

THE HIGH COURT

[2022] IEHC 433

[Record No. 2013/2633 S]

BETWEEN:

GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

MATTHEW WALES

DEFENDANT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 13th day of July, 2022

INTRODUCTION

1. The within proceedings were instituted by way of summary summons issued on the 16th of August, 2013 in respect of unpaid loan agreements entered into in August, 2006. The loans were secured against two properties both of which have been sold, one before and one since the issue of proceedings. Substantial payments have been made to reduce the original indebtedness but this notwithstanding the claim for the balance alleged to be outstanding is now pursued by the Plaintiff.

2. This judgment is delivered in respect of two motions, namely:

- I. the Plaintiff's motion for liberty to enter final judgment on the 20th of February, 2018; and
- II. the Defendant's motion seeking to dismiss the proceedings for want of prosecution and/or on the grounds of inordinate and inexcusable delay which motion was issued on the 23rd of April, 2018.

3. At the date of hearing in May, 2022, the Plaintiff was seeking judgment in the sum of €166,106.62.

PROCEDURAL HISTORY

4. The summary summons which issued in August, 2013 was served pursuant to an order for substituted service (Peart J.) obtained in March, 2014. An appearance was entered on the 19th of March, 2014. The Plaintiff in the proceedings as issued was initially the ICS Building Society.

5. The Minister for Finance subsequently approved a scheme of transfer between ICS Building Society and the Governor and Company of the Bank of Ireland (“Bank of Ireland”) by way of statutory instrument made pursuant to the Central Bank Act 1971 (S.I. No. 257 of 2014).

6. The application for liberty to enter final judgment was grounded on an affidavit of Mr. Gerard Browne (sworn on the 13th of February, 2018) and was preceded by service of a Notice of Intention to Proceed and Notice of Change of Solicitor which were filed in December, 2016 but following failed attempts at service on various dates in April and May, 2017, were finally served by delivery through the letter box of copy documents at the office of the Defendant’s legal practice.

7. The lack of detail in the claim as pleaded was strongly criticised by the Defendant in his replying affidavit of the 23rd of April, 2018. The filing and delivery of the Defendant’s replying affidavit coincided with the Defendant’s application to dismiss the proceedings on delay grounds.

8. Thereafter, by order dated the 9th of November, 2020, the High Court (Simons J.) directed that the title of the present proceedings be amended so as to substitute the Governor and the Company of the Bank of Ireland as Plaintiff on foot of a notice of motion originally returnable to March, 2018. The order further directed that the amended title of the proceedings be duly entered in the Central Office of the High Court with the proper officer. These orders were made consequent upon s. 41 of the Central Bank Act 1971, and in accordance with the principles set out in the judgment of the Supreme Court in *First Active Plc v. Cunningham* [2018] IESC 11; [2018] 2 I.R. 300. The proceedings are now maintained by the Governor of

the Bank of Ireland in reliance on a Scheme of Transfer between the ICS and the Bank of Ireland. Substitution is provided for as a matter of law pursuant to s. 41 of the Central Bank Act, 1971 as follows:

“41.—Where, immediately before the transfer date, any legal proceedings are pending to which the transferor is a party and the proceedings have reference to the business agreed to be transferred, the name of the transferee shall on the transfer date be substituted for that of the transferor and the proceedings shall not abate by reason of such substitution.”

9. In response to the criticisms as to a lack of detail, a more detailed explanation was provided by the Plaintiff in a second affidavit of Mr. Browne (sworn on the 18th of April, 2019), almost a year after the Defendant’s replying affidavit was received. This was replied to by Affidavit of the First Named Defendant sworn in July, 2019.

10. In or about November, 2020, Simons J. ordered the amendment of the pleadings on application of the Plaintiff in reliance on the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v. O’Malley* [2019] IESC 84. The summons was amended to incorporate statements of both loan accounts from drawdown in each case up to the rest date of the 31st of July, 2013, showing that as of July, 2013, the sum of €620,781.84 was due and owing by the Defendant.

11. The further conduct of the proceedings was then characterized by the furnishing of late affidavits well after the date for hearing of the two motions was fixed. By case management order dated the 7th of April, 2022, the High Court (Barr J.) refused to adjourn the hearing on application on behalf of the Plaintiff who had just been served with a further affidavit exhibiting an expert report (from one Mr. Weakliam) on behalf of the Defendant in which it was contended, *inter alia*, that the plaintiff had erred in the application of the tracker interest rate to the two loans. The Court (Barr J.) fixed further time for replying affidavits on behalf of the Plaintiff in response to the late affidavit from the Defendant.

12. In compliance with the case management order, a third affidavit was sworn by Mr. Browne and was accompanied by affidavit of Messrs. Morley and Rogers, all sworn just over a week before the assigned hearing date in May, 2022.

13. Just two days before the date fixed for hearing, the Defendant issued a notice to cross-examine one of the Plaintiff's deponents (Mr. Browne) on his affidavits in the proceedings. This application was the subject of a preliminary ruling during the course of the hearing in circumstances where the two motions together had been called on for one day, with the suggestion of a possibility that they might run into a second day.

14. As late as the date of the hearing, application was made to court to receive a further affidavit from the Defendant's expert in reply to the three affidavits filed by the Plaintiff the previous week.

15. The application for a preliminary ruling in relation to the question of cross-examination of Mr. Browne followed on from the opening of all of the affidavit evidence, including the late affidavit of Mr. Weakliam, which I admitted in circumstances where his report had already been exhibited by the Defendant and had been the subject of affidavit evidence in response on behalf of the Plaintiff.

THE CLAIM

16. As appears from the special indorsement of claim, the proceedings seek to recover monies said to be owed by the Defendant pursuant to two loans entered into with ICS Building Society. These loans are said to have been made pursuant to loan offer letters dated the 1st of August, 2006, and the 2nd of August, 2006, respectively. It is pleaded that the loan offers were accepted in writing by the Defendant on the 7th of August, 2006, and that the monies on both loan accounts were duly drawn down by the Defendant on the 26th of September, 2006.

17. It is also pleaded that the respective loans had been secured by way of a legal charge over two properties in Clonskeagh, Dublin 14 ("the mortgaged properties"). Separate proceedings seeking possession of the two properties were brought in the Circuit Court and the two mortgaged properties have been sold and the sale proceeds have been credited against the debt. The manner in which the sale proceeds have been treated is a matter of considerable controversy between the parties. The sale of the mortgaged properties is not reflected in either the original nor the amended version of the summary summons. While there is a reduction in the amount claimed as between details endorsed on the summons as issued and the amended

summons, this reduction is not pleaded by reference to a corresponding reduction in the outstanding debt associated with the sale of the properties and the pleadings do not explain the changes.

18. The special indorsement of claim seeks judgment in the sum of €620,781.84, together with interest from the 2nd of August, 2013. By contrast, the sum in respect of which it is sought to enter judgment is €159,035.74 (together with interest).

THE EVIDENCE

Evidence of Mr. Browne

19. In his grounding affidavit Mr. Browne describes himself as the legal case manager of the Plaintiff. An issue was raised as to whether he was the legal case manager of the ICS or the Bank of Ireland, but it seems clear that at the date of swearing of his affidavit, the Plaintiff was in fact the Bank of Ireland and there is no ambiguity as to who employs Mr. Browne. Mr. Browne refers to a scheme of transfer between the ICS Building Society and the Governor and Company of the Bank of Ireland which was approved by the Minister for Finance pursuant to the Central Bank Act, 1971 (by S.I. No. 257 of 2014 whereby certain assets and liabilities of ICS were transferred in September, 2014). While he avers that by virtue of the Scheme the liabilities of the Defendant to the ICS and the benefit of any mortgage executed by the Defendant in favour of the ICS were all transferred to the Bank of Ireland, he does not exhibit the Scheme of Transfer. Mr. Browne relies on the Bankers' Book Evidence Act, 1879 in relying on exhibited documents relating to the loan. He confirms that details of the Defendant's liability as set forth and particularised were taken from the original Banker's Book being a computerised Mortgage Accounts System (referred to as "MAS") as confirmed by him. He exhibits two letters of loan offer dating to August, 2006, one for €570,000 and the second for €892,000. These letters were issued one day apart.

20. Both loans were subject to the general and special conditions attached to the loan and these were exhibited. These were identical save that a slightly different interest rate applied. They provided respectively that for the first three years of the term of the loan, repayments would be interest only and at the end of three years would revert to interest and principal. As to interest rate, it was provided respectively in material part that the interest would be no more

than 1.25% or .95% above the European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo Rate”) for the term of the loan unless certified as unavailable, at which point the rate applicable would be the Lender’s prevailing Home loan variable rate.

21. Under the general and special conditions, it was provided that the Plaintiff may in the event of any repayment not being paid on the due dates or any of them, or of any breach of the conditions of the loan or any of the covenants or conditions contained in any of the security documents, demand an early repayment of the principal and accrued interest.

22. Each loan was secured by mortgage deed on a separate address in Clonskeagh, Dublin 4. Both loans were drawn down.

23. Mr. Browne averred to occasions of default entitling the Plaintiff to demand repayment of facilities occurring when the Defendant and his wife fell behind on repayments being in arrears of capital and interest. Letters of demand are exhibited and issued in respect of both loans in March, 2011. Further solicitor’s correspondence on behalf of the Plaintiff dating to January, 2013 is referred to but the Defendant says he never received this correspondence.

24. Figures are deposed to as to the amounts due at the date of issue of the proceedings which substantially exceed the figures claimed as due by the date of swearing of the grounding affidavit. Mr. Browne does not explain in this affidavit the significant discrepancy as between the amounts sought in the special summons and notice of motion respectively, other than referring to “*all just credits and allowances*” having been made. While the original loan amounts totalled some €1,492,000, and the level of indebtedness at the date of issue of the proceedings was €620,781.84, as set out above, by April, 2018 when Mr. Browne’s grounding affidavit was sworn, the figure claimed had reduced to €159,035.74 plus continuing interest.

25. In response to criticisms from the Defendant regarding the lack of detail in the grounding application, a more detailed explanation was provided by the Plaintiff in a second affidavit of Mr. Browne (sworn on the 18th of April, 2019) as follows:

“7. Thereafter the Borrowers engaged with the Plaintiff with a view to completing voluntary sales of the properties. The sale of the [address of property] property closed in May 2013 and the net proceeds of sale, being €845,150.00 were applied to the

Defendant's account 1538941 on the 17th day of May 2013. In this regard I beg to refer to the copy statement of account in respect of account number 1538941, which is at TAB 2 of the booklet of exhibits.

8. The sale of [address of property] closed in July 2014 and the net proceeds of sale, being €477,176.34 were applied to the Defendant's account 1537572 on 29 July 2014. In this regard I beg to refer to the copy statement of account in respect of account number 1537572, which is at TAB 3 of the booklet of exhibits."

26. At para. 17 of his Affidavit, Mr. Browne returns to the question of the Plaintiff's claim and explains that the difference between the principal sum claimed on the summary summons (which also includes a claim for further and ongoing interest) and the amount due at any given time thereafter had changed over the course of the proceedings due to part payments made by the Defendant in respect of his liabilities and further interest accrued pursuant to contract.

27. At para. 26 of this further affidavit, Mr. Browne sets out that the sum due on the loan accounts is €161,007, being €46,980.20 in respect of one account and €114,027 in respect of the other with interest continuing to accrue on the sum of €44,403.58 at the rate of .95% per annum and on the sum of €99,201.92 at the 1.25% per annum. The statements of account exhibited record capital repayments and credits following the payment over of the proceeds of sale of the secured properties and the associated reduction in the balance due.

