[2020] IEHC_136

THE HIGH COURT

[2015 No. 1621 S]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

DAVID MAVROUDIS

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 21st day of February, 2020

Background

1. In these proceedings, the plaintiff seeks summary judgment in the sum of €300,401.66, plus interest accruing from 3 October 2015. These were monies lent by the plaintiff to the defendant which were not repaid. The defendant does not dispute the fact that he borrowed these monies, and that he has not repaid them. Rather, the defendant has set out, at great length in numerous affidavits, a number of matters which he maintains relieves him of the obligation to repay the monies he borrowed. The defendant appeared in person before the Court.

2. The defendant describes himself as being an unemployed engineer; planning consultant; and project manager. He was previously an architect until the establishment of the architects register, as per the Building Control Act, 2007. Like countless other professionals who worked in the building and construction industry, the defendant was a casualty of the recent financial crisis. Even though these catastrophic events took place nearly a decade ago, the aftershocks are still being felt. The virtual collapse of the building and construction sector left professionals, such as the defendant, in a particularly vulnerable position. Those who owed engineers and architects money for professional fees also owed monies to others, leaving the architects and engineers last to be paid, if at all. This was the financial situation which the defendant found himself in when the plaintiff sought to recover the monies lent.

3. The defendant seeks to have the plaintiff's claim remitted to plenary hearing. In support of this, as already mentioned, he has filed several very lengthy affidavits, and written submissions which run to some 55 pages. As a consequence, the hearing of this motion, which ought to have been dealt with in a day, took significantly longer to hear. As will be clear from this judgment, save in respect of one issue, the defendant has established no grounds whereby the Court could direct a plenary hearing of the plaintiff's claim. The result of this will be not only that the defendant will be facing judgment for a significant sum of money, but, should costs be awarded against him, he will also be facing having to pay a significantly increased amount by way of costs.

The plaintiff's claim

4. Monies were advanced to the defendant on foot of three facility letters: -

   (i) By facility letter, dated 6 May 2004, the Governor and Company of the Bank of Ireland offered, and the defendant accepted, a loan facility in the sum of €159,750 together with interest for a term of thirty years. Interest was payable on this loan

at the rates set out therein. The defendant defaulted in his repayment and by letter of demand, dated 25 June 2013, the plaintiff demanded the sum outstanding of that date. By a further letter, dated 27 July 2015, the plaintiff's Solicitors wrote to the defendant informing him that the sum outstanding, as of 22 July 2015, was €92,610.31, which sum was inclusive of arrears of €4,136.86. With further interest, the amount outstanding, as of 2 October 2015, was €93,401.87;

(ii) By facility letter, dated 7 February 2007, the plaintiff offered, and the defendant accepted, a loan facility in the sum of €55,000 together with interest thereon for a term of 25 years. This offer was accepted on or about 16 February 2007. The defendant defaulted on repayment. By letter of demand, dated 25 June 2013, the plaintiff demanded the sum then outstanding, which was €47,269.27 being the redemption balance of the same amount. By a further letter, dated 27 July 2015, the plaintiff's Solicitors wrote to the defendant informing him that the sum outstanding, as of 22 July 2015, was €44,341.12 which sum is inclusive of arrears of €1,639.89. As of 2 October 2015, the amount due in respect of this loan, together with interest thereon, was €44,454.70; and

(iii) By facility letter, dated 20 April 2007, the plaintiff offered a loan facility in the sum of €240,000 together with interest thereon for a term of 25 years. This offer was accepted by the defendant, and the sum of €240,000 was drawn down.

The defendant defaulted in his repayment obligations to the plaintiff and by letter of demand, dated 25 June 2013, the plaintiff demanded the sum outstanding as of 25 June 2013, being the sum of €236,286.38 which sum is inclusive of arrears of €29,653.14. By letter, dated 27 July 2015, the plaintiff's Solicitors wrote to the defendant informing him that the sum outstanding on this loan, as at 22 July 2015, was €162,050.30. The sum was inclusive of arrears of €6,118.21. As at 2 October 2015, the sum outstanding on this loan was €162,554.09, together with interest accruing thereon.

