THE HIGH COURT

[2023] IEHC 418

Record No. 2017/2281 S

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

v

DAVID MELLON AND DERMOT GLYNN

DEFENDANTS

***Ex tempore* judgment of Mr. Justice Mark Heslin delivered on 4 July 2023**

1. I now propose to give a decision in relation to this matter, which will reflect the fact that the court has carefully considered the evidence before it, in the form of sworn averments and exhibited documentation. The court has also had the benefit of hearing submissions today made with clarity on behalf of the Plaintiff's counsel. In addition, I set aside several hours last night and this morning so as to ensure that I arrived in court having read the papers in their entirety.

2. Both Defendants were called today and neither appeared in court. As the Plaintiff's counsel explained, at last week's callover, the court was informed that the Second-Named Defendant (who, up to that point, had solicitors on record for him) had withdrawn his instructions. Counsel also appeared today, as a courtesy, to confirm that the Second Defendant had since filed a notice of discharge of his solicitors, Messrs. Hegarty McCarthy, and a copy of that notice of discharge was handed into court. It is a document, dated the 29 June 2023, in which the Second-Named Defendant, Mr. Glynn, gives notice that he discharges his solicitors and will, as the notice says, hereafter act on his own behalf.

3. Thus, from the 29 June 2023 the Second-Named Defendant was acting as a litigant in person; and, at all material times, this was the position in respect of the First-Named Defendant.

4. The court also has before it, today, an affidavit sworn on the 3 July by Ms. Victoria Riordan, solicitor for the Plaintiff. In it, Ms. Riordan makes averments in relation to the withdrawal, by the Second Defendant, of instructions to his solicitors. This sets out the chronology of events from the morning of 29 June 2023; what occurred at the callover; and the directions as to notice given by Hyland J. (namely, that both Defendants be given notice of today's hearing date); and averments are made in respect of the notice as given.

5. It is perfectly clear from a consideration of the contents of that affidavit that notice to the Defendants complying with the court's directions of last Thursday *was* given. That is clear from the contents of letters which are exhibited by Ms. Riordan and which were sent to each of the Defendants in identical terms. Both letters were dated 29 June; both letters gave the title of the present proceedings and record number; and both stated the following:-

> "*Dear sir,*
>
> *We refer to the above and write to confirm that we attended at the callover this morning before Ms. Justice Hyland and called the Plaintiff's motion for summary judgment on for hearing on Tuesday 4th July next. We further write to confirm that the motion is listed for hearing on 4th July 2023 and our instructions are to proceed. We trust you will note the position*".

6. As I say, letters in identical terms were sent to both Defendants. In short, both were on notice of today's hearing, both were on notice that it was going ahead; but neither chose to attend.

13 October 2017 – Summary Summons

7. It seems useful in terms of this ruling to structure it in as close to a chronological fashion as possible. I therefore begin with the summary summons, which the Plaintiff issued on 13 October 2017, claiming, as against the Defendants and each of them, the sum of €1,191,802.72, together with further and continuing interest and costs.

8. As pleaded, the claim was for sums due by the Defendants in respect of monies advanced by ICS Building Society (which I will refer to as "ICS"), The summary summons pleaded that the claim related to a total of 8 loan accounts, and particulars were given in respect of each. This included the loan account number; the date of offer; the date of acceptance; and the loan, as sanctioned.

9. Loans 1 to 7, inclusive, were pleaded to have been offered, and accepted, on 6 August 2004. Loan 8 was said to have been offered on 22 February 2008 and accepted on the 27 February of that year. The fourth internal page of the summary summons details this information in the form of a spreadsheet, and it was pleaded that the total loans sanctioned came to €2,584,000.

10. The Summary Summons went on to plead, inter-alia, that:-

> *"By virtue of… SI 257 of 2014* (which concerned Approval of a Scheme of Transfer between ICS and the Plaintiff)*; and a Transfer Agreement, dated 5 June 2014, (*made between ICS, as Transferor, and the Plaintiff, as Transferee*); and the Scheme dated 5 June 2014 submitted by the Society and the Plaintiff to, and approved by, the Minister for Finance… the assets and liabilities of the Society, including the liabilities to it of the Defendants, and the benefit of the Loan Agreements, were transferred to the Plaintiff, with effect from 1 September 2014."*

18 December 2017 - Order of Eagar J

11. By order made on 18 December 2017, Eagar J ordered service of the summary summons, and any future documents requiring personal service on the First-Named Defendant, be by way of ordinary prepaid post to his address, which was specified in the order.

