THE HIGH COURT

[2014 No. 2513 S.]

BETWEEN

ALLIED IRISH BANKS PLC.

PLAINTIFF

AND

MARINO MOTOR WORKS LTD.

DEFENDANT

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on Tuesday 27th June, 2017.

1. This is the plaintiff's ("the bank's") motion for summary judgment in proceedings commenced by summary summons on the 13th October, 2014. The claim arises in circumstances where the bank seeks to recover monies owed on foot of a number of loan and overdraft facilities. The defendant company is the owner of a company called Barry's of Bantry Ltd. which is or was engaged in the operation of a car dealership and a crash test and repair centre in Co. Cork.

2. The original sum claimed in the proceedings was €1,121,249.88, but this sum was said at the oral hearing to have been reduced to €728,388.84. The reduction was primarily due to the sale of a property by the receiver and the deduction of the amounts thereby realised; an event which took place after proceedings had issued.

3. The bank's motion for summary judgment issued on the 22nd December, 2014, and was grounded upon an affidavit of Mr. David Coleman, case manager at the plaintiff bank, which set out the details of the loans and overdraft facilities in question.

4. The first loan agreement dates from 2002 and was in respect of a sum of €292,000.00. The letter of sanction is dated the 14th March, 2002. The loan was accepted by Mrs. Mairead Barry and Mr. Sean Barry, directors of the company, in writing on or about 11th April, 2002. This was a term loan for the purpose of assisting the purchase of a dwelling house in Co. Cork. The loan was secured by a number of mortgages and a letter of guarantee for €555,000.00 to be provided by the directors of Marino Motor Works Ltd. together with the assignment of life policies. Mr. Coleman says that "the defendant failed to abide by the terms of the first loan agreement in relation to repayment thereof and the loan account went into arrears" although the details of this are not set out. By letter dated the 5th March, 2014, the bank made formal demand for repayment of the loan at which point the redemption figure was €142,082.00. It will be noted later in this judgment that the defendant disputes that this account in fact went into arrears as described.

5. The second loan agreement dates from 2008. By letter of sanction dated the 31st January, 2008, the bank agreed to make available two facilities to the defendant. The first facility was an overdraft facility on a current account in the amount of €50,000.00 and was for the purpose of providing the defendant with working capital. The second facility was a business credit line in the amount of €350,000.00 for the purpose of the defendant constructing a panel beating unit and spray booth. The securities included a number of mortgages and assignments of certain life policies. The amounts were drawn down. Mr. Coleman averred that the account fell into arrears and by letter dated the 5th March, 2014, the bank formally demanded repayment. At that point, the total redemption figure in respect of the second loan agreement stood at €413,641.09 plus interest in respect of the overdraft facility and the business credit line facility. Again, no details are given of when the account fell into arrears.

6. The defendant, by way of guarantee dated the 28th May, 2014, had undertaken, *inter alia*, to pay to the bank on demand all monies and liabilities which were then or should at any time thereafter become owing to the plaintiff from Barry's of Bantry Ltd., with a cap of €657,000.00 together with interest.

7. There was a third loan agreement in 2008 of the same date. By facility letter dated the 31st January, 2008, the plaintiff agreed to make available three facilities as follows. First, an overdraft in the amount of €200,000.00 for working capital. Second, a business credit line facility in the amount of €330,000.00 in respect of stock facilities. Third, a bank guarantee in favour of Customs & Excise, Vehicle Registration Facility, in the amount of €127,000.00, together with commission to be charged quarterly in advance to the debtor's working account. These were secured by counter indemnities in respect of the bank guarantee in respect of Customs & Excise, together with the guarantee of the 28th May, 2004, (the "intercompany guarantee") with a cap of €657,000.00. Again, Mr. Coleman averred that, after a certain period, there was a failure to make repayments, and by letter dated the 5th March, 2014, the bank formally demanded repayment. The total redemption figure at that time was approximately €565,000.00. By letter dated the 19th March, 2014, the bank called upon the defendant to make payment on foot of the guarantee.