28. On the question of delay alleged by the Defendant as warranting the dismissal of the proceedings, Mr. Browne contended that proceedings were initially not progressed as an act of forbearance on the part of the Plaintiff in circumstances where he was facilitated in disposing of properties on a voluntary sale basis in part reduction of his liabilities. He outlined difficulties in service on the Defendant between November, 2013 and February, 2014 which resulted in an order for substituted service being obtained in March, 2014. He deposed to the fact that further steps were taken in the sale of the second secured property after March, 2014 and no steps were taken pending the closing of that conveyance in July, 2014. Thereafter, the Defendant's appeal against possession proceedings remained before the High Court and was only finally resolved in February, 2015. Mr. Browne contended that pending resolution of the costs issue in the possession proceedings (in February, 2015), the Bank exercised a degree of further forbearance in progressing the proceedings and Mr. Browne recorded that no objection was raised by the Defendant. No reason was offered by Mr. Browne for the delay between March, 2015 and

March, 2016. He maintains that in March, 2016, the matter was formally placed on hold pending an internal investigation of the account in respect of the tracker mortgage concerns but does not refer to any communication with the Defendant in this regard. This process confirmed that the loan was “*not impacted*” in November, 2016. At that point the Plaintiff instructed new solicitors and a Notice of Change of Solicitor was filed in December, 2016 but service was only effected in May, 2017. The delay between June, 2017 and February, 2018 is acknowledged by the Plaintiff but no excuse is offered, albeit that the Plaintiff describes this as “*forbearance*” on its part (again without any apparent communication with the Defendant in this regard) to which the Defendant did not object.

29. In response to a complaint of prejudice, Mr. Browne points out that the Defendant could have reduced his liabilities to the Plaintiff and mounting interest in respect of which he is liable by simply discharging his liabilities due to the Plaintiff.

30. In a further replying affidavit sworn in May, 2022 just two weeks prior to the hearing date, Mr. Browne gave considerable detail in relation to the original loans, the failure to make monthly repayments, the arrears in March, 2011 standing at €13,386.82 on one loan and €25,666.10 on the other. The Statements of Loan Accounts exhibited in the proceedings show the application of interest on the two accounts and the outstanding balance as of July, 2013 in the sum of €576,378.26 on one loan and €44,403.58 on the other giving a total amount together of €620,781.84 (being the sum claimed in the summary summons) as being due and owing on or about the 2nd of August, 2013. Shortly before the issue of the proceedings the balance on one of the two loan accounts came down very significantly and Mr. Browne avers that the reduction of €845,150.43 on that loan represented the net proceeds from the voluntary sale by the Defendant of one of the two secured properties. Mr. Browne also averred that while the Plaintiff was entitled to compound interest under the contract, it had elected to limit interest claims to simple interest since 2013 and this concession benefitted the Defendant. He sets out in considerable detail the Plaintiffs’ calculations in respect of interest due and the dates during which it was accrued.

31. Finally, Mr. Browne joined issue with the Defendant’s expert Mr. Weakliam in respect of the applicable interest rates and relied on the further affidavits of Mr. Morley and Mr. Rogers in relation to the contested question of whether the Defendant’s position that the interest rate under the contract should be zero from October, 2008 because the EU Main Refinancing

Operations Minimum Bid, to which the rate of interest under the loan agreements had been linked, had been discontinued. He averred to the ECB's Main Refinancing Operations interest rates throughout the relevant period.

Evidence of Mr. Wales

32. The lack of detail in the claim as pleaded was strongly criticised by the Defendant in his first replying affidavit of the 23rd of April, 2018 as follows:

“11. As appears from the Plaintiff’s Notice of Motion, I say that the Plaintiff seeks to now enter judgment in the sum of €159,035.74, and as appears from paragraphs 18 and 28 thereof I say and believe that it appears that this sum is comprised of €112,555.96 in respect of account number 1537572 and €46,479.78 in respect of account number 1538941. I say and believe that this is a fundamentally different claim than what is claimed in the Summary Summons, and I say and believe that the Plaintiff has not explained adequately or at all how the sum now claimed is due and owing, other than baldly stating its composition as between account numbers 1537572 and 1538941.”

33. At para. 25 of the same affidavit, the Defendant describes the Plaintiff’s grounding affidavit as “*woefully inadequate*” insofar as Mr. Browne has failed to depose to the sale of the properties against which the loans the subject of these proceedings were secured.

34. The Defendant refers to separate possession proceedings which were pending before the Circuit Court when the summary summons issued bearing a 2012 record number.

35. The Defendant averred to the fact that while the Plaintiff secured possession orders in respect of the properties upon which the loans were secured, the said properties were placed for voluntary sale. The Plaintiff was asked to agree to the conditions of sale which included a condition that he would remain liable for the shortfall once the security was discharged through the sale of the property. He maintains that in circumstances where the Plaintiff consented to the sale without securing agreement in relation to the shortfall that they are now estopped from pursuing the shortfall. It is contended that the Plaintiff, in allowing the sales to proceed, tacitly agreed that the Defendant had no obligation for any shortfalls. The Defendant confirms that at

the date of issue of the summary summons one of the properties had already been sold and the charge had been released for the purpose of the conveyance. The Defendant complains that this is not clear from the claim as pleaded.

36. The Defendant complains that the terms of the mortgage deed were not brought to his attention prior to the signing of the loan agreements. He points out that the mortgage deeds were signed on the 26th of September, 2006 whereas the loan agreements were signed on the 7th of August, 2006 and pre-dated the date of signing of the mortgage deed. In this regard he refers to Article 3(3) of the Unfair Contract Terms Directive and claims in reliance on the Directive that a term is unfair where it irrevocably binds the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract. Complaint was also made in relation to compliance with the Code of Conduct on Mortgage Arrears and the purported removal by the plaintiff of protections available under the Code, the fact that he did not object to the possession orders made in the Circuit Court believing that there were no grounds to object.

37. The Defendant then addressed the question of delay referring to the fact that the Plaintiff now proceeds by motion for summary judgment having taken no substantive steps in the proceedings for a period of 4.8 years. The Defendant accuses the Plaintiff of “*parking litigation*”. He contends that it is inherent in the nature of summary proceedings that they are “*fast track*” proceedings and should be progressed quickly and expeditiously but that it is also imperative that the summons be accurately particularised so that the Defendant know the nature of the claim he is facing. He maintains that the failure to progress quickly and on the basis of accurately pleaded proceedings has caused him irreparable prejudice. He points to the correlation between delay and the “*gross prejudicial interest charges that have accrued by reason of the said delay*”. He also refers to the threat to his professional standing and reputation which he says is associated with the Plaintiff’s delay in failing to progress the proceedings. He further complained about a conflict of interest on the part of the Plaintiff’s solicitors who he contended had previously acted for him. This concern was addressed by the subsequent filing of a Notice of a Change of Solicitor and does not require to be addressed by me.

38. The Defendant accuses the Plaintiff of abusing the process of the court by commencing the within proceedings when proceedings had already issued and were before the Courts on the Plaintiff’s application for possession orders and the Defendant’s appeal in respect thereof. It

was pointed out that the debt pursued in summary proceedings could not be quantified until such time as the security was realised but that the proceedings issued notwithstanding and for the purpose of exerting pressure on the Defendant.

39. In a further replying affidavit sworn in July, 2019, the Defendant made it clear that he was unaware that the Plaintiff was showing “*forbearance*” and was not consulted in respect of same. He also confirmed that he was not aware that the proceedings were placed on hold for the purpose of an internal investigation in respect of tracker mortgage concerns. He stated that he was not informed of any such concerns and he harboured doubts, in the absence of any exhibited documentation, as to whether the loans were the subject of investigation.

40. By way of prejudice, he referred to the fact that his firm banks with the Plaintiff and they have denied him credit facilities arising from the proceedings.

41. The point is made that the Plaintiff failed to issue a Notice of Intention to proceed in the year preceding the Notice of Motion for liberty to enter final judgment and as such the motion is not correctly before the Court. It is further contended that the previous Notice of Intention to proceed was out of time and not acted upon within a year with the result that there was no valid application before the court.

Evidence of Mr. O'Reilly

42. An affidavit was sworn by Mr. O'Reilly, the Legal Case Manager with the Plaintiff, for the purpose of confirming that the documents exhibited in grounding the Bank's application constitute copies of any entry in a Banker's Book within the meaning of s. 9(2) of the Banker's Book Evidence Act, 1879 and confirming that the books have been under the control of the Bank at all material times. He confirmed that the Defendant's liability was particularised by reference to the Bank's computerised mortgage accounts system (MAS), and he has verified their accuracy by reference to the original data. He further confirmed the calculation of interest accrued by reference to the interest rates recorded on MAS as being those from time to time applicable to the loan account facilities.

Evidence of Mr. Weakliam

43. In a report prepared by one Mr. Weakliam on behalf of the Defendant he described himself as a Fellow of the Association of Chartered Certified Accountants and a Licentiate of the Institute of Bankers of Ireland. Whilst he commented adversely on the Bank's records and Mr. Browne's treatment of conveyancing net proceeds of sale as well as statements issuing from the Bank of Ireland instead of from the ICS, the primary issue raised by Mr. Weakliam related to the calculation of interest.

44. Mr. Weakliam pointed out that the 2006 mortgage products sold by the ICS were tracker mortgage private domestic home loans. Mr. Weakliam asserted that according to his calculations, interest was overcharged on both loan accounts. For this reason, he claimed that neither of the loans account were in arrears on the date of the original demand letters from ICS in March, 2011. He maintained that both loan accounts were in credit on that date.

45. He advanced this claim on the basis that the European Central Bank discontinued its Main Refinancing Operations Minimum Bid Rate in October, 2008. He claimed that this meant that under the ICS contract with the Defendant, ICS had only one option which was to certify that the Main Financing Operations Minimum Bid Rate as no longer available and change the rate to the prevailing home loan variable rate as provided for at General Condition 6(b) of the offer letter. No certification issued and the ICS did not therefore amend the interest rate to the prevailing Home Variable rate as provided for in the contract. Mr. Weakliam contended that the only way the rate could be changed, other than in accordance with the terms of the loan agreement, was with the consent of the customer and there is no evidence that this was either sought or granted.

46. He maintained that in the absence of a new agreed rate the rate that applied from the 15th of October, 2008 was zero. He explained that the Plaintiff unilaterally changed the contract interest rate from Main Financing Operations Minimum "*Bid Rate*" to the Main Financing Operations Minimum Fixed Rate plus 0.95% and 1.25% respectively on each of the loans and it was on this basis that repayments were calculated and arrears accumulated from October, 2008. Calculated on the basis of a zero-interest rate from October, 2008, it was Mr. Weakliam's view that there were no arrears in March, 2011 when the letter of demand issued. Instead, he claimed that both accounts were actually in credit on that date. Mr. Weakliam contended that the European Central Bank's Main Financing Operations Minimum Bid Rate is fundamentally different to the European Central Bank's Main Financing Operations Minimum Fixed Rate.

According to Mr. Weakliam, differences include that they have two different names, they were applicable at two different periods of time with no overlap and the basis for their existence was fundamentally different in that that the ECB changed the mechanism for main financing operations, and they were calculated differently. In his Report, Mr Weakliam identified the distinguishing features (at page 12) of the ECB Main Refinancing Operations Minimum Bid Rate compared to the ECB Main Refinancing Operations Fixed Rate in the following terms.

“The distinguishing features between the ECB Main Refinancing Operations Minimum Bid Rate and the ECB Main Refinancing Operations Fixed Rate.