23 January 2018 – Appearance of the First Defendant

12. An appearance was entered, in person**,** by the First-Named Defendant, which is dated 23 January 2013. That is an obvious error in circumstances where the central office stamp is dated 23 January 2018.

21 February 2018 – Appearance of the Second Defendant

13. On 21 February 2018, an appearance was entered on behalf of the Second-Named Defendant, by Hegarty McCarty & Co solicitors,

1 August 2018 – Motion Seeking Liberty to Enter Final Judgment

14. On 1 August 2018 the Plaintiff issued an application by way of motion, initially returnable for 26 October 2018, seeking liberty for the Plaintiff to enter final judgment as against the Defendants in the sum of €1,214,882.64, together with further interest on the principal sums specified therein.

15. That motion was grounded on a lengthy affidavit sworn on 17 July 2018 by Mr. Sean Buckley, a manager in the Plaintiff bank, who made averments as to his source of knowledge at para 1.

16. It is appropriate to note that, in circumstances where the initial motion was returnable before the Master, liberty to enter final judgment was sought, but the relief, today, in the manner I will presently explain in this ruling, is of course for judgment.

17. It is entirely fair to say that the averments made and documentation exhibited by Mr Buckley, reflect and underpin the pleas made in the summary summons.

18. Mr. Buckley refers to and exhibits true copies of the 8 signed and accepted loan offer letters. I have had sight of these. It is clear that the first 7 loans were by way of refinancing and the first 7 loans were to be secured on 7 apartments, all in the same premises in Rathfarnham. The 8th loan was to be secured on a certain property, also in Rathfarnham. As I say, all loan offer letters were signed and accepted and no issue has ever been raised by either of the Defendants in respect of the acceptance by them of these loan facilities.

19. In his 17 July 2018 affidavit, Mr. Buckley proceeds to refer to the applicable loan conditions which include that the secured monies should bear interest, and he makes averments in relation to the calculation of same.

20. I have had sight of the general and special conditions. Clause 1A makes clear that the loan offer was joint and several in respect of the Defendants, and that is the case in relation to each of the 8 loan offers.

21. Clauses 4A and B make clear that the loans were repayable on demand and what is plain from these clauses is that a missed payment *entitled* the lender to make demand for repayment, but did not create a contractual *obligation* to make demand immediately. In other words, it is very clear, from the perspective of the statute of limitations, that 'time ran' *not* from a missed payment, but from a *demand* made by the Plaintiff. Later in this ruling I will return to this issue, in circumstances where it constitutes one of three issues canvassed by the Second-Named Defendant as a would–be defence.

22. Returning, for the moment, to Mr. Buckley's affidavit, he avers that monies were advanced to the Defendants on the basis that same would be repayable with interest by way of monthly repayments over the terms of the loans. I pause here to say that it has never been asserted that the monies were not advanced.

23. He proceeds to aver that the Defendants defaulted on such repayments, and he avers that the Plaintiff sent letters of demand. Again, there is no suggestion that the Defendants did not default and there is no suggestion that any demand was infirm.

24. The letters of demand in respect of the first 7 loans are dated 9 October 2015 and the letter of demand in respect of the 8th loan is dated 11 July 2016. All eight letters of demand are exhibited, and I have carefully considered their contents. They accord precisely with the averments made by Mr. Buckley.

25. He further avers that the Defendants failed, refused or neglected to discharge the sums due. Again, that is not in issue. It has never been asserted that the outstanding debt has been repaid.

26. Averments are also made in relation to the principal sums due, as taken by Mr. Buckley from the Plaintiff's original bankers' book which he avers comprises of the Plaintiff's computerised Mortgage Accounts System, or "MAS".

27. At paras. 10 and 11, Mr. Buckley makes averments with respect to loan number 1 and sets out in detail the sums owning in relation to principal and interest, up to 21 June 2018. This, as is clear from the averments, includes credit for a single payment made, between October 2016 and March 2017, which reduced the outstanding balance; and it seems clear that this payment relates to proceeds in respect of the properties secured.

28. Mr. Buckley carries out a similar exercise with respect to loan no. 2 at paras. 12 and 13. The same is done, at paras. 14 and 15, in relation to loan no. 3. Paras. 16 and 17 concern loan no. 4.

Paras. 18 and 19 relate to loan no. 5. Paras. 20 and 21 concern loan no. 6. Paras. 22 and 23 deal with loan no. 7. Loan no. 8 is dealt with in paras. 24 and 25.

29. With respect to loan no. 8, it is appropriate to note that there is no credit entry, but that would clearly seem to be in circumstances where the sum claimed takes account of a prior sale and the foregoing emerges from a review of the bank statements which the Plaintiff subsequently exhibited, in the manner I will presently come to in this ruling.

