Approved

No redactions required

THE COURT OF APPEAL

CIVIL

NEUTRAL CITATION NO. [2021] IECA 156

Court of Appeal Record No: 2019/117

High Court Record No: 2017/861 S

Donnelly J.

Collins J.

Binchy J.

BETWEEN

ALLIED IRISH BANKS plc

Plaintiff/Respondent

AND

JOANNA SLOAN

Defendant/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 21 May 2021

PRELIMINARY

1. The Defendant, Ms Sloan, appeals from the judgment and order of the High Court (Noonan J) of 12 March 2019 giving Allied Irish Banks plc ("*the Bank")* summary judgment against her in the amount of €1,594,616.10 plus costs.

2. Ms Sloan had denied any liability to the Bank and had resisted its application for summary judgment on a number of grounds. All of those grounds were rejected by the High Court Judge for the reasons set out in detail in his judgment of 12 March 2019 ([2019] IEHC 270).

FACTUAL BACKGROUND

3. The claim made by AIB relates to facilities said to have been advanced to Ms Sloan on foot of a Facility Letter dated 28 June 2007. That letter provided for two facilities. The purpose of the first facility – in the sum of €2,617,000 – was to fund the purchase of 2 office units (Units A & C) in the Apex Centre in Sandyford Industrial Estate (€1.863m) and to provide an equity release for investment purposes (€0.754m). The second facility was also by way of equity release and amounted to €805,000. In respect of each of these facilities, repayment was stated to be *"Interest only for 2 years with review/repayment at that stage"*. The facilities were to be secured by legal charges executed by Ms Sloan over Units A & C, as well as a guarantee for €3,422,000 (representing the combined

total of the facilities) to be provided by Simon Kelly, Ms Sloan's husband.

4. It appears that the €1,863,000 facility was first agreed in July 2006 by way of a Facility Letter dated 24 July 2006. That Facility Letter appears to have been superseded by the Facility Letter of 28 June 2007.

5. The Facility Letter of 28 June 2007 was directed to Ms Sloan at an address in Portmarnock which Ms Sloan says has "*nothing to do with*" her. The copy originally exhibited by AIB was not signed by Ms Sloan. A further copy, apparently bearing her signature, was subsequently exhibited by the Bank but Ms Sloan says that the signature on the document is not hers and, more broadly, she says that she knew nothing of the loan. That is one of the grounds of defence relied on by Ms Sloan and it will be necessary to come back to this issue in due course.

6. It is not disputed that Ms Sloan executed two deeds of mortgage over Units A & C. The first is dated 22 September 2006 and specifically references the Facility Letter of 24 July 2006. The second deed (described as a mortgage and charge) is dated 9 July 2007. It secured Ms Sloan's "*Secured Liabilities*" to the Bank (as defined in broad terms in the deed). Each of these deeds appears to be signed by Ms Sloan and, as I have indicated, she does not dispute their execution by her.

7. Various bank statements are included in the material before the Court which were sent to Ms Sloan at the address where she resides. There is no dispute about the correctness of that address. It seems from the evidence that different account numbers were given

to the different elements of the facilities. The statements relating to the part of the first facility advanced for the purchase of Units A and C contain an error in the header in that they refer to a €11.863m (rather than €1.863m) facility. I agree with the Judge that this is obviously a typographical error and nothing turns on it. AIB's evidence was that these statements, along with annual statements issued each year at the end of January, were issued to Ms Sloan at the address shown on the statements, (Affidavit of Madeline Murray sworn on 5 March 2018, at para 13), which Ms Sloan accepts is her home address.

8. The documents exhibited by the Bank also includes correspondence between it and Ms Sloan in relation to the facilities. On 4 February 2009, the Bank wrote to Ms Sloan at her home address referring to the facilities and complaining that Ms Sloan had not yet mandated the rental income from Units A & C to the Bank. The letter went on to demand payment of €270,435.69, which was the interest owing as of 3 February 2009. Ms Sloan and her husband (who was, it will be recalled, guarantor of the facilities) replied jointly on 19 February 2009 explaining that the rental payments had not been made due to a clerical error and stating that payments had since been made and re-assuring the Bank that further payments would be made as rent was received. The letter appears to be signed by Ms Sloan (as well as by Mr Kelly).

9. AIB demanded repayment of the facilities by letter of 13 April 2017**,** sent by registered post to Ms Sloan at her home address.

10. No payment having been made on foot of that demand, proceedings were issued on 17

May 2017.

