Neutral Citation: [2014] IEHC 395

THE HIGH COURT

COMMERCIAL

[2014 No. 991 S.]

BETWEEN

1. ALLIED IRISH BANKS PUBLIC LIMITED COMPANY

PLAINTIFF

AND

AIDAN FARRELL

DEFENDANT

[2014 No. 992 S.]

2. AIB MORTGAGE BANK

PLAINTIFF

AND

AIDAN FARRELL

DEFENDANT

JUDGMENT of Mr Justice Ryan delivered on the 31st July, 2014.

Case No. 1

1. By notice of motion of the 11th June, 2014, the plaintiff sought *inter alia*, liberty to enter final judgment against the defendant in the sum of €2,536,546.79, together with further interest at contractual rates or under the Courts Act 1981. By order of the 23rd June, 2014, the motion was admitted to the Commercial Court.

2. The grounding affidavit is dated the 10th June, 2014, and is sworn by Joseph Lyons, an employee of the plaintiff, AIB Plc ("the Bank"), and of AIB Mortgage Bank, a wholly owned subsidiary of the plaintiff. Mr Lyons avers in his affidavit that the defendant is also indebted to AIB Mortgage Bank in respect of which separate proceedings are in existence entitled "AIB Mortgage Bank, plaintiff and Aidan Farrell, defendant, Record No. 2014/992S.", and that there is an overlap between these two related proceedings.

3. Mr Lyons sets out details of two loan accounts created respectively by letters of sanction dated the 24th January, 2007, and 22nd April, 2009, in amounts of €2.2m and €140,000. By letter of the 8th April, 2011, the plaintiff made demand in respect of the amounts due on these two accounts. Following negotiations a new letter of sanction was issued by the plaintiff dated the 28th September, 2011, and it was accepted by the defendant on the 5th October, 2011. This action is brought in respect of a breach of the 2011 agreement.

4. Under the 2011 loan arrangement, the plaintiff agreed to lend the defendant €2,399,504 on terms and conditions as set out in the agreement and including the Bank's general terms and conditions governing business lending. Interest was provided for. The loan was to be repayable on demand and repayable in full on the 1st September, 2014, by a single payment equivalent to the principal amount of the facility plus interest accrued but unpaid.

5. The agreement also provided for a loan in the amount of €147,443 on specified terms including the Bank's general conditions and providing for interest. This loan, payment of the principal sum plus accrued interest, was also repayable on demand and in full on the 1st September, 2014.

6. The defendant for his part was required under the 2011 loan agreement, firstly, to lodge €8,500 per month to a current account to meet monthly payments of €3,500 on the first account, €1,500 in respect of the second account – these are the loans in the amount of approximately €2.4m and €147,000 mentioned above – and a further €3,500 on an account with AIB Mortgage Bank, the plaintiff in the related proceedings. Secondly, the defendant was required to pay a capital reduction of €400,000 by the 1st September, 2013, with a further capital reduction of €200,000 due by the 1st September, 2014.

7. The issue that has to be decided on this motion for summary judgment concerns the payment of €400,000 by the 1st September, 2013, as provided under the 2011 agreement. The Bank's case is that the plaintiff failed to comply with the terms, despite having promised to do so and the defendant's argument is that the Bank agreed at a meeting of the 11th June, 2013, with his accountant, Ms Marie Barr, to postpone the payment of that sum until he had been able to dispose of properties that would yield funds to make the payment.

8. In his grounding affidavit, Mr Lyons confirms that in the summer of 2013, the Bank met and corresponded with the defendant's advisers, Barr Pomeroy, in relation to the capital repayment of €400,000 due on the 1st September, 2013, under the 2011 loan agreement.

9. On the 5th February, 2014, the Bank wrote to the defendant calling in the debt. Mr Farrell made a complaint with which the Court is not concerned. Mr Lyons details breaches of the 2011 loan agreement as follows:-

(i) Failure to pay the €400,000 capital reduction by the 1st September, 2013.

(ii) Failure to comply with the written demand of the 5th February, 2014, for payment by the 3rd March, 2014 of all sums outstanding

on the first and second accounts then amounting to €2,537,188.99.

(iii) Mr Farrell cancelled the standing order of €8,500 that he had agreed to pay monthly, of which €5,000 was payable to the plaintiff.

(iv) Mr Farrell failed to comply with a further demand of the 12th March, 2014.

(v) Mr Lyons avers that the defendant does not have any *bona fide* defence.