The two rates are fundamentally different:

- (a) They have two different names (obviously)*
- (b) They were applicable for two completely different periods of time with no overlap*
- (c) Their basis for existence was completely different (The ECB changed the mechanism for ‘main refinancing operations’)*
- (d) They were calculated differently.”*

47. Mr. Weakliam’s Report and subsequent (late) affidavit rely on a document published by the ECB pertaining to the ECB MRO Interest Rate (the document entitled “*Key ECB Interest Rates*”). This document shows two columns under the heading Main Refinancing Operations. One column is headed “*Fixed rate tenders/fixed rate*” while the other is headed “*Variable rate tenders / Minimum bid rate*”. It is clear that under the column headed “*Variable rate tenders / Minimum bid rate*” that no rate is listed since October, 2008. Prior to October, 2008, a rate was fixed under this column every year from mid-2000. What is also clear is that in no year was a rate fixed simultaneously in both the “*fixed rate tenders / fixed rate*” and the “*variable rate tenders / minimum bid rate*” columns. A note appearing on this sheet states:

“On 8 October 2008 the ECB announced that, starting from the operation to be settled on 15 October, the weekly main refinancing operations would be carried out through a fixed-rate tender procedure with full allotment at the interest rate on the main refinancing operations.”

48. Mr. Weakliam further contended that the accounts presented before me do not properly account for the lodgement of the proceeds of sale of the mortgaged properties. In his report he

recorded that he saw no ICS evidence of a receipt of the monies issued to the customer as is required under the Consumer Protection Code 2012 and that it is not proper to treat the proceeds of sale as “*just credit*”.

Evidence of Mr. Morley

49. Mr. Morley is the Group Treasurer of the Plaintiff, responsible for the overall funding and liquidity position of the Plaintiff including interactions with the European Central Bank and he avers as to his familiarity with the detail and operation of the ECB’s Main and Long Term Refinancing Operations which are executed through the Central Bank of Ireland. He disputes the Defendant’s fundamental contention that the ECB had discontinued its Main Refinancing Operations Minimum Bid Rate. Mr. Morley seeks to suggest that the Defendant’s loans were subject to interest linked (at an agreed margin) to the ECB MRO Interest Rate for the time being. Mr. Morley disputes that the loan agreement reference to the ECB Main Refinancing Operations Minimum Bid Rate is different to the ECB Main Refinancing Operations rate for the time being even if that is not a bid rate but a fixed rate. He contends that there is only ever one ECB refinancing rate at any given time and that this is the rate which is identified under the terms of the loan agreements.

50. Mr. Morley contends that there is no dispute in relation to both of Mr. Wales’ loans which were and are ‘*Tracker Mortgage Loans*’, and that the interest rate applicable to each are not to be more than the ECB MRO Interest Rate plus as agreed in the margin of:

- (i) +1.25% in the case of the 1st Loan and,
- (ii) +0.95% in the case of the 2nd Loan.

51. Mr. Morley refers to the primary assertion by Mr. Weakliam in Part 3 of the Report that the ECB discontinued its Main Refinancing Operations Minimum Bid Rate on the 15th of October, 2008. He further refers to Mr. Weakliam’s assertions that without a new agreed rate, the only rate that applies from the 15th of October, 2008 is zero. Mr. Morley believes that both assertions are incorrect and indicate a fundamental misunderstanding of the correct position, namely that:

- a. There is and has been only one ECB MRO Interest Rate set by the Governing Council of the ECB and published periodically;

- b. There has never been a separate Interest ECB Interest Rate called '*the European Central Bank Main Refinancing Operations Minimum Bid Rate*';
- c. There has never been any separate ECB Interest Rate called '*the ECB Main Refinancing Fixed Rate*' and;
- d. An ECB Interest Rate was not '*discontinued*' in October 2008, as alleged, if at all; the ECB MRO Interest Rate has continued to be set and published by the ECB from time to time since before Mr. Wales' Loans were drawn down through to date.

52. It is Mr. Morley's evidence that in October, 2008 the quantum of liquidity which the ECB made available to the Eurosystem via its MRO changed and therefore, the allocation mechanism for such liquidity changed too, namely that:

- a. From June, 2000 to October 2008 the ECB, when providing short term liquidity to the Euro system via its MRO, would make a pool of liquidity for each lending operation for qualifying institutions to bid or apply for at or over the published ECB MRO Interest Rate,
- b. A qualifying institution was permitted to bid to pay a margin over the published ECB MRO Interest Rate on all or part of the fund it sought if it wanted a better opportunity of obtaining the full amount of liquidity it felt it needed. This possibility of participating institutions offering to pay above the published ECB MRO Interest Rate was handled through an application process whereby each participating institution would set out its tender, how much it sought and if it was bidding only at the published ECB MRO Interest Rate for that lending operation or at a margin, to achieve its desired liquidity allotment,
- c. Starting from the 15th of October, 2008, the ECB adjusted its MRO processes so that for each lending institution:

*“- rather than making a limited pool of liquidity available for qualifying institutions bidding at (or over) its published ECB MRO Interest Rate,
- the ECB instead made an unlimited pool of liquidity available for qualifying institutions bidding at its published ECB MRO Interest Rate”*

With participating institutions now being permitted a '*full allotment*'. Mr. Morley saw no reason for a participating institution to tender a bid rate different to the published ECB MRO Interest Rate.

53. Mr. Morley exhibited on affidavit the same printout from the ECB website dated the 2nd May 2022 showing the key ECB Interest Rates from 1999 to date. The printout identifies the three '*Key ECB Interest Rates*' which the Governing Council of the ECB sets for the euro area. Since the most recent rate adjustment on the 18th of September, 2019 it appears on the printout that:

- i. The '*Deposit Facility*' rate is a negative rate of -0.50%;
- ii. The '*Main refinancing operations (or MRO)*' rate is 0%;
- iii. And the '*Marginal lending facility*' rate is +0.25%.

54. The history of those three key ECB interest rates and the ECB's MRO Interest Rate are displayed in two columns on the printout. One column is headed '*Fixed rate tenders, Fixed rate*' and the other is headed '*Variable rate tenders, Minimum bid rate*' with the MRO Interest Rate appearing:

- In the left-hand sub column, under the '*Fixed rate tenders, Fixed rate*' headings, from 01.01.1999 to 09.06.2000;
- In the right-hand sub-column, under the '*Variable rate tenders, Minimum bid rate*', heading, from 28.06.2000 to 09.07.2008 to date.

55. Mr. Morley states that there have never been entries in both columns at the one time, rather there has only ever been one '*...interest rate on the main refinancing operations (MRO)...*' or the ECB MRO Interest Rate at a time. The two sub-columns differentiate between the tender processes (fixed or variable) whereby the ECB manages the allocation of its MRO lending and between which it switches from time to time as it considers appropriate in its managements of liquidity within the Eurosystem.

56. At footnote 2, it notes that:

"...stating from the operation to be settled on the 28 June 2000, the main refinancing operations of the Eurosystem would be conducted as variable rate tenders. The

minimum bid rate refers to the minimum interest rate at which counterparties may place their bids’.

57. This is reflected in the MRO Interest Rates after the 15th of October, 2008.

58. Mr. Morley explains that the words ‘*European Central Bank Main Refinancing Operations Minimum Bid Rate*’ and ‘*(Repo Rate)*’ refer and identify the ECB interest rates which Mr. Wales’ interest rate are tied and tracked. His interest rates would always ‘*track*’ the published ECB MRO interest rate as the lowest of “*minimum*” rate and would not consider or increase by reference to any premium paid by the Plaintiff over the then published ECB MRO Interest Rate to ensure funding. Mr. Morley contends that this benefits Mr. and Mrs. Wales and other like borrowers.

59. However, Mr. Morley argues that such considerations do not apply if the ECB MRO lending operations are conducted based on unlimited pools of liquidity which are available to qualifying institutions. Mr. Morley explains that there would be no reason for any participating institution to tender a bid rate other than the published ECB MRO Interest Rate lending operation. Mr. Morley states that he was advised by Mr. Browne of the Plaintiff and believes that the interest rates charged to Mr. Wales’ Loans have, since 2006, have been no more than 1.25% and 0.95% above the published ECB MRO Interest Rate for the time being.

60. According to Mr. Morley, no ECB Interest Rate was ‘*discontinued*’ in October, 2008 or at all and the ECB has continued to amend and publish a single ECB MRO Interest Rate for the time being, lowering and/or raising it from time to time as appropriate and to make short-term, interbank, liquidity finance based thereon available to qualifying institutions through its MRO system. Where access to the ECB MRO lending were unavailable to the Plaintiff then, under the Loan Agreements, Mr. Wales’ Loan would be subject to the Plaintiff’s prevailing Home Loan Variable Rates and would place Mr. Wales’ at a disadvantage as the Home Loan Variable Rates tend to be higher than the preferential Tracker interest rates. Mr. Morley contends that it is significant that neither the Defendant nor Mr. Weakliam were able to point to or produce an announcement and instead asked the Court to infer that a fundamental European monetary policy took place from the typesetting of an online history of past interest rates.

Mr. Rogers

61. Mr. Rogers is an economist who formerly worked with the Central Bank of Ireland and the European Central Bank. Prior to 2005 he was Head of Liquidity Management in the ECB and, between 2005 and 2010, he was the Head of Market Operations Desk at the Central Bank of Ireland, acting as liaison between Irish Banks and the ECB in relation to the implementation of the ECB's Main Refinancing Operations.

62. He now works in the private sector and is connected with the Plaintiff through Davy which is to be acquired by the Plaintiff. He confirmed as correct the Affidavit of Mr. Morley from his own familiarity with operating the ECB's Main Refinancing Operations. He confirms that the ECB has from 1999 to date published one and only one ECB Main Refinancing Operations Interest Rate to which he has been advised the Plaintiff's loan is tracked. He says that the MRO refinancing rate and the MRO minimum bid rate and the MRO Repo rate are all terms which refer to the same one rate. He says that there is not now and never has been separate or distinct ECB interest rates called either the European Central Bank Main Refinancing Operations Minimum Bid Rate or the ECB Main Refinancing Operations Fixed Rate. He says that no ECB interest rate was discontinued or abolished or ceased to exist in October, 2008 or at all. He says that the ECB MRO Interest Rate for the time being, at which the ECB's Main Refinancing Operations are conducted and which provides the bulk of liquidity into the European banking system, has continued throughout – from 1999 to date – being fixed by the Governing Council of the ECB from time to time and being adjusted upwards and downwards as it sees fit in its implementation of monetary policy and its management of liquidity within the Eurosystem. He confirms that what changed in October 2008 was the quantum of liquidity being made available in the ECB's MRO lending operations and hence the allocation mechanism, but the ECB MRO Interest Rate continued to be set and published before as well as after that date.

63. In short, therefore, Mr. Morley and Mr. Rogers both give evidence, *inter alia*, that:

- a. there is, and there has throughout been, one and one only ECB MRO Interest Rate, which is set by the Governing Council of the ECB and published from time to time;
- b. there is not now, and there never has been, any separate ECB Interest rate called '*the European Central Bank Main Refinancing Operations Minimum Bid Rate*';

- c. there is not now, and there never has been, any separate ECB Interest rate called *'the ECB Main Refinancing Operations Fixed Rate'*;
- d. no ECB interest rate was *'discontinued'* in October, 2008, as alleged or at all, and the ECB MRO Interest Rate has continued to be set and to be published by the ECB from time to time since before the Plaintiff's Loans were drawn down through to date; and
- e. what changed in October, 2008, was - rather - the quantum of liquidity the ECB was making available to the Eurosystem via its MRO, and hence the allocation mechanism for such liquidity.

CHRONOLOGY

From the affidavit evidence the following chronology appears:

- | | |
|----------------------------------|---|
| 1 st August, 2006 | ICS Building Society issued a Mortgage Loan Offer Letter to defendant and his wife whereunder the Society offered to provide a loan in the sum of €570,000.00 to them repayable monthly over 20 years, the said loan facility to be secured by a mortgage over a specified property at Clonskeagh, Dublin 14. The said Loan Offer was accepted on 7 th August, 2006. |
| 2 nd August, 2006 | The Society issued a second Mortgage Loan Offer Letter to the defendant and his wife, whereunder the Society offered to provide a second loan in the sum of €892,000.00 repayable monthly over 20 years, the said loan facility to be secured by a mortgage over a second specified property in Clonskeagh, Dublin 14. The said offer was accepted on 7 th August, 2006. |
| 27 th September, 2006 | The First Loan was drawn down into Loan Account Number 1537572 and the Second Loan was drawn down into Loan Account Number 1538941. |
| 10 th March, 2011 | The Society made demand for the repayment of the entire balance on the two Loan Accounts within 10 days. |
| 5 th July, 2012 | The Society obtained an Order for Possession in proceedings entitled " <i>An Chuirt Chuarda (The Circuit Court), Dublin</i> |

Circuit, County of the City of Dublin, Between ICS Building Society, Plaintiff, and Matthew Wales and Mairead Wales, Defendants” in respect of the property securing the first loan, with a stay on execution for 6 months.