THE HIGH COURT JUDGMENT

11. As already mentioned, the Judge rejected all of the grounds of defence advanced on Ms Sloan's behalf. The first was that the letter of sanction had not been signed by Ms Sloan and that, in fact, she had "*no knowledge*" of the loan which, she asserted was not for her benefit but for the benefit of her husband. She also said that she had not received any independent advice in relation to the transaction. The Judge regarded the suggestion that Ms Sloan had not known about the loan as "*simply not credible in the light of the documentary evidence which in my view is all to the contrary*." The Judge noted in this context that there were "*obvious conflicts*" in Ms Sloan's own affidavits and also placed reliance on the failure of Ms Sloan to explain how she had executed mortgages in respect of a loan about which she claimed to know nothing, as well as her failure to raise any issue as to her knowledge of the loan on receipt of demands for repayment.[1]

12. As regards the assertion that Ms Sloan had not received any legal advice before entering into the loan agreement, Noonan J observed that no authority had been identified which supported the proposition that the absence of such advice affected the enforceability of the agreement and he regarded any such proposition as unstateable.[2] This ground of defence was not pursued on appeal, at least as a separate ground (it was, Mr Ryan

[1] Judgment, at paras 15-16.

[2] Para 17.

suggested, part of the background against which the Court should assess the specific grounds advanced in the appeal).

13. The third defence addressed by Noonan J was to the effect that the Bank's claim was statute-barred. The Judge dismissed that defence on the basis that the principal sum sought to be recovered by the Bank was secured by a mortgage or charge and therefore, by virtue of section 36(1)(a) of the Statute of Limitations 1957, the applicable limitation period was 12 years rather than 6 years (the Judge citing *AIB v Norton* [2018] IEHC 628 in this context). In the Judge's view, that position was not affected by the fact that the secured properties had subsequently been sold (citing on that point the decision of the House of Lords in *West Bromwich Building Society v Wilkinson* [2005] UKHL 44. [2005] 1 WLR 2303). In the circumstances, it was apparent that the claim was not statute-barred and it was not necessary for the Court to determine when time began to run for the purposes of the 1957 Act.[3]

14. While Ms Sloan challenged this aspect of the High Court's Judgment in her notice of appeal and in the written submissions delivered on her behalf, that challenge was not pursued at the hearing of the appeal and, accordingly, it will not be necessary to refer further to the Statute of Limitations issue.

15. The final ground of defence advanced in the High Court – and the principal ground advanced in this appeal – was to the effect that the Bank had (so it was said)

[3] Paras 18-22.

compromised claims against other debtors in respect of related liabilities connected with acquisition of the Apex Centre so that (it was said) Ms Sloan was entitled to rely on section 35(1)(h) of the Civil Liability Act 1961 ("*the 1961 Act")* as a defence to the Bank's claim. The Judge considered that this argument was "*entirely misconceived*", observing that it was not merely a "*bare assertion*" but was *"contradicted by all of the documentary evidence that is available."* Those findings are challenged on this appeal.

ANALYSIS

16. As appears from the above narrative, two potential grounds of defence fall for consideration on this appeal.

17. Before addressing those two grounds, I should briefly note that there was no dispute or debate between the parties as to the proper approach to an application for summary judgment such as this is. The principles have been seen in very many decisions of the Superior Courts, including *Harrisrange Ltd v Duncan* [2003] 4 IR 1 and *Irish Bank Resolution Corporation (in Special Liquidation) v McCaughey* [2014] IESC 44, [2014] 1 IR 749. Ms Sloan drew the Court's attention to a number of decisions, including the decision of the High Court (Clarke J) in *Chadwicks Ltd v P Byrne Roofing Ltd* [2005] IEHC 47, to the effect that where a point of law arises in an application for summary judgment, the court may, but is not obliged to, determine the point within the confines of the summary procedure. That assessment will largely depend on whether the point is a straightforward one.

18. No suggestion was made that the Judge failed to apply the correct principles.

Section 35(1)(h) of the 1961 Act

19. Mr Ryan BL (for Ms Sloan) placed greatest emphasis on this ground and so I will address it first.

20. Section 35 of the 1961 Act provides for a series of deemed identifications for the purposes of assessing contributory negligence. Section 35(1)(h) is in the following terms:

> *"where the plaintiff's damage was caused by concurrent wrongdoers and after the occurrence of the damage the liability of one of such wrongdoers is discharged by the release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged."*

21. The expression "*concurrent wrongdoers*" is defined in section 11 of the 1961 Act. Section 11(1) provides that

> *"11 (1) For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the*

same damage, whether or not judgment has been recovered against some or all of them."

Further guidance is then given in section 11(2) but I do not consider that it necessary to set that sub-section out here.

