[2017] IEHC 363

THE HIGH COURT

COMMERCIAL

[2017 No. 42 S.]

[2017 No. 18 COM]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

PADDY MCKEOWN AND ADELAIDE MCCARTHY

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 12th day of May, 2017

Introduction

1. This is an application by the plaintiff for liberty to enter judgment against the first named defendant in the sum of €1,429,166.22 and against each of the first and second named defendants on a joint and several basis in the sum of €40,548.60. It also seeks judgment as against the second named defendant in the sum of €1,387,003.82 and €40,000. It seeks interest pursuant to contract and statute and costs. The claim arises as follows.

2. The plaintiff is a body corporate and at all material times carries on the business of a bank within the State. Its registered office is at Bank Centre, Ballsbridge, Dublin 4. The first and second named defendants are a husband and wife. They reside at The Poplars, Villa Nova, Douglas Road, Cork. At all material times they carried on business as professional landlords. They own a portfolio of commercial properties in Cork city which generate a rent roll from which they must draw their family income, the expenses associated with their business, including their tax liabilities and their loan repayments.

The Facilities

3. By letter of loan offer dated the 20th May, 2013, the plaintiff offered to refinance three facilities of the first named defendant with the plaintiff. The letter stated: -

> *"The Bank is pleased to offer you the facilities below subject to the terms and conditions set out in this letter and subject to the Bank's General Terms and Conditions Governing Business Lending."*

It referred to three facilities, loan account (934054-28910235), (934054-28910318) and (934054-28910581). In each case repayment was: -

> *"On demand at the pleasure of the Bank subject to repayment/refinance on 31/12/2013. In the interim interest is to be funded by way of a monthly standing order in" [respect of a specified amount]"*

Security for the facility included two letters of guarantee from the second named defendant for €1,650,000 and interest and €40,000 and interest in each case. The first guarantee was held as supporting security facilities 1 and 2 and the second was to be held as supporting security for facility 3. The first named defendant expressly waived his entitlement to take independent legal advice prior to signing the letter which he signed and accepted on the 24th May, 2013.

4. The funds were drawn down by way of refinancing i.e. they had previously been drawn down in respect of the existing facilities. It is common case that the facilities were not repaid or refinanced and each of the loan accounts remains outstanding.

5. The plaintiff offered the defendants a letter of loan sanction also dated the 20th May, 2013, the terms of which were accepted and signed by the first and second named defendants on or about the 24th May, 2013. This facility refinanced loan account number 934054-27044366 in the amount of €39,476.00 together with an overdraft facility of €10,000. The facility was repayable on demand at the pleasure of the plaintiff and pending repayment/refinance on the 31st December, 2013 and interest was to be funded by way of a monthly standing order in the amount of €166. Each of the defendants were jointly and severally liable for the liabilities incurred under the facility. As with the facility offered to the first named defendant alone, the finance had already been advanced and drawn down pursuant to the earlier account. The facilities were not repaid or refinanced and the loan remains in arrears.

The Guarantees

6. By guarantee in writing dated the 2nd March, 2009, in consideration of the plaintiff agreeing to give time or make or continue advances or otherwise give credit or afford banking facilities to the first named defendant, the second named defendant irrevocably and unconditionally agreed to pay and satisfy to the plaintiff on demand, all sums of money which were then or at any time thereafter might become owing to the plaintiff from the first named defendant up to an amount not exceeding €1,650,000 together with interest thereon. The defendant accepted the agreement in writing on the 2nd March, 2009.

7. On the 1st December, 2009, the second named defendant entered into a second guarantee in identical terms in favour of the plaintiff in respect of the liabilities of the first named defendant to the plaintiff up to a total amount not to exceed €40,000 together with interest.

Background

8. The defendants do not deny that they entered into the facilities of May, 2013. They accept that funds were drawn down in the sense that this was a refinancing of existing facilities. They accept that the facilities were temporary and expired on the 31st December, 2013, and they accept that the monies have not been repaid.