5. By reason of the foregoing, there is a sum due and owing by the defendant to the plaintiff of €300,401.66 together with interest accruing from 3 October 2015. The particulars of these loans are set out in detail in an affidavit of Ms. Andrea de Courcey, sworn on behalf of the plaintiff, grounding the application for summary judgment.

Legal principles to be applied

6. The principles which this Court has to apply on an application for summary judgment, such as this, are well established. I refer to the following passage from Hardiman J. in *Aer Rianta cpt v. Ryanair Ltd* [2001] 4 I.R. 607: -

> "… the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

7. I also refer to the following passage from Clarke J. (as he then was) in *McGrath v. O'Driscoll & Ors*. [2007] 1 I.L.R.M. 203, at p. 210: -

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment. …"

8. It is clear that the hearing of a motion for summary judgment is necessarily limited. Despite such limitation, mere assertions by the defendant as to grounds of defence are, without more, not sufficient to have the matter remitted to plenary hearing. It seems to me that a court, when it comes to deciding issues of law or statutory interpretation, is in as good a position to give a determination following a hearing of a motion for summary judgment as it would be following a plenary hearing.

Consideration of defences

9. Having stated the principles, I will now consider the various defences put forward by the defendant to determine whether they reach the threshold as would require the Court to direct a plenary hearing. As has been referred to already, there is no dispute but that the defendant borrowed the monies from the plaintiff and did not repay them in full.

Transfer of loan from Governor and Company of the Bank of Ireland to the plaintiff

10. It will be noted that the first facility, of 6 May 2004 for €159,750, was provided to the defendant by the Governor and Company of the Bank of Ireland. This loan was subsequently transferred to the plaintiff. The defendant questions the legality of this transfer.

11. The background to the transfer is set out in the grounding affidavit of Andrea de Courcey where she refers to this facility as being among the assets that were transferred to the plaintiff under a transfer scheme, dated 2 July 2004, under the provisions of s. 58 of the Asset Covered Securities Act, 2001, which provides: -

> "(1) A designated credit institution may transfer to another credit institution (including one that is not a designated credit institution) the whole or part of its business, or all of its assets or such of those assets as it specifies, but only with the approval of the relevant person and in accordance with this section."

12. The said bank is a "*designated credit institution*" and the transfer was approved by the relevant person, being the then Chief Executive of the Irish Financial Services Regulatory Authority. Further, clause 10 of the said facility letter permits the said bank to transfer the facility as part of a loan transfer scheme. The defendant has failed to identify any breaches of either the Act of 2001 or clause 10.

13. As the defendant has failed to identify any legal infirmity in the transfer of the said loan to the plaintiff, it follows that he has established no ground of defence on this point.

Overpayment of interest

14. The defendant alleges that he was overcharged on interest in respect of, in particular, the first facility of 6 May 2004. There appeared to be a number of interest rates, involving: a fixed rate, a variable rate and a tracker variable rate, which were charged on various occasions. In his affidavit, the defendant estimates the overcharge to have been of the order of €16,201.08.

15. This matter was dealt with in a replying affidavit on behalf of the plaintiff. The defendant may well have an issue on this, which, in my view, could not be fairly resolved on affidavit evidence alone. For this reason, I will remit so much of the plaintiff's claim on interest, as is disputed, to plenary hearing. Taking the figure identified by the defendant, I will round it up to €16,300. I will direct a plenary hearing on that amount.

Advice given by the plaintiff

16. In the course of his various affidavits, the defendant maintains that advice given to him by the plaintiff, to switch to a five year fixed rate in May, 2007, was negligent.

17. I can see no basis for this defence. The plaintiff is a qualified professional and under no disability whatsoever. It is stating the obvious to say that fixing an interest rate will give protection in the event of the rate rising, but will be an additional cost in the event of the interest rate falling. This is a statement of the obvious and I cannot see how the defendant could not have been aware of this. Thus, there is no stateable defence and/or counterclaim on this ground.