8. Mrs. Barry, a director of the defendant company, swore a number of affidavits in the matter from which it was clear that there had been extensive interactions between the bank and the defendant over the years. In her first affidavit, she explained that the company had been operating for seventy-five years in west Co. Cork and was a holding company for a trading business known as Barry's of Bantry Ltd.. The pillar of the business was an Opel dealership although the company also provided other services. Her husband, Mr. Barry, had been appointed franchise dealer in 1983 and the company had run a successful business for over thirty years. She said that the company had been run prudently and conservatively and had not, for example, invested significant sums to build new showrooms or make extravagant financial commitments as other companies had done. She averred that the company never had, and does not have, Revenue liabilities and that no judgments have been entered against it. She said that since 2008, the car industry suffered extensively as a result of the banking crisis but that the company continued to meet its commitments and stayed within its overdraft limits. She said that the company's mortgages with A.I.B. were kept up-to-date and the insurance policies assigned to the bank were paid. She says that loan interest of approximately €45,000.00 was paid to the bank annually. She said that, for approximately fifty years, the company had a strong relationship with the bank. This continued until the company's accounts were transferred from Bantry to a new specialist lending unit in Bandon. She alleged that, from 2009 onwards, the company experienced intimidating and oppressive conduct on the part of the bank such that, she said, its behaviour actually contributed to the financial difficulties of the company and its downward spiral culminating in the loss of the Opel dealership in 2014.

9. In her affidavits, Mrs. Barry set out the basis for this view. She dated the beginning of the problems to a letter sent by the bank dated the 22nd January, 2010, when it sought to increase its security by requesting a new guarantee. She said that this was unreasonable because "the company was fully performing as a customer of the bank and all interest and charges were being paid and up to date." She said that, when they refused to increase the security or to enter into a new guarantee, the relationship between the bank and the company deteriorated and the bank proceeded to disrupt the smooth and profitable operation of the company's

business. In October, 2010, the bank refused to grant an annual insurance loan of €10,000.00, which was unprecedented, and in December, 2010, the bank refused to furnish the company with its annual letter confirming an overdraft limit of €200,000.00 for its stocking provider; P.T.S.B.. In the absence of such a letter, the company's relationship with P.T.S.B. was critically undermined and it was a relationship essential to the business for maintaining new cars in stock and available for sale. She says that the refusal of this letter was at a time when all banking requirements were being met and where the company was operating within its limits.

10. Mrs. Barry then went on to set out a chronology of further events between 2010 and 2014. I do not propose to set out the chronology in detail but rather to pick out some events upon which emphasis was laid during the hearing. She said that, by letter dated the 18th March, 2011, the bank demanded a further security by way of mortgage debenture incorporating fixed and floating charges over all company assets at a time when the company was not defaulting. She said that, one week later, the bank "cancelled" their internet banking facilities which was not only damaging at a practical level but also led to rumours which were damaging to the business. She said that, at this point in time, the overdraft facility of €200,000.00 was drawn down only by €128,000.00. Internet banking facilities stopped and started over a period of months until January, 2012, when they stopped completely. She also complains that surcharge interest was added to their accounts in June, 2011, without notification. She said that a subsequent internal review in 2014 showed that it had been improperly charged and a refund was ultimately organised.

11. Mrs. Barry described various meetings with the bank. She referred to a meeting on the 8th July, 2011, at which there were attempts to resolve matters between the parties. She says that the defendant company offered to sell two particular properties which would have reduced their debts by €600,000.00 but that a bank official, one Ms. Lombard, "unilaterally rejected" this on the basis "that these were performing assets and it did not make sense to sell the two properties." She says that there was a letter in September, 2012, threatening legal proceedings in relation to interest payments. This problem arose because of a change in the manner in which interest payments were collected and she again says that the company's position was subsequently vindicated by internal review.