9. There were considerable dealings between the parties between May, 2013 and the institution of proceedings in January, 2017. A number of offers and counter offers were made in an effort to place the facilities on a basis acceptable to both parties and to address the many concerns and complaints regarding the facilities raised by the defendants. The defendants made two complaints to the plaintiff's Credit Appeals Office, neither of which was upheld. Mr. David Coleman on behalf of the plaintiff stated in his affidavit grounding the plaintiff's application for summary judgment: -

"The Plaintiff has spent a considerable amount of time liaising with the Defendants and their advisors to try to establish whether there is any basis on which their indebtedness might be rescheduled or managed in some way so as to avoid the necessity to issue the present proceedings, but to no avail, and the Plaintiff has been left with no option but to institute these proceedings."

10. In a submission to the plaintiff dated November 2015 the defendants stated: -

"We have not asked for a debt write down or any other form of write off to this point. We acknowledge our debt and only request the opportunity to pay it off over time at existing rates. This was the spirit in which AIB lent us the monies in the first place. We do not pose a risk to the bank and are not in negative equity, in fact our Loan to Value and Income have greatly increased since AIB lent us the money initially for our investment."

11. The plaintiff submitted two restructuring proposals in December, 2014 and June, 2015. Both proposals involved the disposal of the assets of the defendants and an increase in the interest rates to reflect the increased cost of funds to the plaintiff. As the defendants' living expenses were mainly dependent upon rental income from these properties, both of these proposals were rejected by the borrowers.

12. The borrowers submitted two counter proposals to the plaintiff which involved the disposal of only one minor property and continuing the original interest rates applicable to the loans when they were first advanced. These proposals were not acceptable to the plaintiff primarily because they would not cover its costs of borrowings, but also because, in its view, the repayments were not sustainable based on rental income levels for the properties over the long term.

13. The defendants appealed their case to the Credit Review Office for review. The first named defendant exhibited the report to his affidavit of the 27th February, 2017, though he pointed out that they had objected to the report on the basis of "*… a number of issues pertaining to accuracy and impartiality…"* and it had been withdrawn on the 26th October, 2016. Despite this fact, the defendants elected to put it in evidence to the court and so I have considered it. The reviewers reviewed the current and projected rent-rolls from the properties and agreed with the plaintiff that the loans are not sustainable on a long term basis without property disposal.

14. There were further proposals, counter-proposals, an appeal to the plaintiff's appeals board in 2016, but no resolution to the issues between the parties was found and the facilities were neither refinanced nor repaid.

15. Throughout the period the defendants made a variety of complaints to the plaintiff regarding their treatment by the plaintiff. The plaintiff denied that it had acted wrongly and said that where it had made an error it had corrected the error. These matters included claims that: -

•The plaintiff wrongly failed to release title deeds in respect of properties in 2005 which they accept were subsequently offered as security for later facilities.

• The duplication of one repayment of €582.02 in October, 2010 which was corrected in December 2011.

• The alleged wrongful charging of a funding premium to their accounts (their complaint in relation to this was not upheld by the Financial Services Ombudsman).

• The plaintiff delayed in placing the tracker mortgage relating to their family home on an interest only basis when requested in April, 2013 until February, 2014 with the result that they were wrongfully recorded as being in arrears in the amount of €12,000.00.

•Recording that the first named defendant was impaired.

•The preparation of a valuation report by Lisneys auctioneers of the secured properties dated 9th December, 2014 was improperly conducted and reported values significantly less than the values previously placed on the properties by the plaintiff.

•A five year forbearance contract was placed on the mortgage of their family home without their consent in October 2015.

•Two accounts were opened in their names without their consent by the plaintiff in 2015 for the purposes of restructuring which in the event never occurred.

Between 2014 and 2016, the plaintiff issued a number of letters of demand in respect of the expired facilities of May, 2013 and also in respect of the guarantees of the second named defendant, which were not proceeded with. These were on the 3rd and 4th December, 2015 and the 20th September, 2016. By letter dated the 14th December, 2016, the plaintiff called upon the defendants to repay the sum of €40,548.60 pursuant to the joint facility within seven days. By letter dated 15th December 2016 the plaintiff called upon the first named defendant to pay the sum of €1,429,166.22 due in respect of his facilities within seven days and by letters dated 3rd January, 2017, the plaintiff called upon the second named defendant to pay the sum on €1,387,003.82 on foot of her first guarantee and the sum of €40,000.00 pursuant to her second guarantee within 7 days. The demands were not met and so the plaintiff instituted these proceedings on 12th January, 2017. In addition, on the 13th and 23rd January, 2017, the plaintiff appointed a receiver to the defendants' investment properties securing the loans, which are the subject matter of these proceedings.

