Neutral Citation; [2016] IEHC 581

**THE HIGH COURT**

**[2015 No. 407 S]**

**BETWEEN**

**ALLIED IRISH BANKS PLC**

**PLAINTIFF**

**AND**

**MARY POLLOCK, WILLIAM ROCHE AND JUSTIN SULLIVAN**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Baker delivered on the 21st day of October, 2016.**

1. Allied Irish Banks plc (the "Bank") seeks judgment against the defendants arising from two loan facilities both of which were made in 2009 in the respective sums of €519,803.01 ("facility one") and €2,236,953.60 ("facility two"). Both loans were accepted by the borrowers in the Bank's written form of acceptance and signed on 20th July, 2009 and the monies drawn down on 31st August, 2009. The loans were secured over certain real property in the title of the first defendant and her now deceased husband, Tom Pollock. This judgement is given in the claim by the plaintiff against the second defendant only as the personal representative in the estate of Mr. Pollock. The claim against the third defendant has been discontinued, and judgment has already been granted against the first defendant, Mrs. Pollock.

2. When the matter came on for hearing before me on a motion for summary judgment, counsel agreed that the appropriate way to deal with the action against the estate of the deceased was to deal with the preliminary point of law arising, whether the action against the estate was statute barred. In those circumstances the matter was adjourned to enable the preparation of legal submissions and the matter was reconvened for further argument.

3. It is well established that the court has a jurisdiction to determine an issue of law on the hearing of a summary motion and Clarke J. in *McGrath v. O'Driscoll & Ors*. [2006] IEHC 195, [2007] 1 I.L.R.M. 203, made it clear that the court could determine such a question provided:

> "…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."

4. The correct approach appears to me to be explained by the Supreme Court in *Danske Bank a/s trading as National Irish Bank v. Durkan New Homes & Ors*. [2010] IESC 22, that the court may, but is not obliged to, determine a matter of law on a motion for summary judgment.

5. The matter which arises in this case is not one which engages issues of disputed facts. I consider that there is no risk of injustice being done to either party should I determine the question of the accrual of the cause of action on the motion for summary judgment, because both counsel have been given an opportunity to furnish written submissions, there is no disputed fact, and the question is one that can be determined on a consideration of the legal principles and arguments, and on a true construction of the written contract documents.

**Facts**

6. Thomas Pollock died on 7th November, 2010 and a grant of probate issued in his estate to one of his executors, William Roche, on 22nd January, 2015, the other executor, the third defendant, having renounced his right to probate.

7. The estate of the deceased argues that by virtue of s. 9 of the Civil Liability Act 1961 (the "Act of 1961") the claim against the estate is statute barred, the proceedings not having been commenced within two years of the death of the deceased on 7th November, 2010. Proceedings were commenced on 3rd March, 2015 and the question of whether the action is time barred is the sole matter that I deal with in this judgment.

8. Section 9 of the Act of 1961 applies to a cause of action which subsisted at the date of the death and not a cause of action which arose after death. Whether the cause did subsist at the date of death of Mr. Pollock is the matter to considered.

9. No demand for payment was made at any time prior to 7th November, 2010, and the Bank does not present any argument that any valid letter of demand was served until 4th February, 2015, after a grant of probate had issued in the estate of the deceased. If the cause of action can be said to accrue only when demand was made, then the action is not one to which the provision of s. 9(2) apply, the six year time limitation provided by the Statute of Limitations 1957 is the relevant limitation, and the proceedings are not statute barred.

10. The case then comes down to a determination of two questions:

> (a) The date of the accrual of the plaintiff's cause of action against the second defendant, and whether the cause of action was subsisting at the date of the death of the deceased; and
>
> (b) Whether the proceedings are now capable of being maintained by the Bank against the second defendant having regard to ss. 8 and 9(2)(b) of the Act of 1961, as amended.

**The loan sanctions**

11. The claim in debt arises from two facilities contained in a letter to the first defendant and the deceased, and it is accepted that, although the language used in the operative parts of the letter is somewhat different, a proper construction should yield the result that each of them was repayable in the same manner and at the same time.

12. Facility one contained a clause dealing with the obligation of the borrower to repay the monies as follows:

> "Repayment: On demand and at the pleasure of the Bank, subject to clearance in full by way of refinance or otherwise by 30/09/2009. Monthly reductions of €5,000 to apply in the interim."

13. The equivalent clause in facility two reads as follows:

> "Repayment: On demand and at the pleasure of the Bank, subject to capital and interest moratorium until 30/09/2009. Facility to clear in full by way of refinance or otherwise at that stage. Interest to be rolled up within the facility in the interim."

14. In each case, the purpose of the loan was described as "continuation of existing loan...", and those existing facilities were identified by reference to the amounts borrowed (or outstanding) in respect of each. The second facility was described as being for the purposes of the continuation of an existing loan facility originally sanctioned to assist with the purchase of investment properties, and to repay the capitalised interest for seven sequential months between December, 2008 and June, 2009.