12. She described other meetings which took place on the 4th December, 2012, and the 31st July, 2013. She says that, on the 5th September, 2013, they submitted a proposal to the bank, which proposal had been prepared on their behalf by the company's auditors and had cost them €6,000.00. She suggested that the bank did not engage in any meaningful way with the proposal and instead replied by way of email that an independent review would be required and that this review would cost €7,000.00. She said that a subsequent internal review in 2014 vindicated the company's position insofar as the existing proposal prepared on their behalf was found to be sufficient and that an independent review was not necessary.

13. Mrs. Barry says that, on the 31st December, 2013, at a critical time of the year, the companies' facilities with the bank were "terminated". The bank stated by email that the company had a thirty-day window within which to complete the independent business review and threatened legal proceedings if the review was not completed. Mr. Barry wrote to the bank outlining the difficulties experienced arising from this action with regard to employees' wages and debtors. The accounts were re-opened in January, 2014, but the direct debits were cancelled in February, 2014, without notice. The accounts were then operated on the limited basis that the bank would only accept lodgements. She says that, by letter dated the 12th March, 2014, the bank demanded payment of the sum of €127,000.00 in respect of the Customs & Excise guarantee, although the company had never required the benefit of the indemnity from the bank. Her belief was that the issue of the V.R.T. was compounded by the fact that the company had repeatedly sought to reduce the bank guarantee with A.I.B. but had been frustrated in this request.

14. On the 14th March, 2014, the Opel dealership terminated after a thirty-year relationship. Mrs. Barry attributed this to "the bank's interventions and actions to frustrate the business of the company and its unwillingness to resolve matters with the companies." Mrs. Barry said that in June, 2015, the bank produced a proposal, which she described as unreasonable and unworkable, and sought a response within fourteen days. Mrs. Barry's husband was then hospitalised for stress-related illness. The court was told that the business continues to operate, albeit on a much reduced basis, and has a number of employees.

15. I note that Mrs. Barry averred, *inter alia,* that, contrary to what had been averred to by Mr. Coleman set out above, the company had at all times made the repayments in relation to the 2002 loan until the bank closed the company accounts. She also referred to a number of technical matters (company resolution, seal and signature) to which I will later refer briefly.

16. A number of the descriptions of the bank's treatment of the Barrys, as described by Mrs. Barry, were personalised to a particular bank official who had been dealing with them. That official, Ms. Lombard, swore an affidavit of reply, in which she "categorically" rejected the allegations of intimidating and oppressive conduct. She was based as credit manager within the bank's financial solutions group in Bandon, Co. Cork and had taken over the lending file in relation to the defendant in late 2009 or early 2010. She said that the lending file was transferred to her group in the first place because the defendant was struggling to make repayments on the various business credit lines which had been advanced to them. She said that that the bank's internal complaints process had been invoked by the Barrys in relation to a number of the matters raised in Mrs. Barry's affidavit. They had been provided with certain information in this regard and were given apologies in respect of some matters. They were advised of their right to go to the Financial Services Ombudsman's Bureau but did not do so. She exhibited correspondence from 2012 in this regard.

17. She said that, in relation to the letter of the 22nd January, 2010, this "was generated in the ordinary course of the plaintiff's operating system, owing to the fact that the facilities extended to the defendant had expired…". She said that, as regards the refusal of the insurance loan of €10,000.00, what was omitted from Mrs. Barry's affidavit was the letter explaining the reason for refusal; namely, that the plaintiff was awaiting certain financial information, which had not been received, in order to progress the loan. As regards the annual letter to P.T.S.B., this was again because certain financial information was not available at the time of the request. Following the receipt of this information, the letter issued. She said that, as of March, 2011, contrary to what was asserted by Mrs. Barry, (that the company at that time was not defaulting in any way and all sums due were being met in accordance with their obligations), "the business credit line facilities were well overdue for repayment at this stage." She also says that the letter of this date issued automatically because the facilities had expired.