30. At para. 26, Mr. Buckley details the total sums due by the Defendants as of 21 June 2018. This is averred to be €1,214,882.64 owing by the Defendants to the Plaintiff over and above all just credits and allowances.

31. At para. 27, Mr. Buckley avers that the calculations detailed in his affidavit and the sums claimed for interest on the Defendant's liabilities were calculated at the contract rate and rates applicable to the Defendant's loan accounts as shown on the MAS in accordance with the terms of the accepted loan offer letters.

32. At para. 28, Mr. Buckley avers that he is advised by the Plaintiff's solicitor (who is identified by name) and believes, that the Defendants have no defence to the Plaintiff's claim

24 July 2018 – Verifying Affidavit of Wendy Mitchell

33. The Plaintiff's application also relied on a verifying affidavit, sworn by Ms. Wendy Mitchell, on 24 July 2018. Ms. Mitchell averred that she is a "legal case manager" in the Plaintiff bank, and an officer for the purposes of the "Bankers Books Evidence Acts 1879 to 1959 (as amended)". She averred, inter alia, that, all material times, details of the Defendants' liabilities to the Plaintiff on the loan accounts were maintained by the Plaintiff, in electronic format, on the MAS (to which Mr Buckley referred), and which constitutes the Plaintiff's banker's book, for the purposes of the aforesaid Acts.

34. She went on to aver that the MAS was, at all material times, the Plaintiff's only and ordinary bankers' book; that all entries on the MAS in relation to the Defendants' liabilities were made in the usual and ordinary course of the Plaintiff's business; and that the MAS is and was, at all material times, under the control of the Plaintiff.

35. As the Plaintiff's counsel helpfully submits today, this verifying affidavit was sworn, at that point, as a means of clearly establishing compliance by the Plaintiff with the Bankers Books Evidence Acts. However, it is also the case that a Plaintiff bank can establish its debt and its entitlements to judgments by other means.

36. As to service of that application, it is very clear from an affidavit of service, sworn on 30 August 2018 by Ms. Nora O'Brien on behalf of the Plaintiff, that both of the Defendants were served with the Plaintiff's application. This is further evidenced by the reality that the Second-Named Defendant swore a replying affidavit on 22 November 2018.

22 November 2018 – Affidavit of the Second Defendant

37. Although the Second-Named Defendant chose not to attend today's hearing and, therefore, made no submissions, counsel for the Plaintiff very appropriately opened that affidavit in full and I have carefully considered its contents.

38. At Paragraph 6, the following averments are made by the Second-Named Defendant, and it seems appropriate to quote these *verbatim* given that they constitute the contended-for defence:

> "*6. At this juncture, I believe and am advised that I have a full defence to the claim of the Plaintiff on the following grounds:-*
>
> *(a) The Plaintiff has failed completely to prove its title to the loan facilities (collectively the '**Loan Facilities'**) and/or the loan facility letters (the **Facility Letters**) forming the subject matter of the proceedings.*
>
> *(b) The Plaintiff has failed to specify when each of the Loan Facilities went into default and as such I believe that much if not all of the claim of the Plaintiff may be statute-barred.*
>
> *(c) The Plaintiff has failed to demonstrate the computation of the amounts claimed on foot of the Loan Facilities and in particular to demonstrate that it is not making a claim for unenforceable default or surcharge interest*".

39. In relation to the first issue, Mr Glynn asserted that the Plaintiff had not exhibited the 5 June 2014 Transfer Agreement, or the Scheme. He asserted that it was (and I quote) "… *entirely possible that the loan facilities and/or the facility letters were not validly transferred to the Plaintiff"*.

40. He went on to say that, on 21 November 2018, his solicitors served a 'Notice to Produce' on the solicitors for the Plaintiff, calling for the Transfer Agreement and the Scheme, which had not been produced.

41. In relation to the second issue, Mr Glynn averred, at paragraph 13 of his affidavit, that the facility letters date from August 2004, whereas proceedings issued in October 2017. On this issue, he made the following averments at paragraph 14 and 15 (and I quote):-

> "*14. To the best of my knowledge information and belief, the Loan Facilities have been in a position of default for in excess six years. In his affidavit Mr. Buckley has failed to offer any evidence as to when each of the loan facilities went into default. Instead, he simply makes reference to letters of demand dated the 8th October 2015.*
>
> *15. While I appreciate that this affidavit is not a vehicle for legal submission I believe and am advised much if not all of the claim of the Plaintiff may be statute barred*".

