from submissions made at the hearing of the motion, that he did not seek to challenge the validity of the facility letters, nor the letter of pledge ,nor the fact that he had drawn down the facilities, nor did the defendant dispute the computation of the amounts claimed by the bank to be due by him on foot of the loans.

57. Finally, with regard to the defendant's submission that the averments contained in the bank's affidavits of Conor Nestor constituted hearsay on the grounds that he had no personal involvement in the dealings between the bank and the defendant, the bank relied upon the provisions of the Bankers Book Evidence Acts 1879 to 1959 and the decisions of this Court in *Mooreview Developments and Others v. First Active plc* [2010] IEHC 275, *Bank of Scotland v. Fergus* [2012] IEHC 131, *Bank of Scotland v. Stapleton* [2012] IEHC 549 and *Ulster Bank Ireland Limited v Dermody* (Unreported, High Court, 7th March, 2014).

Decision
58. The court is satisfied on the evidence before it that the bank advanced monies to the defendant on foot of the various facility letters and upon certain securities the subject matter of the letter of pledge. The defendant does not challenge the computation of the amount claimed in these proceedings. He contends, however, that he has a good defence and a counterclaim which entitles him to a set off. It is not the function of the court on this application to determine the merits of the case made by the defendant but rather to determine whether he has met the requirements enunciated in the authorities earlier referred to in this judgment and which would warrant the court refusing the relief sought and making an order giving him liberty to defend these proceedings.

59. To deal firstly with the submission that the evidence adduced by the bank in the affidavits of Conor Nestor is inadmissible as being hearsay, it is quite clear that the bank is entitled to adduce evidence from an employee of the bank itself for the purposes of proving an amount due in proceedings against a customer. On the face of his affidavits Conor Nestor is an officer of the bank, accordingly, he was entitled to swear the affidavits he did and that evidence is not inadmissible as hearsay. See *Mooreview Developments Limited and Others v. First Active plc* [2010] IEHC 275, where Clarke J. stated:-

> *"However, the idea that a bank wishing to prove its case in debt against a customer has to produce a separate bank official who was personally involved in each individual transaction which gives rise to the customer's current debt is, in my view, fanciful. A witness from a bank is entitled to give evidence of the bank's records showing the amount due by a customer of that bank. The evidence and those records provide prima facie evidence of the liability. If a specific element or elements of those records are challenged, then the bank might well have a problem if it could not produce a witness who could give personal evidence of the contested matter."*

In this case there is no specific element or elements of the bank's records which are challenged.

60. The foregoing statement of the law was approved by Finlay Geoghegan J. in *Bank of Scotland v. Fergus* [2012] IEHC 131. Moreover, that the sworn testimony of an officer or partner employed by the bank is sufficient to prove an amount due by a customer to a bank see *Bank of Scotland v. Stapleton* [2012] IEHC 549. and that for the purposes of the Banker's Books Evidence Acts 1879 – 1959 an employee of the bank is an officer within the meaning of the Acts, see *Ulster Bank Ireland Limited v. Dermody* (Unreported, High Court, 7th March, 2014).

60. Turning to the defendant's case that the bank was in breach of the provisions of the Investment Intermediaries Act 1995, as amended, I am satisfied that the submission of the defendant is misconceived, firstly because of the express exclusion of the bank from the scope of that Act by virtue of the provisions of s. 2(6)(h) as substituted by s. 16(2) of the Insurance Act 2000 and, secondly, because the bank was entitled in any event to dispose of the share portfolio pursuant to the provisions of the letter of pledge. In this regard, I am also satisfied that the defendant was an execution only client of the bank on foot of the investment

execution terms of business agreement made the bank and the defendant on the 14th October, 2002.