Liberty to Defend

16. The defendants do not dispute that the monies referred to in the letters of May, 2013 were drawn down in the sense that the facility was a refinancing of previous facilities. They also accept that the monies had not been repaid.

17. They seek liberty to defend the proceedings and argue that they have established an arguable ground of defence in respect of: -

(a)The proper construction of the letters of May 2013

(b)The alleged improper motives of the plaintiff in its dealings with the defendants and in particular in seeking summary judgment in these proceedings.

(c)That the guarantees granted by the second named defendant were discharged by a material alteration of the underlying loans.

(d)The defendants advanced a variety of other arguments which were not pursued at the hearing of this case and therefore do not feature in this judgment.

The Legal Principles

18. The relevant legal principles in an application of this nature are well established and are not in dispute. In order to be permitted to defend a claim for summary judgment, a defendant must satisfy the court that he has a fair or reasonable probability of having a real or bona fide defence, as explained by the Supreme Court in *Aer Rianta CPT v. Ryanair Ltd* [2001] 4 I.R. 607 and in *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1.

19. If a potential defence advanced by a defendant is based upon the construction of documents, then the court can assess the issues raised 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 a defence to the claim. See *IBRC v. McCaughey* [2014] 1 I.R. 749, 759.

The First Issue

20. The first issue for consideration is the correct construction of the terms upon which the defendants' facilities were refinanced in May, 2013. The plaintiff's case is that this is an "on demand" facility. It relies upon the decision of McGovern J. in *National Asset Management Ltd v. McNulty* [2013] I.E.H.C. 369 and the decision of Clarke J. in *ACC Bank Ltd Plc v. Kelly* [2011] I.E.H.C. 7. In those cases, the learned judges were concerned with a term where the monies were repayable on demand. However, *without prejudice* to bank's right of demand, the date for repayment was a fixed date in the future.

21. Both Clarke J. and McGovern J. held that the loans were repayable on demand. The terms following that phrase, concerning the payment of interest or otherwise, were the terms that were stated to be what was to happen in the absence of a demand. As was stated by Clarke J. at para. 7.2 of his judgment: -

> *"The ordinary meaning of a loan being repayable on demand is that a person who gives the loan is entitled to demand repayment. The terminology used in describing the other repayment terms is again clear. Those terms only applied where there is no demand. It is by no means unusual for commercial property lending facilities to be payable on demand.*

22. The defendants argued that the term in the letters of May, 2013 was "repayable on demand at the pleasure of the Bank subject to repayment/refinancing on 31/12/2013". They distinguished this from previous facilities and indeed the facilities considered in the cases of *NAMA v. McNulty and ACC Bank Plc v. Kelly* which were stated to be repayable on demand *"without prejudice"* to the bank's right of demand. They submitted that the inclusion of the word *"refinance"* in the May, 2013 agreement necessarily qualified the fact that the facility was repayable on demand. They said it gave rise to an implied term that the first and second named defendants would be given a "reasonable opportunity" to refinance with the plaintiff.

23. The defendants accepted that there were three offers and three counter-offers made by the defendants and the plaintiff between 2013 and 2016. The defendants claim that the plaintiff did not make any reasonable offer, as its offers all involved disposing of some or all of the assets. This was asset disposal, not refinance. They submit that the letter of May, 2013 required the plaintiff to make a reasonable offer to refinance the defendants' facilities (or that the plaintiff accept a reasonable offer made by the defendants to the plaintiff). Whether or not a reasonable offer had been made by the plaintiff, (or indeed by the defendants) and whether it had been rejected wrongfully were matters which required to be determined at the trial of the action.

24. The implication of this argument was that the plaintiff was not at liberty to choose whether, or on what terms, it would offer to refinance the loans, because it was already bound by the terms of the letter of May, 2013 to agree to some unspecified reasonable refinancing of the loans in the future. Further, it could not call in the loans unless, and until the plaintiff made (or accepted) a reasonable offer, even though it is common case that the facility expired on the 31st December, 2013.