42. As regards the third issue, Mr Glynn contended, from paragraph 16 onwards, that the Plaintiff failed to demonstrate the computation of the amount claimed on foot of the loan facilities. He expressed a concern that a significant portion of the amounts claimed by the Plaintiff may be comprised of penalty or surcharge interest. He went on to refer to documentation and information

sought, from the Plaintiff, by the Second-Named Defendant's solicitors. This is detailed at para. 22 and includes *inter alia* confirmation of the amount of surcharge or default interest charged by the Plaintiff; confirmation that the Plaintiff would exhibit a comprehensive statement of account for each loan account; confirmation that the Plaintiff would withdraw any claim for surcharge or default interest; and would not seek to charge any further surcharge or default interest.

43. These three issues were said by the Defendant to constitute (and I quote) "*a full defence"*. It seems appropriate to note that these were the *only* issues put forwards as supposed defences in any affidavit sworn by either of the Defendants. This is of course in circumstances where, in opposition to the Plaintiff's initial application for judgment (and today represents a continuum of that) only *one* affidavit was sworn, and it was the Second Defendant's affidavit to which I have just referred. The First-Named Defendant has, in effect, never engaged and he has sworn no affidavit whatsoever.

29 January 2019 – Replying Affidavit of Marie Carey

44. Moving ahead in time, on 29 January 2019, a replying affidavit was sworn by Ms. Marie Carey, a "legal case manager" employed by the Plaintiff, who made averments at para. 1, in relation to her source of knowledge. Paras. 7 to 10, inclusive, relate to the first issue raised by the Second-Named Defendant and said by him to constitute a defence, namely, title to the loan facilities in light of the transfer from ICS to the Plaintiff.

45. At para. 9, Ms. Carey avers explicitly that, with effect from 1 September 2014, <u>all</u> of the mortgage loan facilities/accounts previously held by ICS were transferred to the Plaintiff. A copy of the Transfer Agreement, dated 5 June 2014, is also exhibited; and Ms. Carey avers that the redactions to same for confidentiality reasons have no relevance to the Defendants or any of the loan facilities in issue.

46. The following is a *verbatim* quote from paragraph 9 of Ms. Carey's affidavit, wherein she makes the following averments with respect to the Transfer Agreement exhibited by her:

> "*9. The relevant point to note is the definition of 'Loan Assets' which is set out in the said Transfer Agreement and includes, inter alia, 'all loans and other extensions of credit'. Clause 2 of the said Transfer Agreement entitled 'Agreement for Transfer' specifically refers to the Assets which are set out in Schedule 1 of the Transfer Agreement and include the Loan Assets at No. 7 thereto. Accordingly, no mortgage loan facilities/accounts held by the Society were excluded from the transfer and so the suggestion made by Mr. Glynn that some loan facilities, including some or all of the facilities to which he was a party, were not transferred, does not arise in the instant case*".

47. It is appropriate to note, at this juncture, that Ms. Carey's averments with respect to the Plaintiff's title to the relevant loan facilities are uncontroverted; and the terms of that Transfer Agreement reflect, entirely, in objective terms, the said averments. In other words, in light of the evidence before this Court, the first issue canvassed by the Second-Named Defendant does not disclose even the possibility of a *bona fide* defence.

48. From paragraph 11, the second issue raised by the Second-Named Defendant is dealt with, namely, the date of default and the contention that the claim may be 'statute barred'. At para 12, Ms. Carey refers to part 3 of the 8 Loan offer letters and she quotes from the Plaintiff's general and special conditions, as follows, being from Clause 4 (b):-

> "*In the event of any repayment not being paid on the due dates or any of them, or any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in Clause 2 (a) the society <u>may demand</u> [underlining added] an early repayment of the principal and accrued interest or otherwise alter the conditions of the loan*".

49. Ms. Carey proceeds to aver, at para. 13, that the effect of the foregoing clause in each of the loan agreements is that time does not begin to run for the purposes of the statute of limitations until demand is made on the borrowers.

50. I pause here to say that, as well as Ms. Carey's averments as to fact being uncontroverted, this is not a complicated or novel issue of law. The use of the words *<u>may</u> demand* plainly makes clear that there was no contractual obligation on the lender or the Plaintiff *<u>to</u> demand immediately,* upon the Defendants' default. As I touched on earlier, it is perfectly clear that, for the purposes of time 'running' against the Plaintiff as regards the statue of limitations, the 'clock starts' when the Plaintiff, in fact, *made demands,* which the Defendants failed to deal with satisfactorily.