10. Mr Farrell's replying affidavit is dated 15th July, 2014. In it, he describes the history of the relationship between him and this plaintiff and the associated mortgage company which is the plaintiff in the separate, but related, proceedings. The borrowings were made in respect of developments in Rathfarnham and Donegal. Mr Farrell describes a dispute that arose between him and the Bank which culminated in a credit arrangement that was entered into on 28th September, 2011, which is the agreement that is cited by Mr Lyons and on which the plaintiff Bank is now suing.

11. In accordance with the agreement, there was a review in June, 2012 and Mr Farrell says that the Bank expressed its satisfaction with his compliance with the terms of the 2011 agreement. He says that in anticipation of the review meeting due for June, 2013 he appointed his financial adviser, Ms Marie Barr of Barr Pomeroy, as his agent in any and all negotiations with the Bank. She was specifically authorised to negotiate on his behalf and he understood, therefore, that "she could bind the plaintiff and indeed myself in respect of any agreement she came to with the plaintiff". He says that it was apparent to him in or around March, 2013, that he would not be able to meet the payment of €400,000 that he was contractually obliged to make by the 1st September, 2013, under the agreement. He instructed Ms Barr to negotiate on his behalf with a view to deferring or arranging a delayed payment of that amount. On 27th March, 2013, Mr Farrell wrote to Ms Eleanor O'Connor of the Bank as follows:-

> "Dear Eleanor
>
> I was under the impression we were to meet in June this year to review our arrangements! I have asked my Accountant/Tax Adviser, Marie Barr, to handle this matter on my behalf.
>
> She will be in touch with you shortly. Regards.
>
> Aidan Farrell".

12. Mr Farrell says that he instructed Ms Barr that the payment could not be achieved by the sale of apartments in Donegal and/or the sale of a house in Rathfarnham. Ms Barr acknowledged the appropriateness of this approach and furthermore acknowledged that she had specifically put this proposal to the AIB personnel at the review meeting with Eleanor O'Connor and Norma McCarthy. He says that the affidavit of Marie Barr which he has read reflects his understanding of the meeting in June, 2013, which of course he did not attend and that his understanding is supported by emails Ms Barr sent to him after the meeting.

13. Ms Barr's email to Mr Farrell of the 6th June, 2013, has as its subject: AIB, and is as follows:-

> "Hi Aidan,
>
> Just reporting on Tuesday's meeting. As well as Eleanor I met her boss Norma McCarthy. They were more than friendly, agreed you are complying in full with your agreement (we didn't touch on the historical position) and agreed there was no requirement for you to complete a sworn statement. I emphasised how hard you were working to make sure you continued to made the necessary payments including having to drive to Donegal every week. I also told them I am considering that you should let the Bank appoint a receiver and then they would be left with all the tax problems, they did not like that idea one bit as you would expect.
>
> I also explained your plans to meet September's capital repayment and they were happy with that. They did ask me for a copy of your 2011 tax returns and rental schedules as you had given them 2010 and they liked to see the rents holding up. I said I would ask you.
>
> Overall the meeting lasted about 15 minutes.
>
> Kind regards.
>
> Marie".

14. Ms Barr's affidavit is dated the 16th July, 2014. She says that she met the defendant on the 29th May, 2013, to discuss the meeting scheduled for the 4th June, 2013, when she was to communicate on his behalf with the Bank. She says at para. 4:

> "The defendant outlined his plan to provide for the lump sum payment of €400,000 capital reduction which fell due and owing on the 1st September, 2013. The plan was to sell one or more of the apartments in Letterkenny and Ramelton, Co. Donegal. He had been approached by a potential purchaser of one apartment in Ramelton. My understanding was that this approach was from a client who had previously rented the property. He also confirmed that he was actively seeking a buyer for additional apartments in Donegal but without much success. It was clear to both of that no realistic offer had been made and in the absence of any sale it was extremely unlikely that the repayment which held due and owing on the 1st September, 2013, could be made on that date. In an effort to look at all options, the defendant broached with me the possibility of a disposal of one of the properties in Dublin, but noted that this would necessitate a reduction in the monthly rental paid to the plaintiff and the defendant was naturally reluctant to follow this particular path. We both agreed that sale of the Letterkenny and/or the Ramelton properties was the preferred route to meet the €400,000 due to be repaid on the 1st September, 2013."