- 17th May, 2013
- The sum of €845,150.00, said to be the net sale proceeds from the sale of the second property, was applied to the No. 2 Loan Account, thereby reducing the balance on same from €729,259.34 to €43,656.51 calculated on the basis of interest fixed by reference to the ECB Minimum Refinancing Operations Rate for the time being.
- 4th June, 2013
- The Circuit Court refused an application made by the Defendant in the Circuit Court Possession Proceedings seeking an extension to the stay on the Order of 5th July, 2012.
- 5th June, 2013
- The Defendant appealed the refusal of the Circuit Court to extend the stay on the Order of 5th July, 2012.
- 31st July, 2013
- The balances then claimed by the Plaintiff as outstanding on the Loan Accounts after posting interest were as follows:
- a. €576,378.26 on the No. 1 Loan Account; and
 - b. €44,403.58 on the No. 2 Loan Account.
- As of 31st July, 2013, the sum of €620,781.84 was claimed to be outstanding across the two Loan Accounts.
- 13th August, 2013
- The Society issued the Summary Summons herein as against Mr Wales seeking judgment in the said sum of €620,781.84.
- 11th November, 2013
- This Honourable Court granted Mr Wales’ appeal in the Circuit Court Possession Proceedings, extending the stay on the Order for Possession of 5th July, 2012, to 1st June, 2014, conditional on the sale of the secured property being effected and closed by 1st June, 2014.
- February, 2014
- The then-solicitors for the Society sought unsuccessfully to serve the Defendant with the Summary Summons herein.

3 rd March, 2014	The Society obtained an Order allowing substituted service of the Summons and any future documents requiring personal service on the Defendant.
12 th March, 2014	The Summary Summons was served by ordinary pre-paid post on the Defendant.
19 th March, 2014	An Appearance was entered on behalf of the Defendant.
29 th July, 2014	The sum of €477,176.34, identified as being the net sale proceeds of the property securing the first loan, was applied to the No. 1 Loan Account, thereby reducing the balance on that Account from €576,378.26 to €99,201.92.
1 st September, 2014	By a Scheme of Transfer between the Society and the Plaintiff, which said Scheme was approved by the Minister for Finance pursuant to the Central Bank Act 1971 (Approval of Scheme of Transfer between ICS Building Society and The Governor and Company of the Bank of Ireland) Order, 2014 (<i>SI No. 257 of 2014</i>) certain assets and liabilities of the Society were transferred to the Plaintiff with effect from 1 st September, 2014. It is claimed that the two Loan Accounts the subject of the within proceedings formed part of the assets and liabilities so transferred.
2 nd February, 2015	An Order awarding the Plaintiff the costs of the Circuit Court Possession Proceedings was made in this Honourable Court.
March – November, 2016	The Plaintiff claims that the within proceedings were placed on hold in March, 2016, pending an internal investigation of the two Loan Accounts in respect of tracker mortgage concerns
21 st December, 2016	A Notice of Change of Solicitor (<i>on behalf of the Plaintiff</i>) and a Notice of Intention to Proceed were filed in the Central Office
April – May, 2017	The solicitors for the Plaintiff attempted unsuccessfully to serve the Notice of Change of Solicitor and Notice of Intention to Proceed on the Solicitors for the Defendant on six separate occasions before doing so on 18 th May, 2017.

30 th January, 2018	<p>The balances then outstanding on the Loan Accounts, calculated on the basis of interest fixed by reference to the ECB Minimum Refinancing Operations Rate for the time being were as follows:</p> <ul style="list-style-type: none"> a. €112,555.96 on the No. 1 Loan Account; and b. €46,479.78 on the No. 2 Loan Account. <p>In the premises, as of 30th January, 2018, the Plaintiff claims that the sum of €159,035.74 was outstanding across the two Loan Accounts.</p>
20 th February, 2018	<p>The Plaintiff's Notice of Motion seeking, <i>inter alia</i>, Summary Judgment in the sum of €159,035.74 issued as against the Plaintiff issued returnable to 20th March, 2020.</p>
24 th February, 2018	<p>The said Notice of Motion seeking Summary Judgment was served on the solicitors for the Plaintiff.</p>
23 rd April, 2018	<p>The Defendant's Notice of Motion to Dismiss for Want of Prosecution issued as against the Plaintiff, returnable to 18th June, 2018.</p>
4 th November, 2020	<p>The Plaintiff issued a Notice of Motion seeking, <i>inter alia</i>, leave to amend the Summary Summons, returnable to 14th December, 2020.</p>
9 th November, 2020	<p>This Honourable Court (Simons J) made an Order, <i>inter alia</i>, that the within proceedings be amended to disclose the correct title of the Plaintiff as being "<i>The Governor and Company of the Bank of Ireland</i>".</p>
1 st March, 2021	<p>The Plaintiff's Motion seeking, <i>inter alia</i>, leave to deliver an Amended Summary Summons was heard by the High Court (Simons J).</p>
15 th March, 2021	<p>Written judgment was delivered in respect of the Motion seeking, <i>inter alia</i>, leave to deliver an Amended Summary Summons.</p>
13 th April, 2021	<p>The High Court (Simons J.) made an order, <i>inter alia</i>, granting leave to amend and serve the Amended Summary Summons.</p>

4 th May, 2021	This Honourable Court (Simons J) made an Order <i>inter alia</i> fixing the hearing of: <ul style="list-style-type: none"> a. the Plaintiff's Motion for Summary Judgment; and b. the Defendant's Motion to Dismiss for Want of Prosecution in the week beginning 30 th August, 2021, and giving directions as to an exchange of Affidavits and Submissions.
5 th July, 2021	The High Court (Simons J) made an Order, <i>inter alia</i> , vacating the trial date, giving further directions as to an exchange of Affidavits and listed the matter for mention on 18 th October, 2021.
18 th October, 2021	The two Motions were transferred for mention only to the Non-Jury list on 28 th October, 2021.
28 th October, 2021	The two Motions were listed for hearing on 12 th May, 2022.
25 th February, 2022	The Defendant swore a further Affidavit.
7 th April, 2022	The High Court (<i>Barr J</i>) made an Order, <i>inter alia</i> , refusing to disallow the Affidavit of the Defendant of 25 th February, 2022, or to vacate the hearing date of 12 th May, 2022, and giving fresh directions as to an exchange of affidavits and submissions.
12 th April, 2022	A Notice of Change of Solicitor (on behalf of the Plaintiff) was filed in the Central Office.

PRELIMINARY APPLICATION REGARDING CROSS-EXAMINATION

64. Practically on the eve of the hearing (just two days beforehand) before me on the 12th of May, 2022, the Defendant served a notice to cross-examine on the Plaintiff's deponent, Mr. Browne. Mr. Browne was only one of three deponents on behalf of the Bank, but he was the primary Bank deponent in respect of the Bank's documentary proofs as to the existence of the undischarged debt.

65. The Plaintiff relied on O.37, r. 2 of the Rules of the Superior Courts in submitting to the Court that unless Mr. Browne was produced for cross-examination, the Court should exclude his affidavits (three in number). Order 37 of the Rules of the Superior Court provides under rule 2:-

“Save in so far as the court shall otherwise order, a motion for liberty to enter judgment under this order shall be heard on affidavit: provided that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Master or the court, as the case may be. In cases in which the Master has jurisdiction, he shall have the same power as the court to hear oral evidence.”

66. Thus, while O.40, r.1 of the Rules of the Superior Court provides for hearings on affidavits, an application for the attendance for cross-examination of the person making any such affidavit may be brought before the Court and cross-examination proceeds only with the leave of the Court, O.37, r.2 makes it clear that where proceedings relate to summary summons matters, no such leave is required. This means that in respect of the summary judgment application no leave to cross-examine was required, whereas on the delay application cross-examination could only be permitted on foot of a court order granted following an application to the Court for leave to cross-examine. A particular complexity in these proceedings was that Mr. Browne had sworn affidavits in which he dealt together with both the application for summary judgment brought by the Plaintiff and the delay motion defended by the Plaintiff.

67. Time limits are fixed under the rules for the service of notices to cross-examine. Order 40, rule 31 of the Rules of the Superior Courts provides:

“When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed

for filing affidavits in reply, or within such time as in any case the court may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.”

68. Due to the late filing of affidavits in this case, time had not run by the 10th of May, 2022 and it was open to the Defendant under the rules to serve a notice to cross-examine with only two days to go to the hearing date. However, consequent upon the lateness of the service of this notice, the Plaintiff was denied the opportunity in the time available since the service of the Notice to Cross-Examine to bring either a Notice of Motion pursuant to O. 37, r. 2 to grant the Plaintiff special leave to use as evidence the affidavits listed in the schedule, without producing the deponents for cross examination or to set aside the notice to cross-examine.

69. Counsel for the Plaintiff indicated that while Mr. Browne was available to be cross-examined, it was submitted to me that it was not appropriate that Mr. Browne be subject to cross-examination in respect of his affidavits. It was pointed out that these affidavits simply set out the Plaintiff's position by reference to documents and correspondence. The Defendant had advanced the nature of his defence by way of replying affidavits throughout the exchange of affidavits. It was maintained on behalf of the Plaintiff that the application to cross-examine was a fishing exercise which was not justified by a material dispute as to fact and that where such material disputed facts were in fact established, the proper course for me would be to transfer to plenary hearing.

70. I was referred on behalf of the Plaintiff to the decision of McDonald J. in *Permanent TSB PLC formerly Irish Life & Permanent PLC v. Donohoe* [2018] IEHC 355 which was a decision on an application to set aside a Notice to Cross-Examine. In that case it was noted that many of the issues raised by the Defendant were vexatious, frivolous, and scandalous and ought not to be the subject of cross-examination. In view of what I considered inflammatory language used in replying affidavits filed on behalf of the Defendant, a similar concern arose for me in this case. As observed by McDonald J. in the *Permanent TSB* case (para. 60):

“in order to give rise to a right of cross-examination any conflict of evidence must be in relation to a material or relevant issue. If the conflict relates to an unsustainable, speculative or irrelevant issue, cross-examination will manifestly not be necessary”.

71. I was also referred to *AIB v. O’Callaghan* [2021] IEHC 14 (Simons J.) (following the conclusion of argument on the preliminary issue), a case involving an application for summary judgment where an application concerning whether the bank should be required to make its deponents available for cross-examination (on the bank’s application for special leave pursuant to O.37, r.2) was heard in advance of the hearing of the application for liberty to enter final judgment. In that case Simons J. considered that “*sweeping statements*” had been made on affidavit on behalf of the bank and that “*a failure on the part of Mr. Neligan to seek to challenge the averments made by the bank’s deponents by way of cross-examination might rebound against him*” and therefore refused the application for special leave.

72. The authorities opened to me reflect that, in general, a motion for liberty to enter summary judgment is heard on affidavit unless the court otherwise orders and it is rare for the motion to be heard on oral evidence because if that course is appropriate, this would usually (albeit not always) mean that the case is one which should be adjourned to plenary hearing. As stated in Delany and McGrath on Civil Procedure, 4th Edition dates 27 – 01:

“Procedure by Summary Summons is intended for use in cases which are capable of summary disposition, without pleadings, and upon Affidavit without the necessity for oral evidence. Its aim is, thus, to enable a Plaintiff to obtain Judgment against a Defendant expeditiously in circumstances where the Plaintiff’s claim is easily quantifiable and the Defendant does not have any valid defence”.