51. It will be recalled that Mr Buckley's affidavit referred to, and exhibited, those 8 demands, which were, in fact, sent by the Plaintiff to the Defendants. He did so at paragraph 8 and the letters of demand comprised exhibits marked "I" to his affidavit. The first of the letters of demand, namely, the letters of demand in respect of loans 1–7, inclusive, are dated 8 October 2015. Each was addressed to the First and Second-Named Defendant. Each specified the relevant account number; the redemption balance; the current outstanding arrears; and the property which the loan related to. If one looks at each of those 7 letters of demand, it is plain that they relate to properties described as apartments 1 to 7, inclusive, of a particular development, located in Dublin 14. The 8th of the letters of demand is dated 11 July 2016. It is also addressed to both of the Defendants. It specifies the relevant account number; and the redemption balance outstanding.

52. There is no lack of clarity in respect of the fact and content of the demands. I take the view that, in circumstances where letters of demand were served in October 2015 and July 2016, followed by legal proceedings, which issued in October 2017, there is no conceivable question of the statute of limitations providing a defence. In short, based on what is incontrovertible evidence before the court the second Defendant has not established even the possibility of a *bona fide* defence with respect to the statute of limitations.

53. It is also appropriate to say, at this juncture, that the details in the letters of demand accord entirely with the *purpose* for which each loan was obtained by the Defendants. For example, if one looks at paragraph 2 in each of the first 7 loan offers (all dated 6 August 2004), one can see that

they specify property to be mortgaged. These properties comprise the 7 apartments referred to in the first 7 of the letters of demand.

54. The third issue raised by the Second Defendant, namely, the calculation or composition of the sum claimed is addressed in a series of detailed averments made between paras. 15 and 18, inclusive, of Ms. Carey's 29 January 2019 affidavit. Among other things, at para. 16 Ms. Carey exhibits a complete set of bank statements in respect of each of the 8 loan accounts, the subject of these proceedings, on the Plaintiff's headed paper. It is clear that the Plaintiff bank has provided statements showing each transaction, from drawdown, on the account in question and, thus, complete clarity on the composition of its claims across the 8 accounts.

55. With respect to surcharge interest which the Second-Named Defendant contended might constitute a significant portion of the Plaintiff's claim, it is averred, at para. 17, that, across the eight 8 loan accounts, surcharge interest was applied only in the case of the loan facility provided through the 'number 4 loan account' (the relevant loan account number being 1502024). Details are given in relation to 8 occasions (between August 2009 and April 2010) when surcharges, of €4.46 on each occasion, were applied. It is averred that, in total, surcharge interest amounting to €35.68 was applied to the number 4 loan account.

56. Paras. 18 and 19 comprise averments updating the Plaintiff's claim, with respect to further contractual interest accrued, across the 8 loan accounts, from 21 June 2018, up to 23 January 2019. Of note is that, in relation to loan accounts 1–7, inclusive, a sum of €520 was paid in August 2018 and credit is given, as is clear from the averments made and calculations set out at para. 18 (a).

57. I pause to observe that, insofar as there was a payment made in August 2018, it speaks to the reality that there is no conceivable statute of limitations defence, given that acceptance of a debt by means of a payment of liability is an answer to the statute; but the statute of limitations issue simply does not arise and nothing turns on that particular observation.

58. Returning to the affidavit, it is averred, positively, that as of 23 January 2019, a total sum of €1,230,731.26 was due and owing by the Defendants, over and above all just credits and allowances; and para. 18 comprises a detailed breakdown of the total, with respect to principal and interest across the 8 Loan Accounts.

59. In light of these averments and the exhibited documentation, in particular, the exhibited bank statements in relation to the loan accounts the subject of these proceedings, the Second-Named Defendant has not made out the possibility of a *bona fide* defence as regards the computation of the debt due and owing.

60. Before the court completes a review of the evidence, in terms of the entirety of the affidavits sworn and the documents exhibited, it appears useful to take stock, at this stage, by making three comments:-

(i) I am satisfied that the averments and exhibited documentation, which I have referred to in this ruling, thus far, constitute *prima facie* evidence of the Plaintiff's entitlement to judgment against both Defendants;
(ii) The Second-Named Defendant has not established the possibility of a *bona fide* defence in respect of any of the three issues raised by him;
(iii) The First Defendant did not raise any issue, has filed no affidavit, and not engaged in any way with the Plaintiff's application.

18 October 2019 – Notice of Intention to Proceed

61. Continuing, then, to look at the pleadings before the court, on 18 October 2019 Plaintiff issued a Notice of Intention to Proceed. This was served on the Second-Named Defendant's solicitors, and was also served on the First-Named Defendant, by post, in the manner averred in an affidavit of service sworn by Mr Dermot Gallagher, on the 5 November 2019.

