[2020] IEHC 442

THE HIGH COURT

[2016 No. 275 S]

BETWEEN

AIB MORTGAGE BANK AND ALLIED IRISH BANK PLC

PLAINTIFFS

AND

PAUL HAYDEN AND SHOSHANNA HAYDEN

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 12th day of June, 2020

Introduction

1. The plaintiffs are seeking summary judgment arising out of five separate loan agreements with the defendants. The details of the various loan agreements are as follows: -

I. First Loan Agreement

2. The first loan agreement was made on 27 July 2004 whereby the second named plaintiff advanced a sum of €735,000.00 to the defendants', payable over a term of 25 years. The interest rate was fixed for one year at 2.75% and the second named plaintiff's variable rate would apply thereafter. This loan agreement was mortgaged against 35 The Woodlands, Greystones, County Wicklow. The defendants accepted and signed this loan agreement on 6 August 2004. The second named plaintiff transferred all its rights and obligations pursuant to this loan agreement to the first named plaintiff. The defendants defaulted on this loan agreement and, as of 16 January 2020, there was due and owing the amount of €820,146.40 together with continuing interest.

II. The Second Loan Agreement

3. Pursuant to a loan agreement made on 27 July 2004, the second named plaintiff advanced a sum of €425,000.00 to the defendants to be repayable over a period of 25 years. The interest rate was fixed for the first year at 3.5% and the second named plaintiff's variable buy-to-let interest rate would apply thereafter. This loan agreement was secured against 18 Delgany Glen, Delgany, County Wicklow, a buy-to-let property. The second named plaintiff transferred all its rights and obligations under this loan agreement to the first named plaintiff. The defendants defaulted on this agreement and, as of 16 January 2020, there was due and owing the amount of €660,980.20 together with continuing interest.

III. The Third Loan Agreement

4. Pursuant to a loan agreement made on 23 July 2004, the second named plaintiff agreed to grant overdraft facilities in respect of the defendants' current account (No. 933554-[---]5090). By letter, dated 16 November 2015, addressed to the defendants, the second named plaintiff demanded repayment of the sum outstanding. As of 16 January 2020, the total balance outstanding for this account was in the amount of €104,389.86.

IV. The Fourth Loan Agreement

5. Pursuant to a loan agreement made on 23 July 2004, the second named plaintiff agreed to grant overdraft facilities in respect of the defendants' current account (No. 933554-[---]4063). By letter, dated 16 November 2015, addressed to the defendants, the second

named plaintiff demanded repayment of the sum then outstanding. As of 16 January 2020, there was due the amount of €20,620.71.

V. The Fifth Loan Agreement

6. Pursuant to a loan agreement made on 17 February 2006, the first named plaintiff advanced a sum of €354,000.00 to the first named defendant, to be repayable over a period of 25 years. The interest rate was fixed for one year at 3.70%. This loan agreement was secured against 50 Church Avenue, Eden Court, Delgany, County Wicklow, a buy-to-let property. The first named defendant defaulted on this loan agreement on 2 October 2008. By letter, dated 25 June 2014, addressed to the first named defendant, the first named plaintiff demanded repayment of the sum then outstanding. As of 16 January 2020, there was due and owing the amount of €321,604.45 together with continuing interest.

7. The total judgments being sought by the plaintiffs are in the following amounts, together with continuing interest, as of 16 January 2020: -

(i) The first named plaintiff against the first named defendant: -

- First loan agreement – account no. 930350-[---]5024 - €820,146.40
- Second loan agreement – account no. 930350-[---]6007 - €660,980.20
- Fifth loan agreement – account no. 930350-[---]3038 - €321,604.45
- Total: €1,802,731.05

(ii) The second named plaintiff against the first named defendant: -

- First loan agreement (account no. as above) - €820,146.40
- Second loan agreement (account no. as above) - €660,980.20
- Total: €1,481,126.60

(iii) The first named plaintiff against the second named defendant: -

- Third loan agreement – account no. 933554-[---]5090 - €104,389.86
- Fourth loan agreement – account no. 933554-[---]4063 - €20,620.71
- Total: €125,010.57

(iv) The second named plaintiff against the second named defendant: -

- Third loan agreement (account no. as above) - €104,389.86
- Fourth loan agreement (account no. as above) - €20,620.71
- Total: €125,010.57

8. There was a further loan agreement (the sixth loan agreement) which the plaintiffs are, at present, not pursuing. Currently there is an issue concerning the tracker interest rates involved.