In *AIB Mortgage Bank v. Lynskey* [2017] IEHC 197, referred to in argument, the Court (Eager J.) granted an application for special leave on the Plaintiff’s application but indicated that the judge’s view the Defendant had raised issues which he considered amounted to an arguable defence, a view which it was suggested, although not binding on the judge hearing then pending application for summary judgment, would be brought to that court’s attention.

73. In all the circumstances, I decided that in this case the mere late service of a notice to cross-examine should not result in the case being altered at the eleventh hour from one on affidavit alone to one which more resembled a plenary hearing by reason of the conduct of

cross-examination by one party and that the appropriate course was to give the Plaintiff liberty, at its election, to bring an application to either to set aside the Notice to Cross-Examine or for special leave under O. 37, r. 2 returnable before me while the case was at hearing. I confirmed that I would abridge time for service of the said motion. I indicated to the parties that if the Plaintiff elected not to bring such an application, the rules provided for the production of Mr. Browne and we would proceed on the basis that he was being produced. The Plaintiff duly elected to bring an application for special leave under Order 37, rule 2.

74. In deciding on how I would rule on the application for special leave, I considered the submissions of the Defendant identifying the conflicts of fact which it was contended gave rise to the necessity for cross-examination on a summary application.

75. Reference was made of behalf of the Defendant to the minimum bid rate controversy which is raised on the affidavit of Mr. Browne. I considered that as Mr. Browne is only one of several deponents dealing with this matter on affidavit and where the thrust of his evidence was to agree with that offered by the two expert witnesses offered by the Plaintiff, that it was unclear what purpose was to be served by cross-examining him in relation to his affidavit without cross-examining the other Bank deponents also.

76. Insofar as reliance was placed on Mr. Browne's reference to the Bank's forbearance as a justification for delay, which was disputed, I concluded that this was relevant to the Defendant's delay motion but not the summary judgment motion and was not therefore a matter which could properly be the subject of cross-examination without an order from the Court, the Court being satisfied that a material dispute arose. As no leave of the Court had been sought or granted in advance of the hearing, I considered that it would not be appropriate to permit cross-examination on this basis.

77. While the Defendant wished to contend that the proofs relied upon were inadequate, I concluded that this was a case he could advance on the basis of the Plaintiff's affidavit evidence and the documents exhibited. In this regard, I was told that an issue sought to be explored was the inadequacy of evidence of transfer. It seemed to me that this was a matter to be addressed by way of legal submission directed to the Plaintiff's proofs on the summary application and did not give rise to a requirement for cross-examination.

78. Having considered the submissions, I was not satisfied that a requirement for cross-examination arose. I was further concerned, given the tone and some content of the Defendant's affidavits in reply, that the opportunity to cross-examine was a fishing expedition during which the Defendant would seek to explore allegations made on affidavit which were marginally relevant at best and which would likely result in a significant prolongation of the hearing contrary to the purpose of a summary hearing procedure. I concluded that were issues of materiality substantiated during the hearing, the appropriate course would be to remit to plenary hearing. I duly made the order sought granting special leave to the Plaintiff to rely on the affidavits of Mr. Browne without producing him for cross-examination and proceeded to deal with the applications before me on the basis of affidavit evidence alone.

PRINCIPLES GOVERNING AN APPLICATION FOR SUMMARY JUDGMENT

79. The principles applicable to an application for summary judgment are well established.

80. The Court of Appeal ruled in *Bank of Ireland Mortgage Bank v. Daly* [2022] IECA 88 (Donnelly J.) that the role of a Court hearing a motion for summary judgment is to adjudicate in the first place on whether the Plaintiff had made a *prima facie* case for judgment and thereafter the Court may only grant the Summary Judgment where there is no arguable defence.

81. In *Bank of Ireland Mortgage Bank v. O'Malley*, the Defendant contended insufficient particularity of the debt had been provided so as to discharge the initial burden which lies on it to establish its *prima facie* debt. In that case the Supreme Court allowed an appeal against summary judgment finding (Clarke CJ.) at para. 6.7:

“But it does not seem to me to be too much to ask that a financial institution, availing of the benefit of a summary judgment procedure, should specify, both in the special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest. Indeed, if it really is as simple as counsel suggested, then I cannot see any reason why Bank of Ireland should not have set out those calculations. A person confronted with a claim or a court confronted with a question of whether there is prima facie evidence for that claim is entitled to at least enough detail to know the basis on which the sum claimed is calculated. The defendant

is entitled to that information to decide whether there is any point in pursuing a defence or, indeed, potentially expending monies on procuring professional advice in that regard. The court is entitled to that information to enable it to form an assessment as to whether there is sufficient evidence to say that the debt has been established on a prima facie basis. Neither the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court.”

82. In *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, Hardiman J. observed that leave to defend should be granted unless it was very clear that the Defendant had no defence, not even one which could be described as arguable. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 McKechnie J. observed (p. 7):-

“(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."*

83. Reviewing this caselaw, McGrath J. concluded in *AIB PLC v. Grove Oil (Roscrea) Limited* [2018] IEHC 793 as follows (para. 25):

"Thus leave to defend ought to be granted unless it is very clear that there is no defence. Leave should not be granted where the only relevant averment is a mere assertion of a given situation which is stated to form the basis of the defence."

84. Accordingly, the question for me on this application is whether firstly the Plaintiff has made a *prima facie* case for judgment including by sufficiently pleading and particularising the claim and, if in the affirmative, if it is very clear that there is no defence. Something more than mere assertion is required, and the defence contended for should be supported by evidence. In this regard, I am entitled to look at the quality of the evidence advanced with regard to the defence identified.

PRINCIPLES GOVERNING AN APPLICATION TO STRIKE OUT ON DELAY GROUNDS

85. The law in relation to the dismissal of proceedings for want of prosecution and/or inordinate delay is also well settled, although the Defendant made the case that the requirement for expedition is more acute in summary proceedings than in other types of proceedings. In this regard reliance was placed on the terms of O.37, O.41, O.122 and O.124 of the Rules of the Superior Courts as regards time within which an application for judgment may be brought, it being contended by the Defendant that the effect of O.41, r.4 being to preclude the bringing of an application for judgment without leave of the Court. Order 122, rule 11 was relied upon to similar effect in support of the Defendant's application to dismiss and his resistance to the application for summary judgment. Under O.122, r.11 it is provided:

“In any case or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the Defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such Order and on such terms as the Court may seem just. A Motion or Summons on which no Order has been made shall not, but Notice of Trial or demanded shall, be deemed proceeding within this Rule.

86. I was also referred by the Defendant to the following extract in Delaney and McGrath on Civil Procedure, 4th Edition at paras. 15 – 103 which states the following:-

“Order 122, Rule 11 imposes a notice of obligation in respect of dormant actions by stipulating that, in any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed must give a month's notice to the other party of its intention to proceed. According to Gibson J in Allen v Redland Tile Company (Northern Ireland) Ltd, a “proceeding is an act which has some degree of formality and significance and which is done in furtherance of an action ... something in the nature of a formal step being either an application to the Court or at least a step which is required by the Rules”. A Motion or Summons in which no Order has been made is deemed not to be a proceeding but a Notice of Trial, even if countermanded is. It has also been held that neither a Notice of Intention to Proceed

nor Notice of Change of Solicitor constitute a proceeding for the purposes of the Rule but the delivery of a pleading would satisfy the requirement.”

87. The Rules do not bind the Court insofar as it has a discretion to permit a departure from the strictures of same. However, provisions of the Rules regarding time serve a purpose and are intended to bring proper expedition to the conduct of legal proceedings having regard to constitutional duties and obligations arising under the European Convention on Human Rights. A hardening of judicial attitudes to litigation delay generally has long been signalled and it stands to reason that in the context of summary proceedings which are commenced on the basis that they are straightforward debt matters, the requirement to proceed with expedition is all the greater. In *Governor & Company of the Bank of Ireland v. Wilson & Cahalane* [2020] IEHC 646 the Court (Barr J.) cited with approval (at para. 55 of the judgment) the decision of MacGrath J. in *Havbell v. O’Hanlon* [2018] IEHC 557 where the Court had regard to the fact that the Plaintiff elected to pursue summary proceedings in respect of the recovery of debt finding that once it decided to adopt that procedure, it was obliged to progress the litigation in a timely manner as envisaged under the Rules of the Superior Courts.

88. In his well-known dicta in *Gilroy v. Flynn* [2004] IESC 98 Hardiman J. said (para. 15):

“[T]he assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one.”

89. The tightening of the approach of the Irish courts to delay can be in part attributed to the jurisprudence of the European Court of Human Rights. In *Comcast v. Minister for Public Enterprise* [2012] IESC 50, Denham C.J. noted in the context of the ECHR that (at para. 52): -

“[I]n recent times there has been an acknowledgement that cases may not be let lie, in a laissez faire attitude, for the parties to move. There is a requirement to ensure that cases are progressed reasonably.”

90. Albeit that the principles are now well established, there is a recognition in the case-law that each case is different and so no hard and fast rules can be identified as to when a case will be

dismissed on delay grounds. The need for a case-by-case assessment, by reference to established criteria, was reiterated in the following terms by McKechnie J. in *Mangan v. Dockeray* [2020] IESC 67 (para. 109):

“109. In addition, it is worth repeating a few points which have consistently been made in the case law: -

- i) The ultimate outcome of a delay/prejudice issue must invariably depend on the particular circumstances of any given situation: “Every case is different. Factual resemblances are only of limited value”. (McBrearty at pg. 36)*
- ii) In cases where the court is essentially concerned with delay post the commencement of proceedings, it will view the obligation of expedition much more strictly where there has been a considerable delay pre-commencement. (McBrearty at pg. 25)*
- iii) Delay and certainly culpable delay on the part of a defendant may constitute countervailing circumstances which militates against a dismissal.*
- iv) The existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply.*
- v) This latter point may be of very considerable significance, particularly in medical negligence cases as most treating doctors and certainly all consulted experts, will rely on such information for their evidence. (McBrearty at pg. 48)”*

91. Notwithstanding a tightening of standards in respect of delay over the last three decades, the decision in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 continues to properly encapsulate the principles applied by the courts in relation to post commencement delay and remains a touchstone authority. In *Primor* the principles were set out in the following terms (p. 460): -

“The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:—

- (a) the courts have an inherent jurisdiction to control their own procedure and to*

dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures;

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action;

(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at;

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay;

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case;

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant;

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.”

92. In this case, the Plaintiff seeks to suggest by way of excuse for delay that its delay was an act of “*forbearance*”. This is strongly disputed by the Defendant who was never informed by the Plaintiff that it was affording him time as some form of “*forbearance*”. In view of the forbearance position adopted by the Plaintiff, I was referred to the case of *Governor & Company of the Bank of Ireland v. Wilson & Cahalane* [2020] IEHC 646 in which Barr J. considered the case-law in relation to circumstances in which it is appropriate for a Plaintiff to put proceedings “*on hold*” and to rely on this as an excuse for delay. At para. 53 of his judgment Barr J. states:

“having regard to the commercial interests of the Plaintiff; it cannot justify the period of delay due to the fact that it is well settled in caselaw that a party cannot make a unilateral decision to suspend litigation while it pursues other avenues of redress, or await the outcome of other events, without at very least securing the IPS and so the Defendants in that course of action being taken, see the Rodenhuis, Comcast & Bagnall cases”.

93. Barr J. goes on to state at para. 54:

“as is stated by Clarke J in the Rodenhuis case, if a Plaintiff wants to put the proceedings “on hold”, he must either get consent of the Defendants to that being done, or he must seek the directions of the High Court to permit that to happen. Neither of these things were done in this case”.