15. Ms Barr proceeds to describe the meeting that took place on the 4th June, 2013, with Ms Eleanor O'Connor and Ms Norma McCarthy of the Bank at their office. She says that the meeting was extremely amicable and Ms O'Connor reaffirmed that Mr Farrell was complying in full with the loan agreements. "I explained the defendant's plan to meet September's capital repayment which was the sale of two properties in Donegal (hereinafter referred to the "Proposed Divestment").

16. Paragraph 7 is as follows:

> "The plaintiff's representatives fully accepted and agreed with the proposed divestment discharging the €400,000 capital reduction. Neither of them expressed any misgivings or concerns regarding our approach and both were satisfied with the proposed divestment. Given that this meeting took place less than three months before the 1st September, 2013, it was clear to me that no demand would be made if the €400,000 payment was not made by the 1st September, 2013, but instead was made out of the proposed divestment. I say and believe that this review meeting was considered by all parties to have satisfactorily concluded on the basis of the proposed divestment discharging the amount due."

17. Ms Barr continued that it was clear to everyone at the meeting that the only way Mr Farrell would be in a position to make the capital reduction was through the proposed divestment and that it was the best way to discharge the upcoming capital reduction.

18. Ms Barr says that she received email correspondence on the 26th August, 2013, from Ms O'Connor of the Bank seeking clarification as to whether the defendant would be in a position to make the capital repayment on the 1st September, 2013. Ms Barr says that "this was inconsistent with the proposed divestment". She replied on the 2nd September, 2013, providing an update on the rental levels and confirming that none of the Donegal properties were sold at that date. Three weeks later Ms Barr received a letter from the Bank dated the 23rd September, 2013, complaining of default in the capital reduction payment and reserving the Bank's right to demand repayment unless immediate repayments were made. Ms Barr forwarded the correspondence to the defendant with a note saying: "As long as you keep paying the €8,000 per month, I don't see the Bank taking action anytime soon".

19. Ms Barr says that she was most surprised to receive copies of the correspondence dated the 5th February, 2014, from the Bank and she and her colleague, Mr McClung, accompanied her to a meeting on the 3rd March, 2014, with Ms O'Connor and Mr Aidan Brennan of the Bank. She says that she reiterated at the meeting that Mr Farrell had continued to make the agreed payment of €8,500 on a monthly basis, was willing to consider a sale of the Dublin/Rathfarnham property and "most of all, the astonishment of both myself and the defendant to the letter of the plaintiff dated the 23rd September, the absence of any follow up action either written or verbal to the letter of the 23rd September, 2013, prior to the plaintiff's email received the 5th February, 2014". Ms Barr concludes her affidavit as follows at para. 19:-

> "In summary, I am quite clear that at no stage did any representative of the plaintiff give any indication that they were other than satisfied with the agreement regarding the proposed divestment discharging the €400,000 capital reduction or that a failure to meet the capital reduction of €400,000 on the 1st September, 2013, could potentially have such serious consequences for the Banking relationship between the plaintiff and the defendant. In my opinion, it is and at all times was the position that there are no insuperable differences between the parties and I believe the behaviour of the plaintiff in this instance is reprehensible opportunistic and predatory. I reiterate that the Proposed Divestment was the agreed way in which the capital reduction of €400,000 would be discharged and it even now remains possible to proceed on the basis of that agreement."

20. Mr Farrell in his affidavit expresses full agreement with Ms Barr's description of the meeting and her reference to a proposed divestment. He says that he understood that apartments in Donegal and/or a house in Rathfarnham would be sold in order to discharge the payment obligation as set out and described in special condition 4 of €400,000 by the 1st September, 2013.

21. Mr Farrell goes on to say at para. 12 of his affidavit the following:-

> "In accepting the Proposed Divestment as a means by which to discharge this amount, the Bank, the plaintiff, I am advised waived their specific right to demand or accelerate any liabilities associated with the Rathfarnham on facility in the event that this was not paid by the 1st September, 2013. I say and believe that on the basis of the agreement as set out and described by Ms Barr as the Proposed Divestment that the Bank is precluded, restricted and estopped from calling in an event of default or accelerating the repayment of any of my facilities in circumstances where the plaintiff has expressly and unequivocally accepted the proposed divestment in lieu of the payment of €400,000 on the 1st September, 2013."

22. The question that has to be considered in this case is whether the Bank agreed with Ms Barr to waive its entitlement to payment of €400,000 by the 1st September, 2013. Mr Farrell is relying on the evidence of Ms Barr as to what happened at this meeting.