Principles to be applied

9. Over the last number of years, the Superior Courts have set out the principles which a court should apply in considering whether to grant summary judgment or to remit a matter to a plenary hearing. I will start with the oft cited passage from the judgment of

Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607 where, at p. 623, he states: -

> "In my view, 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?
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> First *National Commercial Bank v. Anglin* [1996] 1 I.R. 75 and the cases cited therein seem to me to focus on a specific aspect of these questions, that of credibility. It is indeed true that 'the mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend' (*National Westminster Bank v. Daniel* [1993] 1 W.L.R. 1453). Equally, 'it is not sufficient that the court should have reason to doubt the *bona fides* of the defendant or to doubt whether the defendant has a genuine cause of action' (*First National Commercial Bank v. Anglin)*."

10. I also refer to the following passage from the judgment of Irvine J. in *Harrahill v. Swaine* [2015] IECA 36, where she states: -

> "30. In *Harrisrange Limited v. Duncan* McKechnie J. advised that the power to grant summary judgment should be exercised with discernible caution and he advised that a defendant should be considered to have a *bona fide* defence if he demonstrated 'a fair or reasonable probability of having a real or *bona fide* defence.'
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> 31. In *McGrath v. O'Driscoll* the High Court laid out the basic test as to whether a legal dispute should be decided on summary proceedings or not:
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> > 'So far as questions of law and 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 were 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.'"

11. In this case, the defendants have put forward a number of defences which involve questions of law and, to a lesser extent, the construction of documents. What is not in dispute is that monies were advanced under the various loan agreements and not repaid. Both parties helpfully provided the Court with detailed written submissions supported by the relevant legal authorities. In addition, the Court had the benefit of submissions made by Mr. Andrew Fitzpatrick S.C., on the part of the plaintiffs, and Mr. Stephen McCullough B.L., on the part of the defendants. With the assistance of these submissions I am satisfied that the Court is in a position, without doing injustice to either party, to determine a number of the legal issues raised.

Defences

12. Mr. McCullough raised a number of defences, which I will examine in turn: -

(a) The requirements arising from *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84.

13. This recent decision of the Supreme Court restated the requirement on the part of a plaintiff seeking judgment for a sum of money to provide particulars of the amount sought to be recovered as would be sufficient to allow a defendant to know whether he should concede or resist the claim. I refer to the following passage from the judgment of Clarke C.J.: -

> "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."

14. Having considered the documentation before the Court, I am satisfied that the plaintiffs have satisfied the "*O'Malley test*". I refer to an amended "*special indorsement of claim*" on the summary summons. In respect of each of the various loan agreements, the following amendment is made: -

> "The particulars of the amount due and owing are calculated as detailed in the bank account statements in respect of loan account no. [blank] and have previously been notified to the defendants by the delivery of same from time to time."

The relevant bank statements have all been exhibited in the various affidavits filed by the plaintiffs.

15. Further, the various replying affidavits filed on behalf of the defendants were filed before the decision was given in the O'Malley case. In these affidavits no complaint was made that the plaintiffs had not put sufficient evidence before the Court concerning the alleged debts or that there was a lack of particularity as would be sufficient to allow the defendants to know whether or not to concede or resist the claim. I am therefore satisfied that the defendants have not established any defence in this regard.

(b) Code of Conduct.

16. The defendants claim that the facility letters, relating both to the first and second loan agreements, provide that the plaintiffs' entitlement to demand early repayment of the loans is "*subject to due compliance with any statutory requirement, if applicable*". They

further submit that this has the effect of incorporating into the loan agreements the provisions of the Central Bank's Code of Conduct on Mortgage Arrears.

17. The affidavit of the first named defendant (sworn also on behalf of the second named defendant) states that the defendants engaged fully with the plaintiffs in trying to agree an acceptable and sustainable resolution in relation to the arrears on these loans that had arisen. They state that they have been paying and continue to pay the sum of €3,500.00 per month. However, Mr. Garrett McCabe, on behalf of the plaintiffs, states in his affidavit that though €3,500.00 was being paid from February, 2015 and that the last such payment was made in September, 2017 that the contracted monthly repayment was in excess of €4,200.00. This was not acceptable to the plaintiffs and so the defendants were removed from the Mortgage Arrears Resolution Process (MARP). The reasons for this were set out in correspondence sent to the defendants.