94. He continued at para. 58:

“I am satisfied on the basis of the case law and having regard to the provisions of the European Convention on Human Rights, that a plaintiff cannot take such a unilateral decision. The defendant who has been left in the dark, in this case the second defendant, is entitled to complain of the delay in prosecuting the claim against her, notwithstanding that there may have been valid commercial reasons from the plaintiff’s point of view for putting the action on hold.”

95. In *Sweeney v. Keating* [2019] IECA 43, having found inordinate and inexcusable delay in

a failure to progress proceedings in the *Sweeney* case following the delivery of a Statement of Claim for a period of five years, Baker J. turned to consider the balance of justice in the following terms at para. 19:

“If the delay is found to be both inordinate and inexcusable, the court is then obliged to consider what is frequently described as the third leg of the Primor v. Stokes test, whether the balance of justice favours the dismissal of the action. The onus of proof shifts to a plaintiff to establish the existence of countervailing circumstances which would warrant permitting the proceedings to proceed to trial (see the judgment of Fennelly J. in Anglo Irish Beef Processors Ltd v. Montgomery [2002] 3 IR 510). This is because the scales of justice at that point are weighed against the plaintiff who has been found guilty of inordinate and inexcusable delay. If the position was otherwise, there would be no point in a court engaging in an assessment as to whether the plaintiff had been guilty of inordinate and inexcusable delay. The court might just as readily commence its analysis of the application by deciding whether the justice of the case would favour permitting the action proceed to trial.”

96. When considering whether the balance of justice favours the dismissal or continuation of the proceedings, Baker J. noted that the Court should have regard, *inter alia*, to the factors identified in *Primor*, including the conduct of the parties, acquiescence, and possible prejudice.

97. The first matter usually addressed by a court when considering where the balance of justice lies is the extent to which a Defendant has demonstrated he would be likely to be prejudiced if the proceedings were allowed to continue. It is also well established that prejudice must be evaluated in the context of the issues in the case and the nature of the dispute. A material consideration is whether proof or defence of the claim is substantially based on documentary or oral evidence. A further factor is whether there was anything in the Defendant’s conduct which contributed to the delays or would militate against granting the reliefs sought.

98. The Courts have also stressed the importance of prejudice being clearly articulated and have been critical of vague and generalised assertion. This notwithstanding, from her review of the authorities, in *Sweeney* Baker J. concluded that in a case where a defendant has established inordinate and inexcusable delay, even moderate prejudice can tip the balance in favour of

dismissal of the action. However, in *Irish Water v. Hypertrust Ltd.* [2021] IEHC 323, Creedon J. refused to dismiss on delay grounds in circumstances where no specific issues of prejudice by reason of a general decline in recollections had been identified. Relying on the decision of McKechnie J. in *Mangan (APUM) v. Dockery* [2020] IESC 67 (para. 110) where he said that considerations of justice transcend all other considerations and “*imperfect justice is better than no justice*”, she concluded that she could identify no prejudice and that therefore justice would best be served by the action proceeding.

99. The caselaw establishes that the balancing of justice test involves a weighing of different considerations. In *Cassidy v. Butterly & Ors* [2014] IEHC 203 the Court held that where it was found that a defendant is unable to demonstrate prejudice and/or where he has not taken active steps to bring the case forward, he or she may find it difficult to succeed in an application to dismiss a claim for want of prosecution.

100. In summary, therefore, in deciding on this application, I must decide whether there has been inordinate and inexcusable delay. Where inordinate and inexcusable delay is demonstrated, the proceedings may be dismissed where the balance of justice requires it. In terms of the balance of justice test, even moderate prejudice can tip the balance in favour of dismissal. Prejudice is evaluated in the context of factors such as the nature of the claim, the respective conduct of the parties including the extent to which there was acquiescence or consent to the delay, any contribution to the delay, the degree of specificity with which prejudice is identified including prejudice associated with the availability of witnesses and the impact on the defence of the proceedings together with the impact on the Defendant of protracted proceedings in its reputation or otherwise.

HAS THE PLAINTIFF ESTABLISHED A PRIMA FACIE CASE AND HAVE ARGUABLE GROUNDS OF DEFENCE BEEN DEMONSTRATED?

101. A wide number of issues were raised on behalf of the Defendant in opposing the application for summary judgment by way of defence points. In my view, the question of whether the Plaintiff has demonstrated a *prima facie* case is inextricably tied up with the defence points raised, particularly with regard to whether there was a lawful demand on the basis of the loan offers having regard to the interest charged and whether the sums claimed are

due and owing having regard to the proper interpretation of the contract terms governing the liability to interest.

102. Irrespective of the calculation of interest issue which has been raised in substantive fashion by the filing of expert evidence and which I address in more detail below, other matters raised touch on and concern whether a *prima facie* case for judgment has been made out. I propose to address these issues first before turning to consider the substantive issue regarding the proper calculation of interest under the loan agreement.

Whether Loan Transferred

103. In the first instance, it is to be noted that the Plaintiff failed to exhibit the scheme of transfer between the ICS and the Bank of Ireland in making application for liberty to enter final judgment. Reliance is placed by the Plaintiff on the Ministerial Order approving the transfer (S.I. No. 257 of 2014) under which the Minister approved the transfer of the business of the ICS. The statutory instrument recites that on the transfer date, subject to the terms and conditions of the agreement, the assets and liabilities shall be transferred or conveyed to or deemed to have been transferred or conveyed to the transferee. However, assets and liabilities are said to have the meaning defined in the agreement and the agreement has not been placed before the Court. Considering the wide definition of “*business*” under the statutory instrument, I accept that it seems more likely than not that the transfer agreement encompasses the loan agreements with the Defendant, but the failure to put the agreement in evidence to demonstrate that this is indeed the case is, in my view, at least arguably a gap in the Plaintiff’s proofs which goes to the question of whether a *prima facie* case has been established. If this were the only problem for the Plaintiff, I would have considered allowing further evidence to be adduced on this point but given that it is not, there is no point doing so.

Whether Bankers Book Evidence Act, 1879 to 1989 Continues to Apply Post Transfer

104. I am otherwise satisfied with the Plaintiff’s evidence in relation to the loan statements and letters of demand in reliance on the Bankers Book Evidence Act, 1879 to 1989, notwithstanding objections raised on behalf of the Defendant. Section 40 of the Central Bank Act, 1971 provides that the Bankers’ Book Evidence Act, 1879 shall continue to apply with respect to any books transferred from the transferor to the transferee in connection with the

business agreed to be transferred and to entries made in those books before the transfer date. The Minister's Order expressly provides that it shall continue to apply with respect of any books of the transferor transferred to the transferee in connection with the assets and liabilities and to the entries made in those books before the transfer date as if such books were the books of the transferee (Regulation 7(1)(a) and (b)).

ICS Not a Bank

105. The Defendant's position that as the ICS was not a bank and could not rely on the Bankers Book Evidence Act, 1879 to 1989 is wrong in law when regard is had to s. 126(1) of the Building Societies Act, 1989. By reason of this provision, a building society is within the meaning of "*bank*" and "*banker*" for the purposes of the Bankers Book Evidence Act, 1879 to 1989. Accordingly, I do not consider the Defendant's objection to the admissibility of these records in reliance on Bankers Book Evidence Act, 1879 to 1989 as arguable. I therefore have no hesitation in relying on the statements of account printed from the MAS as evidence encompassing ICS books and records within the Bank of Ireland's system as explained by Mr. Browne and Mr. O'Reilly on affidavit, once it is established in evidence that the loans were in fact transferred.

Waiver of Claim for Shortfall

106. As for the issue raised with regard to a failure on the part of the Plaintiff to secure the Defendant's consent to his remaining liability on the shortfall when agreeing to the sale of the properties, this is easily disposed of in my view. If the Defendant is liable for non-compliance with the terms of the loan agreement, he remains liable for any shortfall which arises following the sale of secured property and his consent to same is not required absent some fresh agreement between the parties. In my view, this argument is properly described as "*specious*" on behalf of the Defendant. The Defendant was at all times obliged to pay over the proceeds of sale of the security and in consenting to the sale of the properties, the Plaintiff could not be treated as having relinquished its entitlement to pursue any shortfall absent agreement to this effect. It is not suggested, still less supported by evidence, that the Plaintiff indicated any such agreement. This argument is untenable in my view.

Notice of Terms of Loan

107. Similarly, I have little difficulty in disposing of the Defendant's arguments with regard to the fact that the mortgage deed and charge were formalised after the loan agreement. The mortgage deed and charge were executed before the draw down of the loans and the Defendant, a solicitor by profession, raised no issue in this regard in possession proceedings taken against him in the Circuit Court in reliance on the mortgage deed and charge. There is no merit in him doing so now.

Code of Conduct on Mortgage Arrears

108. Insofar as issues arise, as claimed by the Defendant, in relation to the mortgage deed and the Code of Conduct on Mortgage Arrears, with the exception of a breach of the moratorium, any such issue is a matter for the regulator rather than legal proceedings. As Clarke J. said in *Irish Life and Permanent PLC v. Dunne* [2015] IESC 46, [2016] 1 IR 92 (at p.110):

“Clearly, as a matter of regulation, any relevant financial institution is obliged to comply with its obligations under the Code and will be answerable, in an appropriate way, to the regulator for any significant failure so to do. But that is not the question with which this court is faced. Rather, the court is concerned with the extent, if any, to which the Code can be said to impact on the legal rights and obligations as and between a lender who is a regulated financial institution, on the one hand, and a borrower, on the other hand.”

109. It is also clear from the decision that the only legal consequence of a breach of a provision of the Code in proceedings is in the case of a breach of the moratorium which could result in the Court declining to make an order in possession proceedings (para. 72). Accordingly, even a breach of the moratorium, if alleged, was a matter for the Possession proceedings and not these proceedings.

Absence of Sufficient Particularity

110. While there has already been an application to amend pleadings in this case in light of the judgment of the Supreme Court in *O'Malley*, it is the Defendant's position that there

remains a lack of particularity as to how the sums calculated as due and owing are arrived at. The Defendant maintains that the Plaintiff's pleadings are still deficient in setting out exactly how the calculations have been prepared. The Plaintiff's amended Summary Summons states in the reliefs at paragraph B(i) that:

“€576,678.26 from the first day of August 2013 at a rate of 1.750% and thereafter at such applicable rates varied from time-to-time pursuant to contract until Judgment or prior payment and (ii) €44,403.58 from the first day of August 2013 at a rate of 1.450% and thereafter at such applicable rates varied from time-to-time pursuant to contract until Judgment or prior payment”.

111. This complaint needs to be considered in the context of the case as pleaded and set out on affidavit. It is not in dispute that the loan offers for the two accounts were accepted and drawn down. Nor is it disputed that an order for possession was obtained in respect of each of two properties offered as security and that the sales were “*voluntary*” in the sense that the Defendant offered the properties for sale and the proceeds of sale were transferred in full to the Plaintiff following deduction of costs of sale. Through the exchange of affidavits and the exhibited statements of account, it is clear that the sums claimed in these proceedings are computed by reference to the shortfall on the original loan amounts and interest due following a reduction referable to the sale of each of the secured properties.

112. Given that the Defendant disposed of the properties voluntarily, albeit in circumstances where possession orders had been obtained, I do not accept that he is in any doubt as to how much was paid to the Plaintiff. Nor do I accept that he was ever in any doubt as to what the balance outstanding on each of the loans were, as calculated by the Bank in accordance with an identified rate of interest and upon which interest continues to accrue. On the Plaintiff's case these interest rates may be interpreted as being the rate fixed under the loan agreements as if the ECB MRO fixed rate could be substituted in the place of the tender rate identified under the loan agreement. Accordingly, I do not find a lack of particularity with regard to the pleading of the interest rate charged, it being a separate question as to whether it is legitimate to rely on the ECB MRO fixed rate under the loan agreements.

