

HIGH COURT ON CIRCUIT
CORK CIRCUIT COUNTY OF CORK

[2017 No. 85 CA]

BETWEEN**VIVIER MORTGAGES LIMITED****PLAINTIFF****AND****MICHAEL LEHANE****DEFENDANT****JUDGMENT of Ms. Justice Baker delivered on the 12th day of October, 2017.**

1. This judgment is given in the appeal of the plaintiff against the decision of the Circuit Court of 21st March, 2017 where His Honour Judge O'Donnabháin refused to grant an order for possession of certain lands held by the defendant subject to a charge made on 28th August, 1997 with the Wise Mortgage Company Limited. The plaintiff is the successor in title of the mortgagee and the charge is registered as a charge on Folio 67556F Co. Cork.

2. The parties have agreed that, as the application is one for summary judgment for possession, the test identified in the Supreme Court decision of *Aer Rianta c.p.t. v Ryanair Ltd* [2001] IESC 94, [2001] 4 I.R. 607 is applicable, and that the test to be applied is whether the defendant has disclosed an arguable defence.

3. The facts of the case are quite unusual. The civil bill for possession dated 21st October, 2013 was grounded on an affidavit of Richard Laurence Ashken a director of the plaintiff, the successor in title of the original mortgagee. The original loan of £21,000 was advanced on 1st September, 1997 by the Wise Mortgage Company Limited to the defendant. The loan is not denied. The loan agreement provided for the making of equal monthly payments, the last of which payments was made on 1st August, 2011. The mortgage was for the term of fifteen years and equal instalments of £431.67 were to be made, making a total amount repayable of €77,700.60 and showing an APR of 29.2%.

4. The plaintiff avers that as of 1st September, 2013 the redemption figure on the mortgage loan was the sum of €90,622.44, and that following demand of that sum, the plaintiff sought to exercise its statutory powers contained in s. 19 of the Conveyancing Act 1881. Thus far the matter is not contentious.

5. The defendant seeks to defend on a number of grounds, which I will deal with in sequence.

Interest rate

6. The defendant argues that the interest rate of 29.2% APR is "oppressive and unconscionable" and that he has in those circumstances an arguable defence. Certainly, seen in the context of current very low interest rates in the Irish market the APR of 29.2% does seem high, and perhaps very high. The plaintiff has conceded the point relating to the interest rate and has agreed to limit its claim out of the proceeds of sale of the secured property to the sum of €40,952.64 plus interest at 18% per annum from 1st September, 2012. That concession will reduce the amount now said to be owed to €155,653.12 as of 1st April, 2016.

7. The borrower states that he did have legal advice at the time of entering into the agreement, and that the monies were borrowed to buy livestock, and not to purchase the property itself which he owned in his sole name, free from encumbrances.

8. An amount of affidavit evidence has been adduced relating to the correct calculation of the interest and the defendant argues that the calculations of the plaintiff are in consequence unclear and not in accordance with the payment provisions contained in the loan documentation or in the "commitment letter" of 16th April, 1997 which provides for 180 fixed regular instalments. Clause 8 of the "commitment letter" provides for a different and reduced monthly payment of £289.92 to be applied "provided that payments are made on or before the due date each month", and the borrower argues that accounts exhibited by the plaintiff do not adequately show how the plaintiff and his predecessors in title properly applied the reduced payment amount to take account of payments made early or on time.

9. Clause 11 of the "commitment letter" provides that the loan would be in default 30 days after failure to pay a monthly instalment, and provides in bold terms that 18% is the interest rate applicable to "all monies collected due" should default arise. The clause expressly refers to the "Rule of 78" now explained as being a "statutory rebate mechanism in the UK Consumer Credit Act". The relevant provisions have not been exhibited on affidavit, and I accept as a matter of principle that the "Rule of 78", if it does provide a means by which interest could be calculated is capable of applying to a loan in the jurisdiction of Ireland, if the reference to "the Rule of 78" is clear, and if there is no impediment to the incorporation by reference by a drafting device of a mechanism adapted from another jurisdiction. However, Mr. Lehane, even at this juncture, says he cannot identify the "Rule of 78", nor can his financial adviser, and John Vaughan, a chartered accountant engaged by the defendant, has stated in a letter of 11th March, 2015 which has been exhibited before me that he does not understand how the interest is calculated, and that he does not understand on "what basis these rates of interest were to be calculated or applied".

10. A court hearing an application for summary judgment may in a suitable case, and does in almost all cases, determine the question of interest if such can be ascertained on a calculation, whether that be a simple calculation or one requiring some further engagement and explanation by the parties. I am satisfied however that on the evidence before me that in the present case the basis on which interest can be calculated is opaque and obscure and, while the plaintiff has made a significant concession, it is not possible on the affidavit evidence to ascertain with any degree of certainty the amount of interest, or indeed the extent to which the defendant was in arrears at the date of the demand letter.