Letters of demand

18. The defendant contests the validity of the letters of demand and maintains that after they had been issued he had a meeting with an employee of the plaintiff which *"had the effect of negating those letters of demand".* In support of this, the defendant exhibits a number of letters from the plaintiff. However, examination of these letters does not in any way support the defendant's contention. In fact, the reverse is the case. By letter, dated 16 April 2014, from the plaintiff to the defendant, it is specifically stated: -

> "The bank will not be withdrawing the demand letters which were issued to you. Any enforcement action taken by the bank is an action which the bank has a power to do which is provided under the deed of charge."

19. The defendant made the point that not all the facilities were in arrears and, thus, there was no basis for issuing the letters of demand. However, the mortgage deed exhibited in the affidavit of Ms. Jacinta Enright, on behalf of the plaintiff, provides that the plaintiff is entitled to make a demand on all monies unpaid by the defendant in the event of default of any monthly or other periodic payment in respect of any of the loans secured.

20. I am satisfied that the defendant has identified no issue in respect of the letters of demand as would require me to remit the action to plenary hearing.

Receivership

21. The defendant takes issue with the appointment, by the plaintiff, of a receiver over the secured properties, being numbers 10 and 12A Pembroke Court, Carlow. These issues

relate to the appointment of the receiver, the effects of the receivership on the rents payable from the said properties and the amount achieved by the sale of the said properties.

22. At no stage did the defendant challenge the appointment of a receiver. The mortgage deed provides for the appointment of a receiver, and for the receiver to enter and sell the secured property. Further, the receiver is an agent of the defendant, and the said mortgage deed provides that the defendant "*shall be solely responsible for the acts omissions and defaults of such receiver"*. Thus, if there was a reduction in the rent from the secured properties that is not a matter in respect of which the plaintiff has responsibility.

23. If the said properties were sold at an undervalue, the remedy for the defendant would lie in an action against the receiver and not the plaintiff. Therefore, it follows that the defendant has made out no grounds for a defence concerning the appointment and the actions of the receiver.

Mutual debtors

24. The defendant alleges that the plaintiff excessively pursued a number of individuals who owed him money. He alleges that this had the effect of depriving him of the financial resources which he might otherwise have had. The defendant maintains that this is a basis for defending these proceedings. In my view, this stands up to no analysis. The plaintiff is entitled to pursue those who owe it money. The fact that paying the plaintiff may result in the defendant not being paid monies owed by those persons is unfortunate, but it does not constitute a defence.

Consumer legislation

25. The defendant seeks to rely upon the terms of the "*Unfair Terms in Consumer Contracts Regulations 1995" ("the Regulations")*. This Court considered the application of the Regulations to cases such as this in *Allied Irish Banks Plc v. O'Donohoe & Anor*. [2018] IEHC 599. In that case I stated: -

> "16. Having considered the authorities and having regard to the provisions of the Regulations, I am of the view that the provisions in the 'general terms and conditions of offer of mortgage loan' (clause 3.5) and 'the mortgage conditions' (clause 4.1) that relate to the payment of interest are not in breach of the Regulations. I reach this conclusion for the following reasons: -
>
> (i) Article 4 of the Regulations provides a term will not be 'considered to be unfair by relation to the definition of the main subject matter of the contract'. The main subject matter of the contract in question is that monies were advanced to the defendants to refinance the purchase of an apartment. This was of clear benefit to the defendants. The monies advanced had to be repaid to the plaintiff over the term of the loan. Having the benefit of these monies, which the defendants would not otherwise have had, came at a price – interest was payable. The interest rate may vary over the term of the loan. Thus, in my view, the amount advanced, the term of the loan and the

interest that is payable are the 'main subject matters of the contract'. Therefore, applying Article 4 of the Regulations, the clauses in question that relate to the payment of interest do not fall within the scope of the Regulations.

(ii) It seems to me that interest rate clauses, such as the ones in the instant case, do not to fall within the scope of the Regulations. I refer to what is called the 'grey list' in Schedule 3 subparagraph (l) of the Regulations. Subparagraph (l) covers situations where a supplier of services increases prices, in this case, increasing interest rates. Such may be an 'unfair term' and it would appear to support the defendants' case. However, Schedule 3 goes on to specifically provide that subparagraph (l) does not apply to '… financial instruments and other products or services where the price is linked to fluctuations in … a financial market rate that the seller or supplier does not control.'