113. It is noted that the claim is advanced on the basis of a claim for simple rather than compound interest (notwithstanding that the contract would allow for compound interest) and that this benefits the Defendant in terms of reducing an exposure to interest but also simplifies the claim avoiding a need for further particularity in relation to how interest is computed. Applying the reasoning of the Court of Appeal in *AIB v O'Callaghan* [2020] IECA 318 (Haughton J.), I am satisfied that the particulars advanced in this case, as verified on affidavit, are sufficient to discharge the onus on the Plaintiff to set out the basis for its claim. For these reasons, I would not be disposed to refuse summary judgment by reason of any alleged lack of particularity in the pleadings or evidence.

Overcharge to Interest and Proper Construction of Charge to Interest Clause in Agreements

114. This brings us to the most substantive defence argument raised by the Defendant, namely the issue regarding the terms as to interest agreed and in turn the proper calculation of interest. Both the Plaintiff and the Defendant support their respective positions in reliance on expert evidence and it is clear that the evidence is conflicting. It is also clear that the issue raised as to the applicable rate of interest under the loan agreements is material. The loans in issue were called in by letters of demand whereby the Defendant had allegedly defaulted in payments but whether there was an occasion of default at all is bound up with whether interest was properly calculated on the loans in the first place. The loan offer terms and conditions stated at paragraph 4 under the heading of Repayment at paragraph (b):

“In the event of any repayment not being paid on the due dates or any of them, or of 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 may demand an early repayment of the principal and accrued interest or otherwise alter the conditions of the loan”.

115. The Defendant also refers me to paragraph 6 of the loan agreement headed Variable Interest Rates in particular paragraph 6B which states the following:

“The Society shall give notice to the borrower of any variation of the interest rate applicable to the loan, either by notice in writing served on the borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily

newspaper. Such notice of advertisement shall show varied interest rates on the date from which the varied interest rate will be charged”.

116. There is no evidence before the Court that this occurred.

117. Furthermore, at paragraph 11 under the heading of Special Conditions it is noted that at (a)(viii) in respect of one loan:

“the interest rate applicable to the loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more 0.95% above the European Central Bank Main Refinancing Operations Minimum Bid Rate (“REPO rate”) for the term of the loan. Variation in interest rates shall be implemented by the lender not later than close of business on the fifth working day following a change in the REPO rate by the European Central Bank. Notifications shall be given to the borrower of any variation in interest rate in accordance with General Condition 6(b) of this offer letter. In the event that, or at any time, the REPO rate is certified by the lender to be unavailable for any reason the interest rate applicable to the loan shall be prevailing home loan variable rate”.

118. This same clause appears in identical terms at paragraph 11(a)(vi) of the Special Conditions to the other loan save that the rate was specified as tracking at no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Bid Rate (“REPO rate”).

119. In sum the Defendant contends that under the terms of the loan agreements, the interest rate chargeable was tied to the ECB Main Refinancing Operations Fixed Bid Rate rather than the ECB Main Refinancing Operations Fixed Rate, there being a distinction between the fixed bid rate whereby the amount was fixed by the level banks bid to secure liquidity and the fixed rate whereby the ECB just fixed the rate (when available liquidity not an issue). The European Central Bank Main Refinancing Operations Minimum Bid Rate was not applied from October, 2008 and since then the lending rate is the European Central Bank Main Refinancing Operations Minimum Fixed Rate. It is contended on behalf of the Defendant that there are two interest rates at play here and the respective rates are different. The Plaintiff, on the other hand, maintain that the contract refers to the REPO rate which, at any given time, is either European Central Bank Main Refinancing Operations Minimum Bid Rate or the European Central Bank

Main Refinancing Operations Minimum Fixed Rate because both rates are never available at the same time.

120. As apparent from the contract terms set out above, provision was made in the agreements for the fixing of interest in accordance with a process provided under the loan agreement in the event that this rate was no longer available. The Defendant claims that the ECB MRO “*Minimum Bid*” Rate ceased to be available in October, 2008 and when this rate ceased to be available, no interest was chargeable under the terms of the loan agreement unless the provisions of the agreement which provided for the fixing of alternative interest were activated (through certification, notification, advertisement etc). It is common case that no alternative interest rate was fixed. Accordingly, the essence of the defence contended for is that in breach of contract, on the 15th of October, 2008, the Society unilaterally changed the contracted ‘tracker’ mortgage interest rate from the ECB Main Refinancing Operations Minimum Bid Rate to the ECB Main Refinancing Operations Fixed Rate.

121. The Defendant referred the Court to decision of the High Court in *Governor and Company of the Bank of Ireland v. Phelan* [2020] IEHC 484. I have also been referred to the case of *O’Reilly and O’Reilly v. Promontoria (Finn) Ltd, McCleary, Murphy and Harper* [2022] IEHC 218 where the High Court (Egan J.) applied the decision of MacGrath J. I have found helpful the clear approach taken by MacGrath J. to a similar issue raised before him to be particularly helpful and persuasive. I note from the review of the evidence before him, which seems to have resembled the evidence led by the Plaintiff and the Defendant respectively in this case, that notwithstanding the conflicts of evidence arising, MacGrath J. was able to conclude (para. 62):

“I am satisfied that the evidence establishes the following. Loan facilities are provided by the ECB to qualifying banks and are subject to different interest rates largely dictated by the length of the loan facility. These facilities include a marginal lending facility rate relating to overnight loans. There is also the longer term, LTRO, and a seven day facility which is the ECB MRO. The latter appears to provide the bulk of liquidity to the banking system in the Eurozone. Between 1999 and June, 2000 participating banks seeking ECB MRO funds were required to bid for them, but the rate was fixed. This altered when the ECB announced that, commencing from the operations to be settled on 28th June, 2000, the ECB MRO would be conducted as variable rate

tenders. The ECB put in place a rate, known as the minimum bid rate, which was the minimum interest rate at which participating banks might place their bids in order to secure required liquidity. When introduced in June, 2000, the minimum bid rate was 4.25%. This rate varied from time to time according to the decision of the Governing Council of the ECB. Thus, in so far as such changes impacted on a tracker mortgage, the facility might be described as variable over the lifetime of the mortgage. Arising from the financial crisis in 2008 there was a particular concern about the liquidity of banks and their requirement for funds. It was decided by the Governing Council of the ECB that the quantum of funds that might be made available to a participating bank would effectively be unlimited, subject to the provision of satisfactory collateral. The rate of interest at which the banks might bid for funds became fixed. The participating bank was not required to bid at a higher rate to secure part or all of the funds it required. It is clear from the publications referred to by the parties that this came to be recognised as a significant decision on ECB monetary policy.”

122. It seems to me that the above summary also represents a correct summary of the factual position as established on the evidence in this case. As in the *Phelan* case, when the Plaintiff entered the two loan agreements in August, 2006, the interest-rate applying to the loans was tracked against the interest rates on the ECB MRO, which at that time was set according to the variable rate tender procedures, ‘*minimum bid rate*’. The interest rate applicable to each of the loans respectively was stated in the contract to be calculated at no more than 1.25% or .95% above the “European Central Bank main refinancing operations minimum bid rate (“repo rate”)”. In October, 2008 the fixed rate tender procedure introduced a rate of 3.75%. This rate has varied in accordance with decisions of the ECB’s Governing Council and has continued to reduce over the years. The evidence also indicates that only one interest rate was applied at any one time and at no point were fixed and variable bid rates simultaneously available.

123. Against this factual position, the conflict as between the experts regarding the significance of the non-availability of the ECB Main Refinancing Operations Minimum Bid Rate is stark and its potential implications significant in terms of these proceedings. On the basis of his claim that no interest was payable from October, 2008, the Defendant maintains that following forensic review of his accounts that his accounts were in credit and therefore he was not lawfully in default in 2011 when letters of demand issued and the loans were called in.

It follows from the Defendant's position with regard to the calculation of interest under the loan agreement and his contention that properly calculated no arrears had accrued that the entitlement of the ICS to call in the loan pursuant to 4 (b) was not triggered. Furthermore, interest has not continued to accrue and the sums claimed in these proceedings are not due and owing. It is observed that this argument was not advanced in defending possession proceedings already taken on foot of a claimed occasion of default but that does not detract from the force of the argument in these proceedings, particularly as the issue in possession proceedings is whether a default had occurred, not the amount of money owed.

124. In terms of the merits of the argument for the purpose of this application which requires only that arguability is established in terms of the defence sought to be advanced, I find the reasoning of MacGrath J. in *Bank of Ireland v. Phelan* persuasive. At paras. 65 to 66 of his judgment in *Phelan*, MacGrath J. states:

“This is an application for summary possession, and therefore the test is whether the defendant has advanced an arguable ground of defence that the effect of the decision by the ECB on 8th October, 2008 and the failure by the plaintiff to certify “the unavailability of the rate” results in no interest being chargeable thus leading to overcharging of interest.

*While there may be a strong grounds for arguing that the expression “minimum bid rate” is referable to the tender process rather than being a reference to a specific and separate interest rate, I do not believe that the issue raised by the defendant may safely be described as unarguable. I am satisfied that the conflicting views expressed are such that it would be inappropriate to determine this issue without further hearing. There is a clear conflict, which this court is unable to resolve simply on a consideration of the contents of the affidavits. Further, I cannot be satisfied, to adopt dicta of McKechnie J. in *Harrisgrange*, that there are no issues of law which require fuller argument and greater thought for a better determination of such issues. The applicability, operation and effect of the *contra proferentem* principle, in my view, is also one which would benefit from further argument.”*

125. The Plaintiff in its submissions contends that the Defendant's reliance on *Governor and Company of the Bank of Ireland v. Phelan* [2020] IEHC 484 as authority for the proposition

that the issue raised by the Defendant in respect of the ECB MRO Interest Rate could not “safely be described as unarguable” is misplaced. It is contended that the evidence before the Court in that case was of a very different nature to that before me in the instant case. In particular they point out that in *Phelan* the defendant relied, *inter alia*, on three Affidavits sworn by two separate deponents to substantiate her argument that the primary rate of interest provided in her loan contract ceased to be available from 15th October, 2008. In contrast, the Defendant in this case relies on the evidence on one expert, whose expertise the Plaintiff says is not made clear.

126. In *O’Reilly and O’Reilly v. Promontoria (Finn) Ltd, McCleary, Murphy and Harper* [2022] IEHC 218 where the High Court (Egan J.) referred to the decision of MacGrath J. in *Bank of Ireland v. Phelan* [2020] IEHC 484 relied upon in submission before her and at para. 68 went on to state:

“I am in agreement with the submissions of the Defendants that Phelan is distinguishable because in that case the relevant facility letter specifically stated that the applicable rate was the “MRO minimum bid procedure” and provided that if the lender certified that rate as being unavailable its home loan rate would apply. Therefore as the lender had not appropriately certified that the MRO minimum bid rate was unavailable it was not appropriate to apply an alternative rate. By contrast, however in the present case, the facility letter merely states that the applicable rate is the “ECB rate plus 1.35%” and the borrower therefore has no specific contractual entitlement to assert that the method by which the MRO was calculated must be by means of the minimum bid rate”.

127. I note that the terms of the loan agreements under consideration in *Bank of Ireland v. Phelan* are very similar in terms to those under consideration in this case and cannot be distinguished in the manner which occurred in *O’Reilly and O’Reilly v. Promontoria (Finn) Ltd, McCleary, Murphy and Harper* [2022] IEHC 218. While Mr. Weakliam’s expertise is disputed by the Plaintiff and this is an issue which I consider unsafe to resolve without cross-examination, it seems to me that the thrust of his evidence mirrors that which was accepted as arguable in *Bank of Ireland v. Phelan* is one which follows from the question of the proper construction of the contractual position regarding the charge to interest. This question arises on the loan agreements themselves and the documentary evidence which demonstrates the

existence of two different named rates on official, undisputed documentation produced by both parties explaining the ECB Minimum Refinancing Operations.