61. With regard to the defendant's submission that the adoption by the bank of the Summary Summons procedure to obtain judgment against him amounts to an abuse of the process of the court and that the plaintiff ought to have instituted proceedings by way of Plenary Summons, I am satisfied this submission has no basis in law. The defendant seeks neither to challenge the facility letters, the letter of pledge nor the fact that he drew down the funds comprised in the two loan accounts on foot of those facilities nor is the computation by the bank of the amount claimed in these proceedings challenged. Moreover, it is not disputed that the securities for the facilities were the subject matter of the letter of pledge. It follows that the bank's claim in these proceedings comes within the meaning of Order 2 Rule 1 of the Rules of the Superior Courts; accordingly, the bank was entitled to bring these proceedings by way of a Summary Summons.

62. The defendant has submitted that in its dealings with him the bank was in breach of the consumer protection code 2006 and that this constitutes a defence to the plaintiff's claim.

63. This proposition has been considered by this court in previous cases and with the same result, namely that a breach of the Consumer Protection Code 2006 does not render the contract with the consumer unenforceable. Referring to his own decision in *Zurich Bank v. McConnon* (2011) I.E.H.C. 75 Birmingham J. in his judgment in *McCaughey v. Anglo Irish Bank Corporation Ltd*. (2011) I.E.H.C. 546 stated:

> *"In any event in the case of Zurich Bank v. McConnon… I expressed the view that I could see no basis for suggesting that any alleged breach of the code exempted the borrower from repaying his loan and rejected the argument that a breach of the code rendered a contract null and void. I see no reason to change my mind in that regard."*

65. Having referred to the Consumer Credit Act 1995, as amended by the Central Bank and Financial Services Authority of Ireland Act, 2003 and the provisions of the Consumer Protection Code 2006 ,published pursuant to provisions of s.(8) of the Consumer Credit Act 1995, Herbert J. in his judgment in Friends First Finance v. Cronin (2013) I.E.H.C. 59 held that :

> *"…there is nothing in any of these statutes which expressly or impliedly would render the loan agreements illegal, invalid or unenforceable because of a breach by the plaintiff of any of these statutory provisions or of the Consumer Protection Code 2006."*

66. I accept that different considerations apply in circumstances where a bank is seeking an order for possession in respect of a property which is a principle private residence and where compliance with the code is required to be demonstrated See *Stepstone Mortgage Funding Ltd. v. Fitzell* (2012) 2 I.R. 318 and *Irish Life and Permanent PLC v. Duff* (2013) I.E.H.C. 43. But that is not the case here. The foregoing authorities in relation to that aspect of matters were considered by Ryan J. in *ACC Bank PLC v. Deacon* (2013) I.E.H.C. 427 where he rejected the contention that a failure to comply with the Consumer Codes of Conduct regarding lending to SME's rendered a loan invalid. He distinguished the Fitzell and Duff cases on the basis that those decisions related to claims for repossession of family homes. Fortified by these authorities I am quite satisfied to hold that the breaches of the code alleged by the defendant on the part of the bank do not afford him a defence to the bank's claim.

67. Turning to the defendant's submission that the bank was in breach of a duty of care to him and acted wrongfully when exercising it's power of sale under the letter of pledge by disposing of the share portfolio at the worst possible time in the market causing a loss and consequently a greater liability of the defendant than he might otherwise have had, the evidence before the court establishes that at the time of the sale in November, 2011 the defendant was not in a position to either service or repay the loans, a fact which was attributable as much to the business difficulties in which the defendant found himself as well as to the evolving crisis in the worlds financial markets.

68. I am also quite satisfied that the bank had an unfettered power of sale under the letter of pledge and was entitled to exercise that power by selling the pledged securities when it did so.

69. Whether or not the bank was under any obligation at the time of sale to await an improvement in the market is a question which has previously been considered in a number of cases both in this jurisdiction and in the U.K. In *Bula Ltd. (in receivership) v. Crowley* (2003) 2 I.R. 430, when considering the obligations of a receiver in this regard, Denham J. held that a receiver did not have a general obligation to wait before going to the market and cited in her judgment with approval the following extract from the decision in *Re Charnley Davies Ltd* (2) (1990) B.C. L.C. 760 at 775