18. This defence requires a court to hold that the provisions of the said Code of Conduct were terms of the first and second loan agreements and that the decision to remove the defendants from MARP was unlawful. The legal status of the Code of Conduct was considered by the Supreme Court in *Irish Life and Permanent PLC v. Dunne* [2015] IESC 46. In his judgment, Clarke J. (as he then was) stated: -

> "There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the Court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."

and: -

> "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.
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> In what way can it be said that the Code so impacts? Two possible bases were put forward in argument on behalf of the Dunnes. Counsel suggested that it was possible to argue that the Code might amount to an implied term in the relationship between the parties. In fairness, counsel did not press that argument too far. In my view, counsel was correct in adopting that position. It is very difficult to see how the contractual arrangements between a lender and a borrower must be taken to have implied into them the provisions of the Code in circumstances where the Code can change from time to time (and thus could not have been particularly in the

contemplation of the parties when they entered into their contracts) and where, unlike other legislation such as, for example, the Sale of Goods and Supply of Services Act 1980, the Employment Equality Act 1998 and the Package Holidays and Travel Trade Act 1995, the relevant legislation in this case does not expressly provide that certain terms are to be implied into relevant contracts. If the Oireachtas had wanted to convert any particular provision or type of provision of the Code into an implied term then it would have been easy for the Oireachtas to adopt the same policy as was adopted in respect of other legislation and to have said so."

In light of this, I do not believe that any alleged failure by the plaintiffs to abide by the Code of Conduct gives the defendants a defence. For such an alleged failure to be a defence, it would mean giving the Code of Conduct a legal status which it clearly does not have. The court does not have a jurisdiction to pass judgment as to whether or not the plaintiffs or the defendants were acting reasonably in the negotiations they had to resolve the arrears that had arisen. I think that the furthest the court could go would be to take into account the actions of the plaintiffs and the defendants when the matter of a stay is being considered.

19. It is also clear from *Irish Life and Permanent PLC v. Dunne* that it is not open to the court to imply the terms of the Code of Conduct into the contractual relationship between the parties. I am, therefore, of the view that the defendants' alleged wrongful removal from MARP under the Code of Conduct does not afford a defence to the defendants. I am satisfied that I can reach such a conclusion in the course of a hearing for summary judgment where, as in this case, both parties filed detailed written submissions on this point and referred the Court to the relevant authorities.

(c) Overdraft.

20. The third and fourth loan agreements provided for the granting of certain overdraft facilities. It was a term of the fifth loan agreement that the third loan agreement and the fourth loan agreement had to be cleared on drawdown. Thus, the position was reached that both overdrafts were cleared. However, subsequently, the defendants drew down monies from these accounts. The defendants argued that once these accounts had been cleared, it was necessary for the second named plaintiff to issue new agreements. As no new agreements were issued, the defendants allege a breach of the provisions of the Consumer Credit Act, 1995 (the Act of 1995).

21. Section 35 of the Act of 1995 provides: -

"(1) A consumer shall be informed by the creditor at the time, or before, an agreement is made in respect of the granting of credit in the form of an advance on a current account [including an overdraft] granted by a credit institution…"

and, s. 38 states: -

> "A creditor shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no security given by the consumer in respect of money payable under the credit agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements specified in this Part have been complied with:
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> Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable."

22. An analysis of this defence requires consideration of the legal basis of an overdraft. The plaintiffs relied upon the following passage from Breslin and Corcoran "*Banking Law*" (4th Ed. Round Hall, 2019): -

> "It is a basic obligation owed by a bank to its customer that it will honour on presentation cheques drawn by its customer on the bank, provided there are sufficient funds in the customer's account to meet the cheque, or the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque. Where the bank honours such a cheque, it acts within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque, because the bank has paid the cheque with the authority of the customer.
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> In other circumstances, the bank is under no obligation to honour its customer's cheques. If, however, a customer draws a cheque on the bank without funds in his account or agreed overdraft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. If, however, the bank pays the cheque, it accepts the request and the payment has the same legal consequence as if the payment had been made pursuant to previously agreed overdraft facilities; the payment is made within the bank's mandate, and in particular, the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque."