128. I see no reason for adopting a different position to that of MacGrath J. in *Bank of Ireland v. Phelan* [2020] IEHC 484 in this case. Like MacGrath J., I am of the opinion that in view of the clear conflict in this case as between Mr. Weakliam on the one hand and the Plaintiff's witnesses on the other, that the issue raised cannot safely be described as unarguable. I consider that it would be inappropriate to determine this issue without further hearing. In my view an arguable case has been made out that the Plaintiff has overcharged interest with the potential consequence that no occasion of default on the loans, payments properly calculated, occurred prior to March, 2011 when letters of demand issued and with the consequence that sums in the amounts claimed in these proceedings are not properly due and owing.

Own Motion Obligations

129. The Defendant also calls in aid the Consumer Contracts Directive 93/13/EC as transposed into Irish law by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 ("the Unfair Terms and Regulations"). Article 4(2) of the Directive provides:

"1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language."

130. The Unfair Terms and Regulations are in similar terms.

131. Reliance is placed by the Plaintiff on the decision of Meenan J. in *AIB v. O'Donohoe* [2018] IEHC 599. In that case it was held that the provisions of the general terms and conditions of offer of the mortgage loan and the mortgage conditions that related to the payment of interest did not amount to a breach of the Regulations. The amount advanced, the term of the loan and

the interest payable constitute the “*main subject matter of the contract*”. Therefore, Article 4 of the Regulations did not apply to the contract insofar as the payment of interest was concerned. The interest rate clauses such as the one which the court was dealing with in that case did not fall within the scope of the Regulations. It is specifically provided in schedule 3, sub para. 1 that it does not apply to “*financial instruments or other products or services where the price is linked to fluctuations in ... a financial market rate the seller or supplier does not control*”. The decision of Meenan J. in *Permanent TSB plc v. Rabbitt* [2019] IEHC 100 is to similar effect. There he noted that the defendant had failed to identify any particular allegedly unfair term apart from a general objection applicable to any term that required repayment of the loan with interest.

132. In this case, the debate has largely revolved around the interpretation of the clause of the contracts which concerns the manner in which interest is calculated and charged, as it did in *Bank of Ireland v. Phelan* [2020] IEHC 484. Analysing this same term in *Bank of Ireland v. Phelan*, MacGrath J. stated (referring to the decision of McDermott J. in *Permanent TSB v. Davis* and Meenan J. in *AIB v. O’Donohoe*):

“To adapt the reasoning of McDermott J., the terms relied upon by the plaintiff in seeking an order for possession constitute the main subject matter of the contract under Article 4(2). Clause 11 is a term which, as Meenan J. observed, is one which concerns the ‘main subject matter’ of the mortgage or loan agreement and is therefore not covered by the regulations. The interpretation of this term is considered below but apart from this term, no other term has been identified which it is contended breaches the Unfair Terms Directive and Regulations.”

133. My attention was also drawn to the dicta of the Court of Appeal in *Bank of Ireland Mortgage Bank v. Kane (ex tempore, 9th of June, 2020)* where the Court (Donnelly J.) upheld a decision of the High Court that the clauses relating to interest were part of the main subject matter of the contract and did not fall within the terms of the Unfair Contract Terms Regulations. I was referred to the decision in *AIB v. Cosgrove* [2017] IEHC 803 (Faherty J.) to similar effect.

134. On the basis of these authorities, where similar issues have been considered, I am not satisfied that an arguable ground of defence has been raised on the basis of an alleged breach of the Unfair Terms Directive and Regulations. It seems to me that the primary dispute in these proceedings relates to the interest charged under the agreements and that the terms of the agreement in this regard are the “*main subject matter*” of the loan agreements and therefore outside the terms of the Directive and the Regulations.

HAS THERE BEEN INORDINATE AND INEXCUSABLE DELAY AND IF SO WHERE DOES THE BALANCE OF JUSTICE LIE?

135. The Defendant further relies on O.41, r.4 in contending that the delay in this case is such as to justify a refusal of relief and a dismissal of proceedings. Order, 41 rule 4 provides:

“4. No motion for judgment shall, except by leave of the Court, be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.”

136. The Defendant points out that as no leave was obtained from the Court to proceed by way of summary application in this case and the application for judgment was brought after the expiry of more than a year, I not alone have a power to dismiss the application but the application should never have been permitted to be set down in the first place. This provision is also relied upon as a reflection of the degree of expedition which might normally be expected in an application for summary judgment.

137. The Defendant’s reliance on O.41, r.4 is to my mind misconceived. Order 41 rule 1 provides:

“Except where by the Acts or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.”

138. As pointed out on behalf of the Plaintiff, the Rules otherwise provide for summary judgment. Specifically, Order 37 envisages the bringing of an application for liberty to enter judgment under that rule in respect of claims pursued by summary summons, as these proceedings are. No time limit is provided for under Order 37. Furthermore, under Order 122

rule 7, the Court has the power to enlarge the time appointed by the Rules upon such terms (if any) as the Court may direct. Accordingly, the failure to bring the application for judgment within one year does not deprive the Court of jurisdiction to proceed to make orders on foot of the Plaintiff's motion for judgment.

139. Reliance was also placed on O.122, r.11 which provides that in any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. The Defendant relies on the fact that no such notice was given in this case and that accordingly, the motion for judgment ought not to have properly issued at all and is not properly before the Court. However, it is well established the Court is not deprived of jurisdiction by reason of non-compliance with the Rules. Order 124 expressly provides that non-compliance shall not render any proceedings void unless the Court so directs, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit. My discretion in this regard is broad.

140. It would be wholly disproportionate, in my view, to set aside the application for summary judgment at this stage for non-compliance with the Rules without considering the substance and merits of the application given the considerable work done in bringing the application to the court and the court resource and time committed to hearing the application. Non-compliance with the strictures as to time provided by the Rules remains, however, a relevant consideration in determining whether delay is inordinate.

Is the Delay Inordinate?

141. These proceedings relate to two loans dating back to 2006. As noted above, it is not disputed that these loans were entered into but it is contended that insofar as the loans were secured against two properties. The Defendant has long since lost the benefit of both properties. These proceedings arise in respect of the alleged shortfall that the Plaintiff maintains is due and owing, which is disputed by the Defendant. Proceedings lay dormant following issue in 2013 and were reactivated through the belated issue of a Notice of Motion for liberty to enter final judgment on the 20th of February, 2018. This post-dated the issue of proceedings by some five years and the delay is such that the Defendant contends that the Plaintiff has engaged in "*parking litigation*".

142. I am quite satisfied that there has been inordinate delay in the progressing of these summary proceedings. A five-year period between the issue of proceedings and the subsequent application for judgment in summary proceedings is on any reckoning excessive. It does not comply with the requirements of expedition under the Constitution, the Convention or under the Rules of the Superior Courts. It is hard to conclude that such delay is anything but inordinate.

Is the Delay Excusable?

143. It seems to me that an initial period of delay was excusable in this case whilst the extent of any actual shortfall, if any, arising from the sale of the secured properties was established. The position as regards how much was available from the proceeds of sale was clear, however, from July, 2014. With the exception of a short delay associated with issues as regards service and a period of time when the loans were under internal investigation, unbeknownst to the Defendant, no real excuse has been offered for the delay thereafter.

144. The fact that the loans were subject to an internal investigation as affected by tracker mortgage issues might provide an explanation for delay but only properly where the Defendant was kept informed as to developments in this regard. Being entirely unaware that the loans were under investigation, however, the Defendant in this case might reasonably have thought that the Plaintiff was satisfied to accept the proceeds of the sale of the two secured properties as their “*pound of flesh*” given no further steps on the part of the Bank to pursue the shortfall following the sale of the second of the two properties and the service of a Notice of Intention to proceed in May, 2017 (followed by a further period of inaction).

145. I am satisfied on the authority of cases such as *Governor & Company of the Bank of Ireland v. Wilson & Cahalane* [2020] IEHC 646 that it is not open to the Plaintiff to unilaterally place proceedings “*on hold*” as an act of so-called forbearance and to rely on this as an excuse for delay. Even as regards delay occasioned by the internal investigation, it seems to me that this delay is not properly excusable in circumstances where there was no communication with the Defendant to explain the reason for inaction.

146. In circumstances where there were already delays by reason of awaiting the outcome of the sale of the properties and the internal investigation, it is unacceptable that there would then be further protracted periods of delay for which no explanation at all is offered. I find the period of delay between the issue of proceedings and the subsequent issue of a motion seeking liberty to enter final judgment inexcusable.

Where does the Balance of Justice Lie?

147. In this case I am not satisfied that the Defendant has suffered prejudice to his ability to defend the proceedings consequent upon the failure to progress proceedings to conclusion expeditiously. This is not a case which is in any sense dependent on oral evidence regarding circumstances dating back to the entry into the loan agreement. The issues which arise for determination turn on the documents and on expert evidence in relation to banking matters, rather than on any particular fact dependent engagement between the Plaintiff and the Defendant which requires to be resolved by the court on the basis of oral evidence. No specific prejudice of the type identified in *Governor & Company of the Bank of Ireland v. Wilson & Cahalane* [2020] IEHC 646 has been demonstrated in this case. This case is more akin to that of *Bank of Ireland v. McCrann* [2019] IEHC 818 where the Court ruled (Barr J.) that a five year delay between the issue of proceedings and the bringing of an application for liberty to enter final judgment survived a balance of justice assessment because the case would turn on documentary evidence and it was not a case where critical witnesses had died or become unavailable nor was it a case where it was a factor that the memory of witnesses might have faded over time.

148. An issue which gave me cause for concern as regards prejudice occasioned by delay is that of accruing interest in “*parked litigation*”. It seems to me, however, that interest is not accruing at a penal rate during the period of delay as the Defendant has applied simple interest and the rates fixed under the loan agreement are moderately tracked to ECB lending rates. Had judgment been obtained earlier and remained undischarged, the Defendant would nonetheless be exposed to a claim to interest on an undischarged judgment amount. The Plaintiff indicated when this concern was raised that it would not object to the court disallowing interest for a period associated with litigation delay were the court minded to proceed on this basis. This may or may not be one way for a Court in an appropriate case to disallow a claim or part of a

claim for interest which it is considered was improperly allowed to accrue during a period of litigation delay if a court of trial is satisfied that a quantifiable prejudice arises because of delay. I make no conclusion on this question in the absence of fuller argument and authority. Most important in my consideration of prejudice associated with accruing interest during “*parked litigation*” is my conclusion that it has at all times a matter for the Defendant’s to discharge the balance of the sums due. Any prejudice arising from delay is therefore caused by his own failure to do so earlier and arises directly from his own omission. The issue now raised with regard to the computation of interest was not previously raised and has not been identified as a factor in the Defendant’s refusal to repay sums claimed up until his defence of the application for liberty to enter final judgment. It remains to be established whether a valid defence has been identified and is found to apply in this case. If the Defendant’s defence is upheld, the claim to interest falls away. If the defence is rejected, then liability for interest accrued during the extended period in which the debt was not paid must rest with the Defendant noting that as a defence point the argument now relied upon was only identified after the application for liberty to enter final judgment issued.

149. I am satisfied that the balance of justice lies in favour of allowing the case to proceed.

CONCLUSION

150. I refuse the application for an order dismissing the Plaintiff’s claim for delay on the basis that while the delay was inordinate and periods of same were inexcusable, no real prejudice to the Defendant has been demonstrated.

151. I will make an order pursuant to O.37, r.7 granting the Defendant leave to defend the Plaintiff’s claim and directing the matter be adjourned to plenary hearing.

152. I propose to fix timelines for exchange of pleadings and the progression of proceedings given the antiquity of the action and I will hear the parties in this regard and any other consequential matters.