> Mr Farrell says that he was shocked and horrified by the Bank's correspondence on the 5th February, 2014, and he proceeds to express his indignation and condemnation at this unethical behaviour by the Bank. However, all that depends on whether the Bank was in fact in breach of its agreement in calling in the facilities and instituting its proceedings on the basis of Mr Farrell's failure to comply with his contractual obligations.

23. The Bank filed a replying affidavit sworn by Ms Eleanor O'Connor on the 18th July, 2014, in response to the affidavit of Ms Barr.

24. Ms O'Connor first takes issue with the averment by Mr Farrell as to his notification to the Bank that Ms Barr would attend the meeting. She notes the discrepancy between the description given by Mr Farrell in his affidavit and the terms of the email.

25. Ms O'Connor then refers to Ms Barr's affidavit and her averment that at the meeting she explained the defendant's plan to meet September's capital repayment which was the sale of two properties in Donegal. The point that Ms O'Connor makes is that Ms Barr in her affidavit refers to Mr Farrell's making the capital repayment in September and she also refers to Mr Farrell's expression in para. 20 of his affidavit of the intention to discharge the payment obligation.

26. Ms O'Connor rebuts the suggestion by Ms Barr and Mr Farrell that the Bank granted forbearance in relation to the €400,000 capital reduction. She points out that Ms Barr does not suggest how long that was to last for. She says that Ms Barr did not even refer to forbearance of that kind nor did she seek it, nor was it granted. She exhibits her file note of the meeting which records Ms McCarthy asking if Mr Farrell would be in a position to meet the September 2013, payment of €400,000 and that "MB confirmed that it was AF's intention to meet the repayment. She did not disclose the source of the funds". There was a discussion of the Donegal apartments and that there might be potential sales interest in them. Ms O'Connor rejects the suggestion that the proposed divestment or any other form of forbearance was agreed to at the meeting and she says that neither she nor Ms McCarthy would have been in a position to agree to such forbearance and would have to refer the matter of the credit committee.

27. Ms O'Connor refers to the email of the 26th August, 2013, when she wrote to Ms Barr referring to the capital reduction of €400,000 being due by the 1st September and saying "I am checking slightly in advance, that you might let me know if Mr Farrell is in line to fulfil the obligation". Ms Barr's response of the 2nd September, 2013, did not challenge the contents of the email and Ms O'Connor says that Ms Barr stated:

> "During the course of our meeting [June 2013] you raised the matter of Aidan making cash payment of €400,000 in September to assist in the reduction of the capital amount outstanding on his loan accounts. As I mentioned at the time, Aidan has had a number of his rental properties in Donegal for sale in the last few months, but to date no realistic offer has been made."

28. Ms O'Connor makes the point that if the parties had reached agreement as to forbearance as Ms Barr alleges, she would have referred to that in her reply stating that Mr Farrell was not obliged to make the payment as the Bank had agreed at the meeting in June. But no such statement was made.

29. The same point arises in respect of Ms O'Connor's letter of the 23rd September, 2013, complaining about the failure of Mr Farrell to make the capital reduction payment. But Ms Barr did not respond to it by referring to any agreement allegedly made at the meeting of the 11th June, 2013.

30. Indeed, there is no correspondence from Ms Barr alleging that the Bank agreed at the meeting in June, 2013 to grant forbearance or to defer the payment until such time as Mr Farrell was able to sell properties in Donegal or indeed elsewhere. Ms O'Connor avers that neither Ms Barr nor Mr McClung referred to any such alleged agreement when they met on the 24th March, 2014, with Ms O'Connor and Mr Brennan.

31. The question arises as to whether the Bank is entitled to summary judgment in the case or whether the defendant has raised the defence such as would require the case to be referred for plenary hearing.

32. The test is clear. The law on summary judgment as decided by the Supreme Court in *Air Rianta v. Ryanair* [2001] 4 I.R. 607 may be summarised as follows:-

> 1. Is there a fair or reasonable probability that the defendant has a real or *bona fide* defence? If so, judgment must be refused and the matter determined at plenary hearing. If not, the plaintiff is entitled to judgment.
>
> 2. The mere assertion in an affidavit of a given situation as the basis of a defence does not of itself provide leave to defend.
>
> 3. 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.
>
> 4. The court looks at the case as a whole to see whether the defendant has established that there is a fair or reasonable probability of having a real or *bona fide* defence.
>
> 5. Is what the defendant says credible? If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.
>
> (i) The standard of proof for a defendant at this stage must as a matter of principle be a low one.
>
> (ii) The onus of proving lack of credibility is on the plaintiff.
>
> 6. In *Aer Rianta*, McGuinness J identified the issue whether the proposed defence is so far fetched or so self-contradictory as not to be credible.
>
> 7. Hardiman J asked: Is it "very clear" that the defendant has no case?
>
> (i) Is there either no issue to be tried or only issues which are simple and easily determined?
>
> (ii) Do the defendant's affidavits fail to disclose even an arguable defence?"
>
> 8. The court takes the nature and context of the dispute into account. Hardiman J referred to the facts of the cases in the authorities cited and observed that in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."