21 November 2019 – Master's Order

62. On 21 November 2019, the Master ordered that the matter go to plenary hearing and gave liberty for a statement of claim to be delivered within four weeks. I pause at this stage to observe that, pursuant to O. 37 of the RSC, the Master does not have jurisdiction to send a matter to plenary hearing unless both sides consent, and, in the manner presently explained, there was no such consent.

27 November 2019 – Setting Aside of the Master's Order

63. On 27 November 2019, the Plaintiff's solicitors issued a motion seeking to set aside the Master's order; and also sought judgment in the sum of €1,214,882.64. That application was grounded on an affidavit sworn on 27 November 2019, by Ms. Victoria Riordan, solicitor for the Plaintiff.

64. Ms. Riordan made averments in relation to the chronology of events and, in particular, what occurred in the Master's court on the 21st of November 2019. She made *inter alia* averments to the effect that counsel for the Second Defendant indicated that his client consented to a transfer of the Plaintiff's claim to the judge's list; it was also averred that the First Defendant did not appear; and averments are made to the effect that, of his own volition, the Master adjourned the matter to plenary hearing, notwithstanding the absence of consent by the parties.

65. By order made on 27 January 2020, O'Hanlon J ordered that the Master's order be set-aside in respect of the Second-Named Defendant. That order also recorded that the was no appearance by or on behalf of the First-Named Defendant, but went on to provide that the Plaintiff's motion be transferred to the non-jury list, in respect of the First-Named Defendant.

66. It seems to me, in the manner I will presently explain, that this Court can fairly take the view that the terms of the said order does not reflect what, in fact, occurred. I say this in circumstances where, on that very day, namely, 27 of January 2020, and plainly in the wake of the Master's Court hearing, the solicitors for the Plaintiff wrote as follows to Mr. Mellon:-

"*Dear Sir,*

We refer to the above and further to our letter of the 12th of December last, we write just to confirm that we attended before Judge O'Hanlon this morning, and an order was made in terms of para. (i) of the notice of motion setting aside the order of the Master of 21st November 2019 with the balance of the motion being adjourned to the list to fix dates on this Thursday 30th January 2020. We will attend on Thursday next with a view to applying for a hearing date for the balance of the motion and we will confirm the hearing date to you thereafter".

67. What emerges is that an order was made in terms of para. 1 of the Plaintiff's motion, and the claim against both Defendants in terms of the balance of the motion was adjourned to the Non–Jury List to fix a date. This is notwithstanding the wording on the face of the order. I am satisfied that there can be no conceivable prejudice to either of the Defendants by the court proceeding on the basis that what in fact occurred and what the order made by the learned judge should have reflected was as per the contemporaneous record, in the form of the letter send by the Plaintiff's solicitor on 27 January 2020, namely, that the balance of the motion (which was plainly an application as against *both* Defendants, not confined to one Defendant) go to the Non–Jury List for the purposes of obtaining a date.

68. I am fortified in that view by the reality that the Defendants have chosen not to participate, at all, in the hearing of the claim against them. Thus, they do not rely on what might be called an anomaly in the said order; and it is also fair to say that they have never sought to rely on it. This court can also take comfort from the reality that the First Defendant was advised as to what in fact occurred. Further comfort is available to the court given the fact that, at that time, the Second-Named Defendant had legal advice in the form of solicitors and, indeed, counsel. Further comfort is available, in circumstances where a hearing date, as against *both* Defendants, was in fact pursued and obtained; and no issue has ever been raised about the Plaintiff's entitlement to proceed as against *both* Defendants. That this is what the Plaintiff has, at all material times, intended to do, and that comment is true right up to, and including, the notice plainly given (to both Defendants) in relation to the hearing date today.

6 December 2022 – *O'Malley* Amendment Application

69. Moving ahead then in time, by order made on 6 December 2021 (Coffey J.), the Plaintiff was granted liberty to amend the summary summons and a copy of the amended summons comprises a schedule to the said order. It seems uncontroversial to say that this was an application brought and granted in light of the Supreme Court's well known decision in *O'Malley*.

70. It is perfectly clear that these amendments provided further particulars of the sums claimed *per* the schedules appended to the summary summons. It is also very clear that these schedules comprised copies of statements of account in relation to each of the loans, the subject of the proceedings, being the same statements which Ms. Carey exhibited at para. 16 of her 29 January 2019 affidavit sworn on behalf of the Plaintiff.

71. In short, the particulars in the amended summons and in the statements comprise a very detailed setting-out, from drawdown onwards, of each of the transactions in respect of each of the loan accounts including: drawdown; repayments; interest rates; and the running balances.