18. She said that the internet banking facilities were never cancelled and that the problems in this regard were simply a result of the fact that the relevant account was not in credit and did not have an overdraft in place. In this regard, she exhibits pages from the statement for an account ending 095 from 25th March, 2011, to 6th January, 2012, which is clearly overdrawn in amounts ranging, at the start of the period from €104,000.00 to €158,000.00 on the 30th December, 2011, and €137,000.00 on the 6th January 2012. The authorised limit is stated on the face of the account statement as "nil." She also disputes the correctness of Mrs. Barry's averment that the company was staying within overdraft limits as of June, 2011, and exhibits pages from the statement for the same account ending 095 showing that it was overdrawn in amounts of approximately €150,000.00.

19. Regarding the alleged refusal of the bank to permit the sale of properties, she said that sale was a matter for the defendants and that she had no power to veto the sales. She had merely suggested that it made more sense to sell non-performing assets rather

than performing assets. As regards the requirement for an independent review, this was normal practice. Further, the bank offered to pay for it, which point had been omitted from Mrs. Barry's affidavit. She also disputed that the bank indicated in 2014 that the independent review was not required. She also noted that the calling in of the V.R.T. guarantee by the bank was part of the calling in of all facilities in early 2014. She also averred that the bank had been agreeable to reduce the V.R.T. guarantee to €35,000.00 in 2011 and prepared a letter of sanction incorporating that reduced figure but that the borrowers did not sign.

20. Ms. Lombard said by way of general comment that the bank exhibited considerable forbearance in the matter, extending the timeline for standard disclosure requirements well beyond the norm. She referred to a letter from Mr. Barry, dated the 17th August, 2011, in which he expressed thanks for the patience already exhibited by her up to that point in dealing with the defendant's financial situation.

21. Mrs. Barry swore a second affidavit in which she made a number of points and arguments by way of reply to Ms. Lombard's affidavit. One was her view that the appointment of a receiver in March, 2015, was unnecessary where there had been an offer to sell properties voluntarily and that the appointment of a receiver had caused further reputational damage. She believed that the bank's attempt to get more security from 2010 was part of an overall strategic approach and not related to defaults on their accounts. She disputed that they were "struggling to make repayments" in 2009. She disputed the explanation given with regard to the internet banking on the basis that the periods when it was working within the period did not correspond to periods of credit on the account or the limit being reinstated. She disputed Ms. Lombard's account of the meeting on the 8th July, 2011; she disputed the assertion in relation to the V.R.T. guarantee reduction; and, she said that the bank's proposal was unworkable. There were various other matters raised, such as the fact that letters were sent on various occasions by the bank to solicitors who were not acting on behalf of the Barrys. This appears to have been done in error but Ms. Barry relied upon them as part of her suggestion that the bank had caused unnecessary reputational damage to the company.

22. When the present matter was before the Master's court, an accountant on behalf of the defendants, Mr. Brian Weakliam, was instructed to carry out a review of the interest charges applied between 2002 and 2016. In correspondence of March, 2016, the bank was requested to provide a detailed breakdown of the interest charges in order to facilitate this review but this was refused by solicitors on behalf of the bank on the basis that the matter was before the court and they did not intend to engage in parallel correspondence in relation to the matter. They invited the defendants to furnish an affidavit setting out the accountant's views. The accountant then furnished a report which was exhibited in an affidavit sworn on the 16th June, 2016, by Mr. Barry. In this report, Mr. Weakliam said that he had been furnished with bank statements for a fifteen-year period and that his review had identified a "significant difference between the interest charges on the bank statements and my independent calculations" and that the scale of the discrepancies was "very significant." He said that, according to the bank statements, there "are significant overcharges" and "when you take into account the compounding effect these overcharges are a significant portion of the outstanding debt." He said that he had "based my opinion on what would be normal banking practice for similar commercial banking facilities" and that he had considerable experience of analysing the costs applied by financial institutions to commercial banking relationships of this type. I note that Mr. Weakliam is a fellow of the A.C.C.A. and a licentiate of the Institute of Bankers in Ireland and was an accountant and financial analyst with A.I.B. Group from 1984 to 1996 before he founded a consultancy practice. He gave one particular example, in relation to an account ending 183, where he would have expected the interest to be approximately €5,000.00 when in fact it was €18,000.00. He said that the overdraft facility carried an interest rate of over 10% and that, with that rate of interest and the quarterly compounding effect, the amount of a debt would double in seven years. He also compared the expected quarterly interest, on accounts ending 095 and 183, with the actual interest charged on those accounts. He found "significant discrepancies" between the two sets of figures, which he explained were "overcharges." He added that "in order to form a definitive conclusion the bank must provide their calculations" in lieu of which it had to be concluded that there were significant interest over-charges.