22. Section 35(1)(h) cannot be fully understood without reference to section 17 of the 1961 Act. In material part, it provide**s:**

"(1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.

(2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest."

23. Sections 17 and 34(1)(h) were the subject of close analysis by the Supreme Court in *Defender Limited v HSBC France (formerly HSBC Institutional Trust Services (Ireland) Limited* [2020] IESC 37, [2021] 1 ILRM 1

24. Ms Sloan's claim to be entitled to be entitled to rely on section 35(1)(h) requires a little explanation. In her first Affidavit (sworn on 6 December 2017), Ms Sloan avers that Units A and C were previously owned by a company called Daleridge Limited ("*Daleridge*"). Ms Sloan's husband was, she says, a shareholder in Daleridge. Daleridge was, it appears, liquidated at some point and, as a result, Mr Kelly became entitled to Units A and C. However (so Ms Sloan says) the Bank approached him and the other former shareholder in Daleridge to refinance their indebtedness associated with the Apex Centre (that debt being with a third party institution). The Bank (so Ms Sloan says) then funded the refinancing by offering a loan to members of the other families that had held shareholdings in Daleridge, *"on exactly the same terms*" as the Bank's loan agreement with Ms Sloan. These loans, it was said, were secured on other units in the Apex Centre. According to Ms Sloan, those other loans (but *not* the loan made to her) were subsequently transferred to NAMA and NAMA *"has either sold on those loans to certain funds and/or compromised the terms thereof."* Ms Sloan says that she has been advised that she is entitled to the benefit of any such compromise (paragraphs 12-15 of the first Affidavit of Ms Sloan).

25. In response, it is said on behalf of the Bank that it is a stranger to these contentions and that, in any event, Ms Sloan's indebtedness to the Bank is on foot of the Facility Letter

of 28 June 2007. The Bank states that it "*has not reached any agreement which reduces Ms Sloan's liability under [that letter] under the Civil Liability Act 1961, or otherwise"* (Affidavit of Madeline Murray sworn on 5 March 2018, at para 18). Elsewhere in that affidavit, Ms Murray states that in June 2006, the Bank advanced funds of €8 million to borrowers, including Ms Sloan's father-in-law, to purchase units in the Apex Centre.

26. In her second Affidavit (sworn on 23 April 2018), Ms Sloan refers to what she describes as "*this €8 million facility*" and asserts that "*other spouses of interested parties in this loan facility have been made subject to compromise and/or settlement proceedings by the assignees or purchasers of this debt and I say that, as such, I am entitled to the benefit of such compromise <u>if it occurred</u>"* (my emphasis)

27. That is the factual basis on which it is submitted that Ms Sloan has at least an arguable defence by reference to the provisions of the 1961 Act and in particular section 35(1)(h). In fairness to him, Mr Ryan made his submission carefully and did not pretend that it was without its frailties, not least because of the absence of any concrete or specific information about the nature and terms of the compromises that Ms Sloan was seeking to rely on. However, he submitted, what was before the Court was enough to satisfy the low threshold applicable in order to have the claim adjourned for plenary hearing and he observed that, in that event, procedural tools such as discovery would be available to his client.

28. I do not agree. The high-water of the material before the Court is that the Bank made loans to other borrowers in 2006 to fund the acquisition by those other borrowers of

other units in the Apex Centre, that those loans were on the same terms as the loan made to Ms Sloan, that some or all such loans (but not the loan made to Ms Sloan) were subsequently transferred to NAMA and afterwards sold on *by NAMA* and/or compromised *by NAMA*. It is not suggested that *the Bank* entered into any "*release or accord"* with any of these other borrowers and, as Mr White (for the Bank) observed in argument, it is not even positively asserted that NAMA did so. As I pointed out in argument, the transfer of a loan *to* NAMA did not typically involve any reduction or forgiveness of the borrowers' liability on foot of that loan. That is equally true of loan sales *by* NAMA. Even where loans are sold at a discount to their book value (as is frequently the case), that will not operate to reduce the liability of the borrowers concerned.

29. But, even if (in favour of Ms Sloan) one overlooks these very significant problems, the fundamental point is that, even if any liabilities were compromised, such liabilities were and are entirely distinct from the liability of Ms Sloan to the Bank on foot of the Facility Letter of 28 June 2007. It is not suggested that any of the other borrowers had any form of liability to the Bank in respect of the loan to Ms Sloan (any more than Ms Sloan had any liability to the Bank in respect of the loans made to those other borrowers). It is very unclear whether there was ever was any *"€8 million facility*"; rather, as I read the evidence, there were *facilities* amounting in the aggregate to €8 million. However, even if there was any such "*€8 million facility*", Ms Sloan had no involvement with it or liability in respect of it. Her sole liability is on foot of the loan made to her and she is the only one liable on foot of that loan – as Mr Ryan aptly put it in the course of

argument, the covenant to pay is her covenant alone.[4] The very fact (if fact it be) that the other loans were transferred to NAMA, whereas the loan to Ms Sloan was not, serves to emphasise that they are distinct and independent liabilities.