> *"A mortgagee is bound to have regard to the interests of the mortgager, but he is entitled to give priority to his own interests, and may insist on an immediate sale whether or not that is calculated to realise the best price; he must take reasonable care to obtain the true value of the property at the moment he chooses to sell it, see Cuchmere Bride Company Ltd. v. Mutual Finance Ltd. 971) Ch. 949. An administrator, by contrast, like a liquidator, has no interest of his own to which he may give priority, and must take reasonable care in choosing the time at which to sell the property."*

70. At page 453 of the report Denham J., referring to this dictum ,stated:

> *"The receiver is in the same position as the mortgagee. The first duty of the receiver is to the secured creditors. Thus, in proceeding to sale, the receiver may put the secured creditors' interests first. The receiver was not under a duty to wait for the market to rise."*

71. In *China and South Sea Bank Ltd. v. Tan Soon Gin* (1990) 1 A.C. 536 the Privy Council was concerned with a case involving the sale of security over shares. In that case a delay on the part of the creditor in exercising its power of sale resulted in the sale of the shares at a point in time when they were worthless. It was held by the Board that the creditor owed no duty to the surety to exercise its power of sale over the mortgage securities and could decide in its own interests whether to sell and when to do so.

72. Lord Templeman delivering the judgment of the Board and referring to the obligations which it had been submitted were required of the creditor in equity stated:

> *"If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and if the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the*

creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgager and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock C.B. in Watts v. Shuttleworth 5 H & N. 235 at 247 it appears to their Lordships that in the present case the creditor did no act injurious to the surety, did no act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all."

73. I have little doubt but that had the market fallen instead of rising after the sale by the bank that the defendant would have had no complaint in relation to this aspect of matters or at least not the complaint he now seeks to advance. There is no doubt but that the bank was required to take reasonable care to obtain the best value for the shares at the time when they were disposed of in the market. However, given that the shares were sold on the open market in this instance it is difficult to conceive how a case could be made that the bank failed to take reasonable care by doing so.

74. Bearing in mind that the defendant was neither legally advised or legally represented, it would seem on the basis of the evidence now before the court and having regard to the defendants submissions, that the defendant's case against the bank in relation to this aspect of the case is that the bank owed him a duty of care in circumstances where the market was beginning to rise, that the bank ought to have waited for the market to rise further before exercising its power of sale and that in failing to do so the bank was negligent. In the view of the Court any such claim would constitute a separate cause of action in the tort of negligence and would not of itself be a defence to the plaintiff's claim; though it could be pursued by way of a counter claim or in separate proceedings.

75. Notwithstanding the authorities to which reference has already been made, it could not be said in the circumstances of this case as disclosed on affidavit that such a claim is unarguable. As to whether or not such a claim could be maintained that is not an enquiry which can or should be entered upon by the Court at this juncture since, apart from what is appropriate by way of consideration by the court on this motion at this juncture in the proceedings, many of the facts on which it may be based might only become fully ascertainable consequent upon the utilization of court procedures such as discovery, inspection and interrogatories.

76. With regard to the defendant's submission that the bank was responsible for the Irish banking system collapsing and that it engaged in market manipulation of share prices which also affected other banks by reckless lending and misstating the figures in its published accounts, these are unquestionably serious allegations. Whether there is any substance to any of these allegations is already the subject matter of other proceedings in which the bank is involved directly or indirectly. The defendant maintains that it was as a result of these activities that he finds himself in his present position. It is an incontrovertible fact that thousands of individuals, institutions and even States, including our own, were affected by the crisis in the world's financial markets. To what extent any of the defendant's allegations in this regard may have been extant, if at all, at the time when he executed the facility letters and the letter of pledge, or as may have affected subsequent investment decisions made by him, or whether they are sufficient to constitute or maintain a cause of action against the bank, would have to be established in any proceedings as may be instituted by the defendant. However, for the purposes of this motion, and applying the principals already referred to earlier in this judgment, it is my view that, in the circumstances of this case, any such claims do not, as a matter of law, constitute a defence or a defence by way of counter claim and set off to the bank's claim herein but rather are what Clarke J. described, in Moohan v. S.R Motors (Donegal) Ltd, *infra*, as independent cross claims.