15. The Bank's general terms and conditions contain at clause 3 the following sub-clauses:

> "3.1.1 Loan account facilities are repayable on demand. However, in normal circumstances, the Bank expects that the loan will be available as stated in the letter of sanction.
>
> 3.1.2 Without prejudice to the Bank's right to demand repayment at any time, the happening of any of the events set out in clause 4.2 may lead to the Bank making demand for payment, with or without notice to the Borrower."

16. General condition 4.2 identifies an "event of default" as follows:

> "4.2 A term loan though expressed to be repayable over or within a specified period may be terminated by the Bank and the Bank may demand early repayment at any time with or without notice to the Borrower upon the occurrence of any of the following events:"

17. The relevant events of default were a failure on the part of the borrower to make repayment on the date due, or the death of the borrower or any guarantor of the borrower.

**The arguments**

18. The plaintiff argues that the cause of action against the second defendant accrued only when a valid demand was made by the plaintiff against the estate of the deceased. The evidence is that a letter of demand was served on 4th February, 2015 following the extraction of a grant in the estate of the deceased. The Bank does not rely on an earlier letter of demand sent on 13th May, 2013.

19. The net question to be decided is whether the monies became due and owing to the Bank only following demand, or whether they were due on the passing of the date of redemption, being 30th September, 2009.

20. It is argued by the plaintiff that it cannot have been the intention of the parties that the loan agreed to be advanced by facility one was payable in full and without demand some six or seven weeks after the loan was accepted. It is argued that regard be had to the fact that provision was made for monthly repayments, and the plural was used, and the letter of offer expressly provided that the impact of changes in interest rates would not be reflected in any adjustment of the instalments.

21. It is argued also, that a failure to repay on 30th September, 2009 was an "event of default" entitling the Bank to demand payment, and the passing of the date of redemption did not in itself entitle the Bank to commence the proceedings without demand first being made.

22. The second defendant argues that by virtue of Clause 3.1.1 the loans, while they were payable on demand, were to be available as stated in the letter of sanction, i.e. they were available as short term facilities only, to be repaid on or before 30th September, 2009. It is said that on a true construction of this general condition when combined with the special conditions, the Bank could demand payable early on the happening of any of the events identified as an event of default, but absent such, the loans had an identified redemption date, and were repayable without demand on that date.

23. Counsel argues that general condition 4.2 means that the Bank could demand early repayment of a fixed term loan, but that the Bank did not require as matter of contract to make demand at the end of that specified and agreed term. Demand was required to request early repayment, but not payment on the agreed redemption date. It is argued that on a construction of the language of the contract, and using the ordinary canons of construction, that the facilities were repayable on or before 30th September, 2009, or on earlier demand by the Bank on the happening of the fifteen different circumstances expressly provided in clause 4.2 of the general conditions.

**Legal principles**

24. The matter gives rise to a question of the construction of the general and special conditions of the loan facilities. That the special conditions will prevail where there is any difference between applicable special conditions and the general conditions is not in doubt.

25. The parties are agreed as to the principles to be applied in the interpretation of the contract and both rely on the leading judgment of the Supreme Court in *Analog Devices B.V. & Ors. v. Zurich Insurance Company & Anor*. [2005] IESC 12, [2005] 1 I.R. 274, in which the Court adopted the principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 W.L.R. 896, the relevant elements of which are as follows:

> a. The construction of a contract must seek to ascertain the meaning that the document would convey to a reasonable person in the position of the contracting parties.
>
> b. The matrix of fact or background information may be relevant in order to construe the language of the document.
>
> c. Previous negotiations and any declarations of subjective intent are disregarded.
>
> d. The meaning of a document cannot be reduced to an analysis of the meaning of its words taken in isolation, or viewed as a sterile exercise of looking at dictionaries or syntax.
>
> e. A result that flouts basic common or commercial sense must yield to one which does make sense.

26. These principles have been analysed and adopted in a number of cases in the Superior Courts of Ireland, albeit that Fennelly J. in *ICDL GCC Foundation FZ-LLC v. European Computer Driving Licence Foundation Limited* [2012] IESC 55, [2012] 3 I.R. 327 cautioned against the use of these general principles as a tool of speculation. It is useful to quote the approach he preferred, that of Griffin J. in *Rohan Construction Limited & Ors. v. Insurance Corporation of Ireland plc* [1988] I.L.R.M. 373:

> "It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances."

27. That approach, which I adopt, requires that the court should commence "with an examination of the words used", and interpret these in accordance with their "natural and ordinary meaning". Evidence of surrounding circumstances "will not normally be allowed to alter the plain meaning of words".

28. Another relevant canon of construction is that the court construes the contract in its entirety, as expressed in *Marathon Petroleum (Ireland) Limited v. Bord Gáis Éireann* [1986] IESC 6 which at p. 11 contains the following *dicta* of Finlay C.J.:

> "… my obligation is to seek in the terms of the entire Agreement evidence of the real intention of the parties and that, if I can find it, that should prevail over the ordinary meaning of the words."