23. An affidavit of reply was sworn by a Mr. Tadgh Hennessy, case manager in the bank's litigation team, dealing with the interest charges. He dealt with the example given by defendant's accountant and said that the interest in question was correct because it related to two accounts, not one, as assumed by the accountant, and that this was in accordance with the terms and conditions of the contract with the borrower; namely, that interest in respect of business credit line accounts would be charged to the current account. He also exhibited extracts from two accounts for a period including September, 2007, which showed that quarterly interest had been charged in respect of the two accounts on one account and said that there was, in fact, no discrepancy in the figures.

24. In a second affidavit sworn by Mr. Barry on the 7th October, 2016, he exhibited a further report from the accountant, Mr. Weakliam, who said, *inter alia*, that it is not normal banking practice to mix interest from different bank accounts. He said that, given the complexity and the mixing of interest charges between different bank accounts, there was insufficient information to validate the interest charges.

25. Mr. Hennessy swore a further affidavit on the 15th March, 2017, indicating that the net proceeds of sale after receiver's costs amounted to €428,000.00. He set out how they were applied by the Bank and said that the total redemption figure is now €728,388.84.

Legal Issues

26. Obviously, as this is a motion for summary judgment, the matter falls to be decided according to the usual principles as set out in cases such as *Aer Rianta cpt. v. Ryanair Ltd*. [2001] 4 I.R. 607; *Harrisrange Ltd. v Duncan* [2003] 4 I.R. 1; and, *Allied Irish Banks v O'Brien and Anor*. [2015] IEHC 260. A key matter is whether the court is satisfied that "there is a fair or reasonable probability of the defendant having a real or *bona fide* defence." (per McGuinness J., *Aer Rianta c.p.t. v Ryanair Ltd*.) Such a determination will be based on the circumstances of each individual case as a whole. There is a low threshold for the respondent in such an application which does not require proof of the probability of success of the defence and court should exercise the jurisdiction to grant summary judgment with caution.

27. Although numerous complaints and grievances were set out in the affidavits sworn by Mrs. and Mr. Barry, many of them could not possibly amount to a defence in these proceedings even if true and counsel on their behalf at the hearing rightly sought to extract from the list of complaints particular matters which might warrant the proceedings being remitted for plenary hearing. He emphasised two issues in this regard; (1) the interest charges; and, (2) a potential counterclaim on behalf of the defendants.

Interest Charges

28. As regards the interest charges, counsel referred to the accountant's report exhibited on behalf of the defendant, described above, and argued that, notwithstanding the matters raised in the replying affidavit on behalf of the bank (the affidavit of Mr. Hennessy referred to above) it was significant that the accountant had averred that it was not normal banking practice to mix interest from different bank accounts. It was argued that the defendant's expert should be in a position to ascertain whether the interest charged was correct and that it was not satisfactory or fair that the bank would simply present a figure for interest by way of a *fait accompli* without explaining the underlying methods and principles by which the figure was arrived at.