77. Similarly , I am also satisfied that insofar as there may any arguable case arising from the exercise by the bank of its power of sale of the securities or from the general conduct of the bank in the carrying out of its business affairs to the extent that that directly affected the defendant , particularly his investment decisions, even if successful in any respect, are independent cross claims and do constitute a defence or defence by way of counterclaim and set off to the claim in these proceedings .

78. Even if the defendant had a defence by way of a counter claim entitling him to a set off of an amount as was found due on such claims that would not, in the circumstances of this case, operate to warrant the court refusing the bank's application for liberty to enter summary judgment since it was a term of the contract between the bank and the defendant that all repayments on foot of the facilities were to be made without counter claim or set off : there being no dispute or challenge to the facility letters or the letter of pledge that is a term to which the court must give effect.

79. However, that is not end of the matter. Given that the defendant may be in a position to establish sufficient evidence ,whether through court procedures, including discovery, inspection or interrogatories, or otherwise, to ground any proceedings as may be brought by him in relation to the serious allegations which he makes concerning the actions of the bank, particularly in relation to the disposal of the share portfolio, the court considers it both necessary and appropriate, in the interests of ultimate justice, to exercise its inherent jurisdiction with regard to the granting of a stay on the execution of the judgment which the court will enter for the plaintiff. Taking into consideration the forgoing , the relative positions of the parties and all of the circumstances outlined in this judgment, including the financial circumstances of the defendant, it seems to me that justice will be best served by granting the plaintiff an order giving it liberty to enter a final judgment against the defendant for the amount claimed but with a stay of execution of the judgment on certain conditions in relation to the prosecution of a counter claim or such other proceedings as the defendant may now decide to pursue against the bank .

80. Consideration must also be given to the exercise of the court's discretion in relation to the granting of a stay on the execution of the judgment in circumstances where, as in this case, the plaintiff was not a party to the matters complained of by the defendant and where the plaintiff took the interest of the bank by way of legal assignment. It is my view that in doing justice between the parties that neither the fact of the assignment nor the fact that the plaintiff was a stranger to the matters of complaint by the defendant could have the affect of placing the plaintiff in a more favorable position with regard to execution of the judgment than that occupied by the bank and that that is particularly so where the assignment post dated the institution of these proceedings and where the order of the 28th July 2014 was made after the hearing of the motion in respect of which this judgment is given and of which the plaintiff was on notice.

81. The inherent jurisdiction of the court to grant a stay of execution on a judgment or order is well settled. Commenting on the inherent jurisdiction of the new Supreme Court of Judicature and how it should be exercised, following the coming into force of the Judicature Ireland Act 1877 , and which I adopt, Fitzgibbon L.J. in Earl of *Desart v. Townsend* 22 Ir.L.T.R. stated:

"I hold that we have the power to stay the execution of the process of the court whenever justice requires that it should be stayed -- for example where some further investigation is necessary, or where it is in furtherance of ultimate justice, or for the benefit of one or both of the parties, without injury to either of them , that the judgment should not be immediately enforced. But there is another rule, much older, which is binding on us, for delaying justice is as contrary

> *to Magna Charter (sic) as denying it, and we cannot stay proceedings where doing so would work injustice. No court is invested with any power or jurisdiction to delay justice if justice would be defeated by delay."*

See also *Prendergast v. Biddle infra; Barry v. Buckley* (1981) 1 I.R. 306 and *Danske Bank v. McFadden* (2010) I.E.H.C. 119.

82. The stay on execution of the judgment which the court will grant in this case is conditional upon the defendant prosecuting his cross claims whether by way of counter claim or separate proceedings against the bank with due diligence in accordance with the rules of the Superior Courts and both parties shall be at liberty to apply in relation to the stay which will otherwise remain in force to abide the outcome of the defendant's proceedings against the bank.

83. The court will make an order giving the plaintiff liberty to enter a final judgment against the defendant for the amount due in respect of principal and interest calculated at the bank's rate up to and including the date of this judgment but with a stay on execution of the judgment on the conditions stated herein.