25. I do not accept that the construction advanced by the defendants is tenable. This is so for the following reasons:

(1)In light of recent decisions of the High Court, a term that a facility is repayable on demand means just that: once a demand has been made it is repayable. I see no distinction between a clause which is "subject to" certain terms or which is "without prejudice" to certain terms. As Clarke J. made clear, these are provisos which are to operate unless and until a demand is made (or the facility otherwise expired). They do not override the fundamental nature of the facility.

(2)The construction of the clause advanced by the defendants involves implying a term into the contract which contradicts the express term of the contract itself. This is not permissible. (*BP Refinery (Westernport) Pty Ltd; Shire of Hastings* [1977] 16 A.L.R. 363, *Carroll v. An Post National Lottery Company* [1996] 1 I.R. 443, *Aga Khan v. Firestone* [1992] I.L.R.M. 31).

It follows that I hold that the facilities were payable on demand and the plaintiff was entitled to call in the loans as and when it did.

The Second Issue

26. The defendants allege that the plaintiff acted for improper motives in its dealings with the defendant and in particular in seeking judgment in these proceedings. They allege that the plaintiff acted in bad faith and therefore cannot call in the loans. They say that the plaintiff sought excessive security for loans advanced from 2005 onwards. They say that the plaintiff incorrectly stated that the defendants were in arrears in respect of certain loans, and therefore the plaintiff was incorrect to classify the first named defendant as impaired. They say the plaintiff acted unfairly and unreasonably in saying that the loans were unsustainable. They make complaint that they were improperly treated in relation to their family home in relation to a forbearance agreement and a write back. They say the plaintiff improperly failed to release security in 2005 when certain facilities were repaid. They say that a valuation report prepared by Messrs. Lisneys was flawed and the valuations attributed to their properties were low. They say that they were not actually in arrears in respect of the facilities. They say that the letter dealing with their internal appeal in the plaintiff rejected their appeal with no explanation. They say that the plaintiff appointed a receiver to their investment properties after it had instituted these proceedings and they made complaint with regard to a credit review.

27. A considerable part of their complaint related to the treatment of their tracker mortgage in respect of the family home. That

facility does not form part of these proceedings, and so the issues they have raised in relation to that facility do not give rise to a defence to the sums claimed in these proceedings.

28. In relation to the alleged improper motives of the plaintiff in respect of the facility; the subject matter of these proceedings, at best the defendants' case was no more than a mere assertion that the plaintiff ought not to have treated them as it did. They have not adduced any evidence which substantiates their allegations that they have been improperly treated by the plaintiff and the actual complaints advanced, even if proved, do not afford a defence in law to the plaintiff's right to seek repayment of monies it advanced to the defendants many years ago and which have not been repaid.

29. Clarke J. stated in *IRBC v. McCaughey* [2014] I.R. 749, 759: -

> *"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…"*

This is the situation here in relation to the defendants' allegations, and I therefore find that they are not entitled to defend the proceedings on this ground.

30. The defendants have not established how the alleged improper motives of the plaintiff, even if proved, would amount to a defence to the claim for summary judgment by the plaintiff in respect of an on demand facility that expired on the 31st December 2013. It is remarkable that, in the plethora of allegations advanced against the plaintiff, it is not stated that the plaintiff represented that it would not call in the loan in accordance with the terms of the facility. No case has been made out that the alleged improper motives, even if established, would provide an answer to the claim to be repaid monies that they accept they borrowed and have not repaid. The questions of security and of the appointment of a receiver over certain assets do not arise in these proceedings. It has long been established that a plaintiff is not required to elect between causes of action available to him to recover sums due and owing. Any errors in relation to the valuations prepared by Linsey, if errors there be, are not attributable to the plaintiff and therefore cannot give rise to a defence in these proceedings.

31. It follows that the defendants have not shown that they have a fair or reasonable probability of having a real or bona fide defence and thus the plaintiff is entitled to summary judgment in the amounts claimed at reliefs 3 and 4 of the notice of motion.

The Third Issue

32. The third issue related to the guarantees of the second named defendant. The second named defendant did not swear an affidavit in these proceedings. She relied upon the affidavit of the first named defendant. He averred that she "refused" to provide any further guarantees, while the loans of the first named defendant were being renewed on a temporary basis. On that basis, she argues that the guarantee is discharged.