29. In response, counsel on behalf of the bank relied on clause 7.9 of the General Conditions of the loan which provided that "[a] certificate issued by any officer of the bank as to any amount payable in respect of facilities will be final and binding on the borrower save in the case of manifest error." He also referred to the decision of Dunne J. in *Allied Irish Banks plc. v. Yates* [2012] IEHC 360 as authority for the proposition that such clauses were valid and accepted by the Irish courts. In fact, there was no certificate in this case as envisaged by clause 7.9. In this regard, counsel argued that it could not be the case that a certificate carried greater weight than the sworn averment of the relevant bank official.

30. I have carefully examined the decision of Dunne J. in *Allied Irish Banks plc. v. Yates* in which she considered a number of authorities and issues relating to "conclusive evidence certificates." In that case, the issue arose in the context of an application by the defendant to have a bankruptcy summons dismissed. The debtor raised a number of technical points as to the form of the certificate, which had been provided, as well as a more general argument that such a clause was contrary to public policy and/or the Constitution. He also argued that it should not be possible to rely upon such a certificate so as to exclude a deduction from the amount claimed arising from a mistake of law or an equitable set off. Having quoted from the judgments of Hamilton P. in *O'Maoileoin v Official Assignee* [1989] 1. I.R. 647; Murphy J. in In *Re Sherlock* [1995] 2 I.L.R.M. 493; Cozens-Hardy M.R. in In *Re. A Debtor* [1908] 2 K.B. 684; and, Denning M.R. in the case of *Bache and Co. (London) Ltd. v Banque Vernes* [1973] 2 Lloyd's Rep. 437 Dunne J. said, at paras. 21-23:-

> "…it seems to be clear that the conclusive evidence clause can be relied on by a bank against a surety in a case such as this. The reliance on such a clause does not oust the jurisdiction of the courts - it simplifies the proofs in respect of the amount alleged to be due. It is also clear that in certain cases the certificate can be challenged, for example, in circumstances involving illegality or fraud. No such issue has been raised in the present case. Nonetheless, that decision left open the possibility of challenging the validity of the underlying debt referred to in the certificate.
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> Reference was made on behalf of the debtor in the course of the submissions to a number of statutory provisions granting conclusive evidential status to either a certificate or statement made by named individuals. In that context, I was referred to the decisions in the case of *Maher v. A.G.* [1973] I.R. 140 and *The State (MacEldowney) v. Kelleher* [1983] I.R. 289. Those decisions relate to conclusive evidence clauses incorporated into statutory provisions and it seems to me that the fact that such statutory provisions were found to be unconstitutional does not avail the debtor in this case. A unilateral statutory provision conferring such status on either a certificate of statement made by a specific individual is entirely different from the situation in which two parties mutually agree how they will determine certain issues that may give rise to disputes between them. I do not think that the situations are analogous.
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> I would also observe in relation to the certificate at issue herein that the existence of or furnishing of the certificate referred to in the guarantee is not a prerequisite to claiming judgment from a debtor. As was noted from in the decision in *Dobbs v. National Bank of Australasia Limited* referred to above, the bank can recover without the production of a certificate if by ordinary legal evidence it proves the actual indebtedness of the customer. The clause, assuming it is valid, enables the bank by producing a certificate to dispense with proof of the amount of the indebtedness."

The debtor in the *Yates* case had raised the question of whether the certificate could be regarded as conclusive if an issue arose as to a question of law or the right to an equitable set off. This arose in the case by reason of (a) a claim that the bank had overpaid the receiver out of company monies in breach of an agreement between the parties; and, (b) a claim that the bank had failed to stop accruing interest on the account and that this was also in breach of the agreement. Dunne J. held, having regard to *Moohan v. S. & R. Motors (Donegal) Ltd.* [2008] 3 I.R. 650, that the fact that a conclusive evidence clause could be relied upon did not preclude a party from raising an equitable set off or counterclaim in respect of the sum claimed against them. She also held that, if the clause were to be used, the certificate must comply strictly with the terms provided for in the particular contract and held that there was an argument in the case as to whether the certificate was made, as required, by an "officer of the bank." She went on to discuss the comment made in *Bache and Co. (London) Ltd. v Banque Vernes* by Denning M.R. that a certificate of a bank must be honoured because it ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. She said that she did not think that the position of a bank was analogous to an arbitrator, engineer or architect in a building contract case because the latter would be an independent third party who does not benefit from the giving of the certificate. She said, at para. 32:-