33. I also adopt the helpful summary by McKechnie J in *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1 of the Courts' approach to summary judgment. Among the points highlighted by the judge are the following:-

> • 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;
>
> • 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;
>
> • 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.

34. The Court's task is not simply to examine the affidavits and exhibits to discover whether there is a conflict of fact on a decisive point. Neither is it to weigh conflicting depositions in the balance to decide which is more probable. It has to apply the above credibility test to the proposed defence. That is what the courts did in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, *Aer Rianta v Ryanair* and the other Irish and English authorities. In *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21 Lord Ackner said:

> "It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of the defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or *bona fide* defence."

35. I must now apply these principles. The defence proposed by Mr Farrell is that the Bank was not entitled to call in his loan on the basis of default in the payment of €400,000 on the 1st September, 2013. The reason for that was that it had agreed at the meeting between Ms Barr and Ms O'Connor and Ms McCarthy of the Bank that the Bank would not insist on the payment on the 1st September, but would defer it so as to permit the proposed divestment to take place and which would yield the funds to make the payment.

36. I do not think Mr Farrell has established a defence. Not only that, he has not established that he might have a defence. There is nothing for a court to decide. The proposition put forward by Ms Barr does not stand up. This arises for a number of reasons.

(i) Ms Barr does not swear to an agreement having been reached. She actually indicates the exact opposite. She described how Mr Farrell was going to make the payment, not that he was unable to make the payment or was going to be incapable of doing so.

(ii) Ms Barr does not at any point aver that Ms O'Connor or Ms McCarthy agreed to anything. Specifically, she does not say that they agreed that the Bank would defer the payment due on the 1st September, 2013. She does not say what the agreement was, how much leeway was to be given to Mr Farrell, i.e. how long he was going to get by way of forbearance if he was not going to make the payment on the 1st September. She does not say what other terms or conditions there were. It is unthinkable that the Bank would have agreed to a deferment without terms or conditions, not even as to the time when it was to be repaid, not even as to how much was to be repaid, if any, on the 1st September, the agreed date, nor any other provision whatsoever. This is the most fundamental problem with the proposed defence. There is simply no agreement that is averred to in the affidavit. Whatever about the intention that Ms Barr had, and whatever about the understanding that she had in leaving the meeting, as to which I will saying something in a moment, Ms Barr does not depose to any basis whatsoever on which it could be said that the Bank's representatives agreed to any proposed deferment.

(iii) Ms Barr does not actually say that she proposed or suggested that there should be a deferment or that there would be a deferment of the payment.

(iv) There are incidental features and matters of inference that indicate the high improbability of anything like the suggested agreement having taken place. In *Ryanair*, Hardiman J referred to *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, where, he said, "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable". That precise point arises in this case. It is simply untenable for the defendant to maintain that he instructed his accountant and tax adviser to go to the Bank to negotiate a deferment of a loan repayment and that she would not even refer to any such conversation or negotiation or agreement in subsequent correspondence to him or in correspondence with the Bank, or in negotiation or meetings with the Bank subsequently, or in response to conduct by the Bank that was wholly inconsistent with the agreement alleged to have been arrived at.

(v) A defence based on this meeting is similarly untenable where there is no responding affidavit to that of Ms O'Connor, in which Ms Barr puts in issue any of the matters raised by Ms O'Connor. Neither can it be tenable that following the meeting at which this important alleged agreement was reached in June, 2013 the plaintiff's accountant/tax advisers did not notify him as to the outcome of the meeting. Not only that, the deponent does not exhibit any note or memorandum of the meeting or the alleged agreement.

(vi) In all the circumstances, the proposition put forward at second hand by Mr Farrell as to what was agreed at the meeting is untenable and incredible. His behaviour and that of his adviser is wholly inconsistent with the agreement that he alleges. A defendant is required to furnish a basis of defence. Is it the case that the defendant might have a defence if what he or she asserts were to be accepted by a court? That is another way of expressing or summarising the test in a single sentence. On that basis, this proposed defence cannot succeed.