It follows from this that each time the defendants drew on these accounts when there were not sufficient funds available, it amounted to a request by the defendants for an overdraft which was granted. If the defendants' interpretation of the Act of 1995 is correct, it would mean that each time the defendants drew on these accounts when there were no sufficient funds available, the second named plaintiff had to provide to the defendants a statement for the purposes of the said Act. I do not think this is correct. As is stated in the passage from Breslin and Corcoran in "*Banking Law*", an express contract

is not required, "*the payment has the same legal consequence as if the payment had been made pursuant to previously agreed overdraft facilities…".*

23. In any event, if I am incorrect and there has been a breach of the Act of 1995, I am satisfied that the matter is covered by s. 38 quoted above. There is no suggestion that an alleged failure to comply with the requirements of the Act of 1995 was deliberate and certainly it could not be maintained that there has been any prejudice to the defendants. It would be just and equitable to dispense with the said requirements, were such applicable. I am satisfied that the third and fourth loan agreements are enforceable.

24. In my view, the defendants have raised no defence under this heading. In reaching this conclusion, the Court had the benefit of written legal submissions, was referred to the relevant authorities and heard the submissions of counsel.

(d) Tracker Interest Rate.

25. The defendants maintain that in respect of the first and second loans that they should have been offered a tracker mortgage rate on the expiry of the initial rate.

26. In considering this defence, I refer to the "*applicable interest rate*" as set out in the letters of offer in respect of these loans. The wording in respect of the first loan states: -

> "2.7%, fixed for 1 years after which the rate will revert to the bank's variable interest rate, unless borrower(s) avail(s) of another interest rate option then on offer by the bank…"

Similar wording is used for the second loan offer. It seems to me that the wording is clear. It was open to the defendants to avail of another interest rate then on offer and, presumably, this would have included a mortgage tracker interest rate should this have been on offer at the time. There was no obligation, as maintained by the defendants, for them to be offered such an interest rate, but they could have requested it.

27. I am satisfied that the defendants have not established a defence under this heading. The clear wording of the relevant terms in the letters of offer, for both the first loan and the second loan, does not support such a defence.

(e) "Part Payment".

28. In the course of the first named defendant's affidavit, when addressing the fifth loan agreement, he states: -

> "When those loans fell into difficulty, I had discussions with Karl Ruddy, an employee of the plaintiffs with whom I had a longstanding and good working relationship, and he told me that the plaintiffs wanted the properties to which the loans related to be sold and the proceeds applied to the outstanding balances. When I pointed out to Mr. Ruddy that the plaintiffs were asking us to sell at the bottom of the market and that if they waited, we could obtain a higher price when the market recovered, Mr. Ruddy told me that the plaintiffs just wanted to move the files on and he assured me that if I agreed to sell at that time, I would not be

pursued for any residual debt. It was on that basis that I agreed to sell the properties and I understand that in doing so had an agreement that the plaintiffs would not pursue me further and that any residual debt would be written (sic). As such, it is my case that the plaintiffs are breaching that agreement by seeking to obtain judgment against me in respect of the fifth and sixth loans."

As already noted, the plaintiffs are not pursuing the sixth loan.

29. Mr. Fitzpatrick, on behalf of the plaintiffs, submitted that this defence amounted to no more than an "*assertion*" and, in any event, the defendants would still be faced with the hurdle of the principle in *Pinnel's Case*. In support of this submission, the Court was referred to a number of authorities including *Harrahill v. Swaine* [2015] IECA 36, *National Asset Loan Management Limited v. Barden* [2013] 2 I.R. 28 and *Ulster Bank Ireland Ltd and Anor. v. Deane and Anor.* [2012] IEHC 248.

30. Having considered the matter, I am of the view that as the first named defendant specifically identified a servant or agent of the plaintiffs with whom he had an alleged conversation that this brings the matter beyond being an assertion. Even if the defendant does establish that there was such an arrangement, he undoubtedly will be met with the defence that a creditor's agreement to accept a lesser sum in full satisfaction of the whole debt does not discharge the obligation to pay the entirety of the amount due. This is the rule in Pinnel's Case. Notwithstanding this, I have to consider that, depending on the evidence adduced, a factual situation may emerge which would prevent the application of this rule. For these reasons, I am going to direct a plenary hearing in respect of the fifth loan agreement.

Conclusion

31. By reason of the foregoing, I am satisfied that the plaintiffs are entitled to judgment against the defendants in respect of the first, second, third and fourth loan agreements. Counsel will provide to the Court amounts in respect of these which are presently outstanding.

32. I will direct a plenary hearing in respect of the fifth loan agreement, solely on the issue raised by the defendants, namely, as to whether there was an agreement that if certain properties were sold and the proceeds applied to the fifth loan agreement that any residual debt would be written off. Further, if this was the case, what are the legal consequences of same.

33. I invite counsel to make submissions concerning the consequential orders that arise from this judgment, including costs.