> "The position of a bank issuing its own certificate either through a manager or officer or other designated person employed by the bank is different and as such one may have to be somewhat more circumspect in accepting that such certificates are unlikely to be mistaken."

She went on to say, at para. 33:-

> "It is clear from the authorities to which I have referred above that an error on the face of a certificate can clearly be challenged. But it seems to me there must also be an argument in an appropriate case for a challenge to be made to a conclusive evidence certificate in the event that it could be demonstrated that there was a significant error in the figures certified, whether that error appeared on its face or otherwise."

Having discussed the case of *North Shore Ventures Limited v. Anstead Holdings Inc. and Others* [2012] 1 Ch. 31, Dunne J. concluded:-

> "That case is a useful summary of the limits as to the extent to which such a certificate can be relied on although that was not the basis of the decision. Summarising the position in this case, there are a number of issues that have arisen relating to the fees due to the receiver and to the question of the charging of interest on the amount of the debt due by Celtic Bookmakers Limited to the applicant. The certificate relied on by the applicant does not preclude the debtor from challenging the amount said to be due either on the basis that the sum demanded is overstated as alleged or on the basis that the debtor is entitled to a set off in respect of the alleged overpayments. In this case, I am satisfied that having regard to the decision of McGovern J. to which I have referred, who in turn relied on the well known *ex tempore* decision of the Supreme Court in the case of *St. Kevin's Company against a Debtor* (unrep., Supreme Court 27th January, 1995) that so far as the amount due by the debtor to the applicant is concerned, the debtor has raised issues which have to be litigated separately outside the bankruptcy process. The issues raised are real and substantial and have some prospect of success. For that reason, I would indicate at this stage that I will dismiss the bankruptcy summons."

31. Having regard to the analysis in the *Yates* case, what are the significant features of the present case? The first point of note is that Dunne J. emphasised the need for strict compliance with the certificate procedure; but in the present case, there is no certificate at all. The second point of note is that, while Dunne J. said that, in the absence of a certificate, the bank could nonetheless rely upon proving matters in the ordinary way in accordance with rules of evidence, the only evidence before the court

at present is by way of general averment without any indication whatsoever as to how the particular figures which are inclusive of interest have been arrived at. It is true that the general conditions of the loan contain a number of clauses dealing with how interest is to be ascertained and how it is to be charged and that the individual loan agreements set out the applicable interest rates for the various facilities. However, the defendant's accountant has stated, in his professional capacity, that he is not in a position, on the basis of the information available, to check if the interest calculated is in fact correct, because, as is clear from the affidavit of Mr. Hennessy, there were multiple accounts and that charges were made to one account in respect of more than account. Mr. Weakliam describes this as atypical, although I do note that this procedure was explicitly provided for in the conditions of the loan. A third point of note is that there is no suggestion of fraud, illegality, or set off and the matter clearly does not warrant being remitted for plenary hearing on the basis of an arguable defence on any of those grounds. Fourthly, there is no specific example of actual overcharge. The examples of possible overcharge given by the defendant's accountant appear, in light of the affidavit of Mr. Hennessy, not to be borne out. In essence, the real complaint is not that the defendants can currently point to examples of error but that they cannot assess the figures at all because of the insufficiency of information. Fifthly, Mr. Weakliam averred that, because of the effect of compound interest, the calculation of the interest in the present case amounted to a substantial proportion of the debt. Accordingly, the question of interest does not appear to be a minor matter in this case.