33. Separately, she also argues that the guarantees have been discharged in circumstances where there have been material changes in the underlying contractual obligations between the plaintiff and the first named defendant. She also relied upon the previous conduct of the plaintiff. In the past, when the first named defendant sought further facilities, the plaintiff had sought a separate guarantee from the second named defendant. In case of the 2013 facility this did not occur.

34. In this case, the plaintiff relies upon two guarantees. The first was granted by the second named defendant to the plaintiff on the 2nd March, 2009. Clause 1 of the guarantee provided: -

> *"In consideration of the Bank agreeing at my/our request to give time or make or continue advances or otherwise give credit or afford banking facilities for so long as the Bank may think fit to them [first named defendant] I [the second named defendant] hereby agree to pay and satisfy to the bank on demand all sums of money which are now or shall at any time hereafter be owing to the Bank anywhere on any account whatsoever whether from [the first named defendant] solely or from the [first named defendant] jointly or jointly and severally with any other person or persons or from any firm in which the [first named defendant] may be a partner including without limitation the amount of notes or bills discounted or paid and other loans or credit or advances made to or for the accommodation or at the request either of the [first named defendant] solely severally or jointly or of any such firm as aforesaid or for any money for which the [first named defendant] may be liable as surety or in any other way whatsoever together with in all case aforesaid all interest, discount and other bankers' charges (on a full indemnity basis) including legal charges occasioned by or incident to this or any other security held by or offered to the Bank for the same indebtedness by or to the enforcement of any such security."*

The guarantee was for the sum of €1,650,000. Clause 2 provided that it was to be a continuing guarantee.

35. Clause 6 of the guarantee provided: -

> *"The Bank shall be at liberty without obtaining any consent from the Guarantor and without thereby affecting its rights or the Guarantor's liability hereunder at any time:-*
> *(i)to determine, enlarge or vary any credit to the Borrower …"*

The plaintiff submits that it is clear on its face that the guarantee is a continuing all sums due guarantee up to the amount of €1,650,000. Therefore, it was not necessary for the plaintiff to obtain further guarantees in respect of the May, 2013 facility. It follows that the refusal of the second named defendant to provide further guarantees is irrelevant to its right to rely upon the guarantee of 2009. It says that Clause 6 (i) of the guarantee provides an express answer to the defence raised by the second named defendant that the guarantee was discharged by the material alteration of the original facility by the facility of May, 2013. The May, 2013 facility amounts either to an enlargement or a variation of the first named defendant's credit within the meaning of Clause 6 (i) in that it refinances three existing facilities. The plaintiff is expressly authorised to do so without discharging the guarantee.

36. It seems to me that this argument is correct. While the agreement of May, 2013 may well constitute a material variation of the facility in respect of which the guarantee was originally granted in 2009, on its face, that does not discharge the guarantee. The plaintiff was expressly entitled to vary the first named defendant's facility without obtaining any consent from the guarantor and without thereby affecting its rights or the guarantors' liability under the guarantee. In my judgment, it is clear that the guarantee has not been discharged by the grant of the facility of May, 2013.

37. Neither has it been discharged by the failure of the bank to obtain an alternative or fresh or additional guarantee. There was no obligation on the bank so to do and a failure to obtain a new guarantee can in no way discharge the existing guarantee. It was not a

guarantee limited to a specific facility; but rather was a guarantee expressed to be a continuing all sums due guarantee.

38. The second guarantee was entered into on the 1st December, 2009. It was in identical terms to the guarantee of 2nd March, 2009, save that the limit was €40,000. For the reasons advanced in relation to the guarantee of 2nd March, 2009, I likewise hold that the second guarantee is enforceable and the second named defendant has raised no bona fide defence in relation to the claim advanced by the plaintiff in respect of either guarantee.

No *Bona Fide* defence
39. For the reasons analysed, I am not satisfied that the defendants have a real or *bona fide* defence to the plaintiff's claims for summary judgments against them.