11. On that ground alone, it seems to me that the matter is not one suitable for summary judgment.

12. The defendant accepts that he borrowed the principal sum, that he fell into arrears, and that the charge was validly created. He says however, that at the date of demand the amount due by him was a sum of approximately €8,000 and that if that calculation is

correct, he would have been in a position to repay the full amount of capital and interest due at that date.

13. The difference between the parties with regard to the amount due is at such a level that it makes it impossible to reconcile on affidavit evidence. This is not a case where the defendant has made a calculation by way of a mere assertion, and the calculation proffered by him, supported by a letter from his chartered accountant, raises sufficient doubts with regard to the true figure owed in respect of the loan for me to conclude that the matter is not one in respect of which an order for summary possession should be granted.

14. In the absence of clarity with regard to the figures, and having regard to the ambiguity in the loan documentation, it is at least arguable that the claim of the plaintiff could fail, either on the grounds that the loan documentation is void for uncertainty, or that the interest rate was not agreed, or amounts to a penalty.

Invalid letter of demand

15. The defendant relies on an argument that the amount stated in the letter of demand is incorrect and the claim was flawed, as the letter of the demand is not sufficient to enable the plaintiff to argue that the loan amount has become due for the purposes of an application under s. 62(7) of the Registration of Title Act 1964.

16. This question has been conclusively determined by Cregan J. in *Flynn v. Nation Asset Loan Management Ltd. & Ors.* [2014] IEHC 408, where he held that a letter of demand even if it did overstate the amount due "was still a valid letter of demand" (para. 233). The letter of demand in the present case is not a statutory notice such as is found s. 8 of the Bankruptcy Act 1998, but is rather akin to what Cregan J. called a "contractual demand". The notice therefore, in accordance with that authority does not require to be exact, provided it is clear what is to be done by the borrower. This point cannot succeed.

Unlawful or illegal transaction

17. This is the most unusual aspect of this case. In his supplemental affidavit sworn on 16th March, 2015, the defendant complains that monies advanced by Wise Mortgage Company Limited were "the fruits of crimes", and "the laundered proceeds of crime". His affidavit evidence is to the effect that one Ian Leaf, also known as "Ian Andrews" is a "convicted fraudster", who engaged in a "complex web of transactions" inter alia, through the unregulated sub-prime lending market. Confiscation proceedings, similar to those that might be instituted by the Criminal Assets Bureau ("CAB") in this jurisdiction, were taken against Mr. Leaf/Andrews in the jurisdiction of England and Wales. It is arguable that the original mortgagee, the Wise Mortgage Company Limited transferred its assets to Home Funding Corporation Limited of which the present plaintiff is a direct successor in title.

18. Apart from his averment on affidavit, the defendant exhibits a newspaper article from the Irish Examiner newspaper dated 16th February, 2013 and a copy of an RTE News report of 6th February 2015 which refer to the establishment by Mr. Leaf/Andrews of a company, Home Funding Corporation Limited, which was funded through an "investment vehicle" basis in the Bahamas. Richard Ashken was identified as a "controlling party" of that company and it is he who swore the grounding affidavit in the present proceedings. Mr. Leaf/Andrews was sentenced to twelve and a half years in jail, reduced to ten years on appeal, for money laundering and tax offences. The exhibited documents are in no sense evidence, but they do elevate the averments of Mr. Lehane in his supplemental affidavit to more than "mere assertions", and do in my mind raise a sufficient basis on which a court might be concerned to investigate the providence of the funds.

19. The affidavit of Joan Donnelly on behalf of the plaintiff does not deny that Home Funding Corporation Limited was one of the assets confiscated from Mr. Leaf/Andrews, nor does she deny any of the so-called "money laundering" activities of Mr. Leaf/Andrews. She says however, that as a matter of English law the purchase by Home Funding Corporation Limited of the confiscated assets cured "any taint that could possibly have affected any aspect of the plaintiff's business" and as such, the monies advanced to the plaintiff were not in any way tainted by illegality.

20. That is an argument which requires evidence of foreign laws and none was adduced before me. While the proposition that a sale by CAB of confiscated assets can pass an unencumbered title is one that could be readily be accepted, the agreement by analogy with foreign legislation is not one that I can accept without evidence.

21. Accordingly, I consider that the defendant has shown he has an arguable defence on the ground of illegality, and sufficient to defend an application for summary judgment.

22. In all of the circumstances, the appeal from the Circuit Court is dismissed. The matter cannot be determined on affidavit.