I would suggest that this provision is consistent with the view that interest rate clauses, such as those in question before this Court are the 'main subject matter' as per Article 4, of a mortgage or loan agreement and thus not covered by the Regulations."

26. Though I am of the view that the Regulations do not apply in the case before me, I am mindful that if they did then the court is required to assess, of its own motion, whether a contractual term is unfair. I cannot find any unfairness in the terms of the loan or the mortgage deed. In simple terms, monies were advanced by the plaintiff to the defendant which had to be repaid by the defendant. These monies came at a price, namely: having to pay interest. The various loans were secured and, in default, the plaintiff was entitled to appoint a receiver over the property secured. I cannot see any unfairness in this.

27. The defendant seeks to rely on alleged breaches of the Consumer Protection Codes of 2006 and 2012. He alleges, *inter alia*, that the plaintiff failed to act *"honestly, fairly, professionally in a manner that protects my best interests, as their customer".* The plaintiff denies this, but submits that any alleged breach of the said Code does not afford a defence. The plaintiff relies on the decision of Birmingham J. in *Zurich Bank v. McConnon* [2011] IEHC 75, where he states: -

> "Entirely lacking is any suggestion that a breach of the Code renders the contract null and void or otherwise exempts a borrower from the liability to repay. The questions of sanctions is referred to in s.33AQ of the Central Bank Act, 1942 as amended by s. 10(1) of the Central Bank and Financial Services Authority of Ireland Act 2004. This contains provisions for matters such as caution or reprimand, the payment of a monetary penalty to the financial regulatory authority, disqualification provisions and the like, but again there is no suggestion that a lender is prohibited from seeking repayment from its borrower. The contrast between the approach taken in the Code and the approach of the Consumer Credit Act, 1995 is striking. Section 30 of the Act contains mandatory provisions concerning a credit agreement

> or contract of guarantee entered into by a consumer. … There are no comparable provisions whatever in the Code."

28. The defendant also relied on the provisions of s. 30 of the Consumer Credit Act, 1995. However, s. 30 does not apply to "*housing loans*", which are defined in s. 2. It is clear that the loans in question before the Court fall within the definition of "*housing loans*".

29. The defendant also seeks to rely on the "*Code of Conduct on Mortgage Arrears 2013*". However, this Code only applies to a mortgage loan secured on a borrower's "*primary residence*". This is clearly not the case here.

30. By reason of the foregoing, I reach the conclusion that the defendant has established no defence under consumer protection legislation nor under the various codes of conduct which he has referred to.

Prospectus

31. The defendant submitted that the plaintiff failed to comply with its "*base prospectus*". In particular, he relies upon the following extract from the prospectus: -

> "… the ability of the Issuer to dispose of a residential property, realisation of that security is likely to involve sale of that property with vacant possession. The ability of the Issuer to dispose of a residential property without the consent of the borrower will depend on a court granting vacant possession, the relevant property market conditions at the relevant time and the availability of the buyers for the relevant residential property."

32. Firstly, it is not at all clear what relevance this extract has to the case before the Court. Secondly, an alleged breach of the prospectus does not give rise to actionable rights on the part of the defendant.

Covered assets pool

33. The defendant seeks to rely upon the terms of the Asset Covered Securities Act, 2001. The purpose of this Act was to create a legal framework for the issue, by designated banks, of bonds secured on underlying mortgages or loans to public sector bodies. I cannot see what relevance the terms of this Act have to the defendant's purported defence. The defendant has failed to identify any provision in the said Act that may assist him in his defence.

Conclusion

34. By reason of the foregoing, I am satisfied that, save for the issue of interest, the defendant has failed to establish any defence as would permit this Court to direct a plenary hearing in the action. I therefore will grant the plaintiff judgment in the sum of €284,101 (plus interest that may have accrued), and remit the sum of €16,300 to plenary hearing.