30. In these circumstances, section 35(1)(h) cannot possibly avail Ms Sloan. Even if one assumes that the liability of some or all of the other borrowers has been discharged by release or accord made by the Bank (and there is no evidence whatever that such was the case – what is suggested is that "*the assignees of purchasers of the debt*" may have entered into some unspecified "*compromise*"), and even if one assumes (again in favour of Ms Sloan) that the failure to repay a loan in accordance with its terms amounts to a "*wrong*" for the purposes of Part III of the 1961 Act, Ms Sloan and the other borrows are not "*concurrent wrongdoers*" in circumstances where they are not responsible to the Bank "*for the same damage*". Rather, they each are (or were) responsible to the Bank for their respective, individual and distinct loan liabilities.

31. *ACC Bank plc v Malocco* [2000] 3 IR 191 was relied on by Mr Ryan in support of his submission that Ms Sloan had an arguable defence on the basis of section 35(1)(h) of the 1961 Act. The decision does not assist Ms Sloan in my view. It concerned a joint debt owed to ACC by the Defendant and his wife. ACC and the wife had reached a compromise, involving payment of an agreed sum by her in discharge of her liability to

[4] Of course, Ms Sloan's husband is also liable as guarantor but there was no suggestion that his liability as guarantor has been comprised by the Bank or that section 35(1)(h) might apply by reason of any dealings between the Bank and Mr Kelly.

ACC. ACC had given credit for that payment in its claim against Mr Malocco but he argued that the effect of the payment was to discharge his liability also, relying on the provisions of the 1961 Act referred to above. For the reasons set out in her judgment, Laffoy J concluded that an arguable defence had been established. Husband and wife had been co-debtors (apparently on a joint and several basis, though Laffoy J thought it was immaterial whether their liability was joint or joint and several) and, while the judge expressed concern at the absence of any documentary evidence as to the intention of the settlement agreement (in the context of section 17 of the 1961 Act), she was nonetheless unwilling to grant summary judgment.

32. *ACC v Malocco* illuminates here by way of contrast. Here, there has been no compromise with any co-debtor of Ms Sloan in respect of any joint loan liability to the Bank. Furthermore, the fact that Laffoy J was prepared to direct a plenary hearing of ACC's claim, even in the absence of any documentary evidence of the intention of the settlement agreement entered into by ACC with the wife, does not, as suggested, provide a basis for adopting a similar approach here. The evidential deficits here are far more fundamental but the key point is that, even taking every "*fact*" asserted by Ms Sloan as correct for the purposes of this appeal, the argument that section 35(1)(h) is or may be applicable fails to get off the ground.

33. Mr Ryan sought to suggest that there was a conflict of evidence as between the averments of Ms Sloan regarding the possible compromise of other Apex Centre-related loans and the averment of Ms Murray to the effect that the Bank has not reached any agreement which reduces Ms Sloan's liability under the June 2007 Facility Letter,

whether under the 1961 Act or otherwise. However, there is no such conflict. There is *no* evidence before the Court that calls into question that clear statement by Ms Murray.

34. In *ACC v Molocco,* Laffoy J expresses the view that non-payment of a debt is a breach of contract and thus constitutes a "*wrong*" for the purposes of Part III of the 1961 Act: at page 201. That issue is currently before a differently-constituted panel of this Court for determination but, for the purposes of this appeal, I have taken *ACC v Malocco* to be a correct statement of the law. However, for the reasons I have explained, the decision does not assist Ms Sloan.

35. It follows that I would uphold the conclusions of the Judge on this ground.

Ms Sloan's knowledge of/involvement in the loan transaction

36. This ground is addressed in detail by the Judge and it can, in my view, be dealt with relatively briefly.

37. The Judge considered that Ms Sloan's contention that she did not know of the loan was *"simply not credible".* On the basis of the material before the Court, the Judge was entitled to come to that view and, indeed, I find it very difficult to see how any other view could have been taken.