72. The amendments also contain a plea to the effect that the total sum included compounded surcharge penalty interest of €35.68 which was applied to the Defendants' account in 2009 and 2010, in accordance with the Plaintiff's contractual entitlements.

73. The said order, as made on 6 December 2021, specified that service upon the First Defendant could be by ordinary pre-paid post to his address; whereas service on the Second Defendant would be by means of service on his solicitors.

74. The amended summary summons was duly issued, on 9 February 2022, and the court has the benefit of an affidavit sworn on 23 August 2022, by Ms. Nora O'Brien, a legal executive with the Plaintiff's solicitors, who averred that service was effected on the First and on the Second-Named Defendant, on 17 February 2023. As Ms. O'Brien avers, *both* the Court's 6 December 2021 order and the amended summary summons were served.

27 June 2022 - Application to Re-enter the Proceedings

75. On 27 June 2022, the Plaintiff's solicitors issued an application to re-enter, which was returnable for 17 October 2022. Again, this was served on *both* of the Defendants. That is clear from a further affidavit of service sworn by Ms. O'Brien, on 29 September 2022, in which she averred that the application for re-enter was served on the First, and on the Second-Named Defendants, on 8 August 2022.

8 June 2023 – Supplemental Affidavit of Emily Jane Maguire

76. On 8 June 2023**,** a supplemental affidavit was sworn on behalf of the Plaintiff by Ms. Emily Jane Maguire, a "legal case manager" for the Plaintiff, who made averments at para. 1 in relation to her source of knowledge. She went on to refer to the affidavits sworn by Mr Buckley and by Ms. Carey, respectively, in the context of the Plaintiff's application for liberty to final judgment against the Defendants in the sum of €1,230,731.26. She proceeded to aver that, since the swearing of Ms. Carey's affidavit, no payments have been made into any of the loan accounts; and she averred that the aforesaid sum remains due and owing by the Defendants and each of them to the Plaintiff.

77. At para. 4, she averred that further interest of €151,807.71 has accrued on the Defendants' loan accounts, from 24 January 2019 (to which date, interest was made up in Ms. Carey's affidavit) to 31 May 2023. I pause here to say that this comprises a clear setting-out of the interest calculation and the total due, as of 31 May 2023, and neither of the Defendants has chosen to take issue with the contents of Ms. Maguire's affidavit in that regard.

78. At paragraphs 'a' to 'h', inclusive, of Ms. Maguire's affidavit, she set out details in relation to the interest accrued, on a loan-by-loan basis, and averred to the relevant sums due with regard to principal; interest; and the total owing, as of 31 May 2023, in respect of each particular loan account.

79. Para. 5 comprises a detailed setting-out of the calculation of the sum due by the Defendants, which is averred to be a total of €1,382,538.98, owing to the Plaintiff by the Defendants over and above all just credits and allowances. She averred that the sum remains due and owing. Ms. Maguire further averred, *inter alia*, that the calculations detailed in her affidavit, including the sums claimed for interest on the Defendants' liabilities, have all been calculated at the Plaintiff's normal contractual right and rates of interest, applicable to the Defendants' loan accounts, as shown on the MAS, in accordance with the terms of the accepted loan offer letter.

80. Ms. Maguire also avers that she is advised by the Plaintiff's solicitor (who is named) and believes, that there is no defence to the Plaintiff's claim. As I say, neither of the Defendants have chosen to take issue with any of these averments or any of the calculations.

81. It is in these circumstances, as Ms. Maguire avers, the Plaintiff is seeking judgment in the sum of €1,382,538.98, together with further interest on the principal sums (and each of the 8 of these are set out at paragraph 20 of Ms. Maguire's affidavit) from 1 June 2023, until payment or judgment.

82. On 21 June 2023, Rafael De Souza Salvador, legal executive**,** swore an affidavit in which it is averred that, on 14 June of this year, service was effected on the Defendants, of Ms. Maguire's supplemental affidavit.