Counterclaim
40. The defendants say that they have a counterclaim against the plaintiff for damages for prematurely and improperly calling in the loans, the subject matter of these proceedings. Secondly they say that they have been overcharged interest of approximately €50,000 to €75,000. Thirdly they state: -

> *"… We have suffered significant loss and damage to our business interests and personal affairs by the negligent treatment of the Plaintiff. I say that by refusing to allow us to place our loan obligations on a long term-basis and/or offer a reasonable restructure, we have been at the mercy of the Plaintiff for the last four to five years. I say and believe that this has been highly unsatisfactory and placed considerable strain on [the defendants]. I say and believe that a considerable claim for damages arises against the Plaintiff for, inter alia, breach of contract, negligence, negligent misrepresentation, misstatement, duress and frustration, as well as a potential claim for damages for misfeasance and pursuance of ulterior motives."*

41. The plaintiff denies that it prematurely or improperly called in loans which expired in December, 2013 and therefore, says that no claim for damages can arise in the circumstances.

42. In relation to the alleged overcharging, even the height of the complaint advanced by the defendants that this amounts to a claim for €57,857.67 based upon the report exhibited by the first named defendant to his affidavit. The plaintiff says this cannot amount to a defence to a claim against the first named defendant in the sum of €1,429,166.22 together with €40,548.60. Likewise, it cannot amount to a defence to the claim against the second named defendant in the sum of €1,387,003.82 together with €40,000. The plaintiff says that it is not pursuing interest which has accrued on these sums since the commencement of proceedings on the 12th January, 2017. Had they sought this sum, it would have amounted to a figure greater than the counterclaim identified by the defendants.

43. The plaintiff relies upon the principles applicable to set-off and cross claims set out by Clarke J. in the High Court in *Moohan v. S & R Motors Donegal Ltd* [2008] 3 I.R. 650 at 656 where he stated:

> *"(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 proportion 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 judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast v. Biddle (Unreported, Supreme Court, 31st July, 1957)."*

44. The plaintiff submits that the unliquidated counterclaim alleged against the plaintiff is impossible to discern as a distinct counterclaim beyond the grounds of defence to the plaintiff's claim. In truth, the counterclaim is no more than the defence and it submits that it is at best nebulous and unquantifiable and should not be the ground for a stay on a judgment as set out by Clarke J. in *Moohan.*

45. I accept the submissions of the plaintiff in relation to the counterclaim advanced by the defendants. As I have held that the defendants do not have a defence to the plaintiff's claim, no issue of set off can arise based upon the alleged wrongful calling in the loans of the defendants. In the exercise of my discretion, the unliquidated claim for damages is not such that I am prepared to impose a stay on the judgment to be entered in favour of the plaintiff pending the determination of the counterclaim against the plaintiff.

46. The only new claim advanced by way of a counterclaim is the quantified claim in relation to alleged overcharging of interest in the amount of €57,857.67. Strangely, it was not advanced as a defence to the plaintiff's claim at the hearing of the application for summary judgment. No issue was taken with the sums claimed by the plaintiff.

47. In response the plaintiff denies any overcharging. It says that it has waived any claim to surcharge interest. The plaintiff is entitled to credit for interest on the sums due since 12th January, 2017, even though it has not quantified the claim to interest. It says that the plaintiff's General Terms and Conditions Governing Business Lending provide that a certificate issued by any officer of the plaintiff as to the amount payable in respect of the facilities will be final and binding on the defendants save in the case of manifest error. Therefore, it says, the defendants have neither a defence to the claim based on this claim nor a right to a set-off.

48. I cannot resolve this factual dispute at this point. Whatever the merits of the plaintiff's reliance on the General Terms and Conditions Governing Business Lending, no certificate as to interest from an officer of the plaintiff was introduced in evidence. Neither was there evidence as to the amount of interest due to the plaintiff since the issuing of the proceedings. So, I cannot say that there is no case for a set-off, as argued by the plaintiffs.

49. On the other hand, there is a very wide discrepancy between the judgments to which the plaintiff is entitled and the full amount of this claim of the defendants. There can be no doubt but that if the defendants were to succeed in this claim that the plaintiff will be in a position to pay it. On the other hand, given the scale of the debt due by the defendants to the plaintiff, a set-off would in reality mean very little. In the exercise of my discretion, I decline to put a stay on the judgments to be entered in favour of the plaintiff against either of the defendants. There shall be judgment accordingly.