38. While Ms Sloan denied executing the Facility Letter of 28 June 2007, she did not dispute that she had executed the two mortgages exhibited by the Bank. No explanation

was offered by her as to why she would have executed those deeds other than by way of security for the loan: she was, in fact, completely silent on the circumstances in which those deeds were executed. Ms Sloan did not dispute that she had received the various statements of account which, on the Bank's evidence, had issued to her at her place of residence over many years. She did not dispute that she received the letters of demand issued by the Bank, including the letter sent in February 2009 demanding payment of arrears of interest nor did she disavow the letter written in response, in the joint names of herself and her husband.

39. Furthermore, it is apparent from the Affidavits sworn by Ms Sloan herself that she well knew of the loan. Ms Sloan's complaint that she did not have independent legal advice cannot be understood unless she was involved in the loan transaction. In paragraph 7 of her Second Affidavit, she expresses her belief that the Bank "*was advancing money to me as the daughter-in-law of Paddy Kelly and the husband of Simon Kelly and that there was no interest in this loan for me personally and that it was in order to facilitate lending to the wider Kelly family.*" Even if that is so, it does not give rise to any defence to the Bank's claim here, at least in the absence of any suggestion of duress, undue influence or the like (and no such suggestion has been made at any stage of these proceedings).[5] For present purposes, however, the key aspect of this averment is that it

[5] *Danske Bank v Miley* [2016] IEHC 105 was one of the authorities provided to the Court in this appeal. Counsel for Ms Sloan did not take issue with the analysis of Baker J regarding duress/undue influence at paragraphs 21-26. In fact, counsel did not address this issue at all in argument. For completeness, it may be noted that, elsewhere in her affidavit evidence, Ms Sloan appears to accept that she received some benefit from the loan, even if (on her account) she was not the primary beneficiary: see paragraph 15 of her second Affidavit.

is utterly inconsistent with any suggestion that Ms Sloan did not know of the loan or had no involvement in it. Equally inconsistent with that suggestion is the averment at paragraph 10 of the same affidavit to the effect that Units A & C had been put into the name of her husband as a result of the liquidation of Daleridge "*and then I purchased the properties from him. The transaction was only undertaken to allow for interest on the loan to be deducted for tax purposes.*"

40. At paragraph 15 of her second Affidavit, Ms Sloan returns to the issue of independent legal advice, stating that she "*did not receive independent legal advice at the point at which I executed the liabilities*". The Judge attached some importance to this averment, considering that it appeared to directly contradict any suggestion that Ms Sloan had not known of the loan or agreed to it.[6] The Judge's analysis was criticised by counsel for Ms Sloan as involved the sort of "*excessive parsing*" of his client's affidavit that had been deprecated by the Supreme Court in *Irish Bank Resolution Corporation v McCaughey* [2014] IESC 44, [2014] 1 IR 749, per Clarke J at para 38. That criticism is, in my view, quite misplaced. On its face – without any requirement for any parsing or analysis – Ms Sloan's averment can only be understood as indicating an involvement in the transaction which she claims to have had no knowledge of. The suggestion made before the Judge (and repeated, though faintly, before this Court) was that Ms Sloan was referring not to the loan but to the mortgage deeds executed by her. That is less than plausible – the deeds did not *create* any liability on the part of Ms Sloan but rather *secured* the liability arising from the loan. But even if that explanation were to be

[6] Judgment, at para 10.

accepted at face value, the execution of the mortgage deeds by Ms Sloan was, in itself, inconsistent with the suggestion that she did not know of and/or had no involvement in the loan. In the course of argument, counsel for Ms Sloan was given an opportunity to explain why his client might have executed the mortgage deeds if, as suggested, she did not know of the loan. It is to counsel's credit that he did not seek to offer any such explanation.

41. This analysis leads inevitably to the conclusion that, although the threshold is indeed low, the evidence here was not sufficient to establish that Ms Sloan has a fair or reasonable probability of having a real or *bona fide* defence to the Bank's claim. Ms Sloan's assertion that she did not know of and/or agree to the loan is no more than a mere assertion that is contradicted by the thrust and detail of her own evidence as well as being fundamentally inconsistent with the available objective evidence. It is, in my view, "*very clear that the defendant has no defence"* on this or any other ground.

CONCLUSION AND ORDER

42. In the circumstances, I would dismiss the appeal and affirm the Order made by the High Court giving judgment and costs to the Bank.

43. As Ms Sloan's appeal has been entirely unsuccessful, it would seem to follow that she should have to pay the Bank's costs of the appeal. If Ms Sloan wishes to contend for a different costs order, she will have liberty to apply to the Court of Appeal Office within 21 days (which takes account of the upcoming Whit vacation) for a brief supplemental

hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have provisionally indicated above, Ms Sloan may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Donnelly and Binchy JJ have authorised me to record their agreement with it.