32. Having regard to all of the above matters, it seems to me that the matter is not suitable for disposal by way of summary judgment. I have reached this conclusion with some considerable reservation, but my concern is that a summary judgment would be entered for a particular sum when neither the defendant nor the court is in a position to check, on the information available, that the figures are correct. This is not a straightforward case of a single loan with a single loan account on which the interest charged can be easily calculated. There were multiple accounts and the interest calculation is potentially complex. It has not been done in a manner sufficiently transparent for a professional accountant, on the information available to date, to be able to assess whether the figure is correct. Further, the bank has refused to provide the information when it was requested, albeit that the request was made late in the day. I am doubtful whether a conclusive evidence clause, which is a clause directed at rendering the proof of interest easier for the bank in court proceedings, necessarily means that the customer can be deprived of the information enabling him or her to engage his or her own professional accountant to double-check the total figure presented to the court; all the more so, when there is in fact no certificate in the particular case. Accordingly, albeit with considerable hesitation, I have decided to remit the matter to plenary hearing on this ground.

Proposed Counterclaim

33. The second issue put forward by counsel on behalf of the defendant in oral argument was in relation to a counterclaim. He said that, if the matter went to plenary hearing, the counterclaim would be a claim in negligence and would essentially amount to a claim that the bank's own conduct, in allegedly pressurising the defendants in various ways throughout the years 2011-2015, had actively contributed to a situation of financial difficulty for the defendants which culminated in their losing the Opel dealership and, in turn, their inability to meet their contractual commitments with the bank. In this regard, he argued that the affidavits disclosed a whole series of factual disputes between the parties as to when and to what extent they had gone into arrears and that this was relevant to whether the bank had exerted unfair pressure by seeking further security at particular times and whether it had unreasonably withdrawn certain facilities at other times. These factual conflicts included; (a) when and precisely to what extent the defendants entered into arrears; (b) the circumstances of the sending of the letter in 2010 requiring extra security; (c) the circumstances concerning the bank's refusal to furnish the annual letter to P.T.S.B. in relation to the overdraft; and, (d) whether internet banking facilities were cancelled or not during a certain period.

34. He argued that, while he accepted that the Code of Conduct for Business Lending to Small and Medium Enterprises 2012 was not actionable in itself, nor would breaches thereof by the bank render loans unenforceable, the Code was nonetheless relevant insofar as it would inform an assessment of negligence and the standard of care towards a customer expected from a bank. He argued that Clarke J. in *Moohan v S. & R. Motors (Donegal) Ltd* had set out that the test for a counterclaim defeating an application for summary judgment arising out of the same set of facts was whether there was a *prima facie* case for set off and argued that the test had been met in the present case.

35. There is no doubt that there was a long set of interactions between the parties involving considerable correspondence and meetings, only some of which have been put before the court. It is true that no evidence was put before the court to suggest that the bank went beyond the normal banking/customer relationship and somehow took on the mantle of offering general business advice; however, the defendant's case, in terms of its proposed counterclaim, is primarily one not of fiduciary duty but of simple negligence in the course of the ordinary bank-customer relationship. I do not underestimate the difficulties facing any defendant in bringing such a claim home successfully; however, it is probably fair to say that the nature of the defendant's business was such that the banking facilities available to the business were integral to the day-to-day running of the business. It is possible that, upon a close examination of the evidence, a conclusion might be reached that there was some negligence on the part of the bank at particular moments in time which may have negatively impacted on the defendant's business and, in turn, its ability to repay the bank. I am sceptical, on the basis of the evidence I have seen, that this is so but, in view of the substantial conflict of evidence concerning various factual matters as between Mrs. Barry's affidavits and that of Ms. Lombard, I am not in a position to conclude that the proposed counterclaim is inevitably doomed to fail and that the defendant simply has no case in this regard. Accordingly, on this ground also, I will remit the matter to plenary hearing.