(vii) Even when notified of the failure to allege and agreement at the meeting of June 2013, it is noteworthy that the person who attended the meeting and who allegedly secured the Bank's forbearance did not return to the fray with another affidavit explaining what actually happened. It is moreover notable by its absence that Ms Barr does not even refer to her own note of the meeting or immediately thereafter. It would indeed, as I commented during the hearing, be expected of a professional to take notes and record the substance of an important meeting of this kind for which there had been a preparatory consultation between client and adviser at an earlier stage.

37. It is clear in my view, that there is no defence to this case. The defendant has not established a fair or reasonable probability of having a real or *bona fide* defence. Neither is what the defendant says credible or tenable.

38. In the circumstances, there must be judgment for the plaintiff.

[2014 No. 992 S.]

BETWEEN

AIB MORTGAGE BANK

PLAINTIFF

AND

AIDAN FARRELL

DEFENDANT

Case No. 2
1. This related case was also the subject of the 2011 agreement that is considered above and €3,500 out of the agreed monthly payment of €8,500 was allocated to these loans. In his grounding affidavit for judgment in this case, Mr Lyons sets out the background from 12th April, 2006, when this plaintiff offered the defendant a mortgage loan of €1,700,000 on the terms and conditions as set out in the facility letter. This loan was to assist with the purchase of apartments in Donegal. One of the terms was that the plaintiff could demand early repayment of the loan and accrued interest if the plaintiff was in breach of the offer terms or of his mortgage. The loan was secured by mortgages over the apartments. In view of certain complications, the mortgages were re-executed. The mortgages were subject to the AIB mortgage conditions (2006 Edition).

2. In September, 2008 the loan became an annuity type mortgage. The plaintiff made demand of payment by letter of the 8th April, 2011, by reason of non-payment. By the same letter, demand was also made in respect of the two loans that are the subject of the above related proceedings, 2014/No. 991 S. This demand and the subsequent negotiations with the defendant led to the agreement embodied in the AIB letter of sanction dated 28th September, 2011, that was accepted by the defendant on the 5th October, 2011. The relevant terms of that agreement are set out in the related judgment above.

3. Mr Lyons deposes to breaches of the loan agreements and of the plaintiff's mortgages on which he grounds the application for judgment as follows:-

(i) Failure to pay €400,000 by 1st September, 2013;

(ii) Default between October, 2009 and the date of the 2011 agreement in capital and interest payments and in addition, the defendant cancelled the €8,500 monthly payment thereby failing to make the €3,500 due under these loans;

(iii) Failure to discharge within three months money due to AIB;

(iv) Failing to make payment in accordance with written demand and, in particular, €1,712,091.79 due as of 4th February, 2014, and another later letter of demand.

4. Mr Lyons deposes that there is no defence to the action.

5. The defendant, Mr Farrell, says in his affidavit dated 15th July, 2014, that although it is more a matter for legal submissions nevertheless, there is no basis upon which these loans namely the Donegal facility, can be called in. The height of the plaintiff's case is that there is a cross default and acceleration of the liabilities by reason of the default in the other loans. He contends that the documentation cannot give rise to cross default so that if he defaults under the Rathfarnham loans that can trigger a corresponding default under the Donegal facility.

6. Counsel, Mr Fitzpatrick, points to the defaults cited by Mr Lyons. It is certainly clear that the defendant stopped payment of the monthly sum of €3,500 going towards this liability. He also refers to the terms of the mortgages which are in the names of AIB Mortgage Bank and Allied Irish Bank Plc as mortgagees. He points out that para. 2.1 of each mortgage contains the mortgagor's covenants with each of the lenders to pay the total debt. Paragraph 2.3(a) defines total debt as including all amounts payable by the mortgagor in respect of any loans or credits of any nature and does not restrict liability to the sum advanced and secured under the particular deed.

7. Under the mortgage conditions (2006 Edition) of the plaintiffs in these two actions events of default include any event stipulated in an agreement whereby a lender becomes entitled to demand any of the total debt or if the mortgagor fails to discharge any money payable within three months of the due date.

8. In these circumstances it is clear that the defendant is in default of his obligations under the mortgages, of his payment undertaking in the September/October agreement 2011 and also by reason of the triggering of crossover liability in respect of the two loans. There must accordingly be judgment for the plaintiff in respect of its claim on foot of this notice of motion in addition to that of the related proceedings.