27 June 2023 – Affidavit of Victoria Riordan

83. The final affidavit in the papers was sworn by Ms. Victoria Riordan, solicitor for the Plaintiff, on 27 June 2023. At para. 3, she referred to the Appearance entered, in person, by the First-Named Defendant on 23 January 2013. Ms. Riordan went on to aver that, since entering the said Appearance, the First Defendant has taken no further active role in the proceedings; has not delivered any affidavit in response to the Plaintiff's motion; nor has he appeared in court on any occasion in respect of that motion. She proceeded to aver, at para. 5, that the First-Named Defendant has, at all times, been put on notice of the various court listing, and she referred to copies of correspondence issued by her firm, to the first Defendant, to his address. I have had sight of all those letters which are dated, respectively, as follows:-

- 5 January; 2 August; 24 October; 2 November; and 3 December, 2018;
- 18 February; 5 April; 16 April; 28 May; 10 July; 16 October; 16 October again; 18 October; 26 November; and 12 December, 2019;
- 27 January; 31 January; 18 June; 7 August; and 17 August, 2020;
- 17 February; 8 August; and 18 October, 2022;
- and, lastly, 13 June 2023.

84. Of course, there has been further correspondence which I touched on earlier in this ruling, in terms of the most recent notification to each of the Defendants, which complies with the directions given by Hyland J. and that was of the notice in the form of letters dated 29 June 2023.

85. Returning to Ms. Riordan's affidavit, she avers, at para. 6, that the First-Named Defendant has never replied to this correspondence; and that the only communication which Ms. Riordan has had from the First Defendant was a telephone call in October 2019, in which the First Defendant suggested that he would not be defending the proceedings and was considering consenting to judgment. Ms. Riordan goes on to aver that, by letter dated 16 October 2019, she wrote to the First Defendant enclosing a draft letter consenting to judgment, for him to sign and return, if he so wished. She avers that no such letter was forthcoming.

86. At para. 7, she further avers that, when the date for the hearing of this motion (namely, today, 4 July) was given by the Court on 20 October last, the Plaintiff's solicitors wrote to the First Defendant, on 1 November 2022, confirming this hearing date. She goes on to aver that the Plaintiff's solicitors wrote, again, on 31 May 2023, re-confirming the today's hearing date. Ms. Riordan exhibits a copy of both letters, the contents of which accord precisely with her averments.

87. Her 27 June affidavit concludes with the averment that no correspondence that has issued from the Plaintiff's firm to the First-Named Defendant, to date, has been returned undelivered.

88. It is not necessary to repeat what I said in relation to the Second-Named Defendant's position. He has, at all material times up until the 29 of June 2023, been legally represented, but he is now a litigant in person, and neither of the Defendants have chosen to participate today.

Conclusion

89. To draw this ruling to a conclusion, this is an application for summary judgment, and the proper approach which this Court should take to an application for summary judgment is clear from the authorities. The law is well - settled and it is sufficient for present purposes to refer to the decision by McKechnie J in *Harrisrange Ltd v. Duncan*. In paragraph 9, on page 7 of the reported decision, the learned judge summarised the relevant principles in 12 paragraphs and it is those principles which this Court applies today. The test as outlined in *Harrisrange* is as follows:-

> *"(i) The power to grant summary judgment should be exercised with discernible caution;*
> *(ii) In deciding upon this issue the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
> *(iii) In so doing the Court should assess not only the Defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the Plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
> *(iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*

(v) Where however, there are issues of fact which, in themselves are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues;

(vii) The test to be applied, as now formulated is whether the Defendant has satisfied the Court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the Defendant says credible?', - which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) This test is not the same as and should be not elevated into a threshold of a Defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) Leave to defend should be granted unless it is very clear that there is no defence;

(x) Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the Defendant or has reason to doubt whether he has a genuine cause of action;

(xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

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

90. Having quoted the *Harrisrange* principles, it is clear that this Court's jurisdiction to grant summary judgment should be *exercised sparingly*, with *discernible caution.* Leave to defend, at plenary hearing, should be granted unless it is *very clear* that there is no defence.

91. Having carefully considered the evidence, and approaching the matter with all necessary caution, it is very clear to me that there is no defence.

92. As I mentioned earlier, the Second-Named Defendant canvassed three issues, all of which were undermined by uncontroverted evidence.

93. For the sake of completeness, it has never been suggested, for example, that any term in the lending contracts was unfair to the Defendants, or that the relevant Directive (which, of course, relates to consumer contracts) applies, so even if that (Unfair Terms in Consumer Contracts) Directive applied, it is clear that the present proceedings relate only to the "core" terms of lending contracts.

94. The Defendants have not established even the *possibility* of having a *bona fide* defence. Had they met the principles in *Harrisrange* this court would have been obliged to grant leave to defend

by way of plenary hearing. However, the Defendants have not met what is, in relative terms, a low threshold under the *Harrisrange* approach.

95. By contrast, the Plaintiff has put before the court cogent and clear evidence which establishes their entitlement to judgment.

96. For these reasons, the appropriate outcome is to grant judgment against the Defendants in favour of the Plaintiff in the sum of €1,382,538.98.