29. The exercise therefore seems to me to involve the following steps:

> a. The court should first look at the ordinary meaning of the relevant words in the contract.
>
> b. The court should interpret the contract as a whole.
>
> c. Ambiguity should be resolved by reference to the surrounding circumstances in order to ascertain the intention of the parties.

**Was demand necessary after the passing of the redemption date?**

30. The Bank argues that demand was necessary to trigger the accrual of the cause of action. Counsel for the second defendant argues that no demand was required of the borrower, and that the making of a demand was not a condition precedent to a right of action accruing. Both counsel rely on a statement of principle contained in Canny, Limitation of Actions (2010) that:

> "If monies are loaned it is a matter of construction of the contract to determine the date from which the limitation period will run. If a time for repayment is stipulated, time will run from that date." (para. 6.09)

31. Canny goes on to suggest that time can start running the moment a loan is advanced, and that this is:

> "… a rule of some antiquity, and although it has been applied in subsequent cases, the decisions all emphasise that one must examine the terms of the agreement to ascertain whether the making of a demand was in fact a condition precedent to a right of action accruing."

32. I adopt that statement as a correct statement of the law, albeit it cannot determine the question of construction arising in the present case.

33. A similar proposition stated in Donnelly, The Law of Credit and Security (2nd ed., 2015) is also relied on:

> "Loan agreements may be expected to make provision for repayment. The way in which a lender may require repayment of a loan depends on the type of loan involved. Overdrafts are generally repayable 'on demand' while, in the absence of default, term loan repayments fall due on a specified date or dates, the details of which will be provided in the loan contract. If a date for repayment is set out in the contract, there is no obligation on the lender to make a further demand for repayment. The monies will automatically fall due when the date arrives." (para. 7-90)

I also accept that this is a correct statement of the law, but again note that it does not answer the question of construction in this case.

34. Counsel for the plaintiff relies on the approach taken by Dunne J. in *Start Mortgages Limited & Ors. v. Gunn & Ors*. [2011] IEHC 275. Judgment was given in a number of different cases with differing loan conditions. In one of these, the case involving the application against Mr. and Mrs. Clair, it was submitted on behalf of the bank that demand was not necessary, and that accordingly the application for possession came to be considered on the basis that the right of action had accrued before the coming into operation of the Land and Conveyancing Law Reform Act 2009. Because the judgment of Dunne J. was concerned with a different legal question she did not engage in any analysis of the question that arises before me.

35. The Supreme Court considered the nature of a loan contract in *Irish Life & Permanent plc v. Dunne* [2015] IESC 46, [2015] 2 I.L.R.M. 192. In the course of his judgment, at para. 6.6, Clarke J. identified precisely the question that arises for consideration in the present case, namely whether principal monies "had become due", and noted that loan documentation can differ such that in some cases the principal monies borrowed become due without demand, and in other cases demand is due before a default can be said to have occurred.

36. With regard to a provision in the mortgage under consideration by him in one of the two cases with which the judgment dealt, the mortgage deed provided that the debt should "become immediately payable to Permanent TSB" if the mortgagee defaulted in the making of two monthly instalments of payment. Clarke J. said that no letter of demand or other action on the part of the lender was needed for the total sum to become due. As he put it at para. 6.9:

> "That provision is automatic in its effect."

37. While that judgment, of course, is one which rests on its facts and the terms of the contract, it shows that the construction of

loan documents can lead to a conclusion that monies borrowed under a loan contract can become due without demand, and that a cause of action can thereby be said to have accrued without demand.

38. Counsel for the plaintiff, however, argues that the loan documentation in the present case does not contain any express provision as a result of which it could be said that the loan monies became payable "immediately" upon the happening of a certain event, or in particular on the passing of the redemption date, and that the reasoning of Clarke J. can be distinguished.

39. The word "immediately" was also found in *First Southern Bank Limited v. Maher* [1990] 2 I.R. 477, relied on by the second defendant, but which the plaintiff argues is readily open to being distinguished. In that case, the terms of a promissory note provided that an event of default occurred if a payment was not made within one month of its due date. Barron J. took the view that while demand could in many cases be necessary to call in a current account or liability under guarantee, no demand was necessary and the money became due and payable once there was default for the period identified, and held that the cause of action had accrued when the monies became "due and payable" and that as the action was not pursued until more than two years after the death of the debtor it was barred by the provisions of s. 9(2) of the Act of 1961.

40. *Bank of Ireland v. Stafford* [2013] IEHC 546, a judgment of McGovern J. is not, it seems to me, on point as the third defendant there argued that while death was an event triggering default, demand for payment was still required to be made and as that demand was made after the death of the deceased, the claim was not one which was subsisting at the date of his death, or not one that survived against the estate, but rather an action which accrued after death.

41. In the present case both facilities were repayable on demand and at the pleasure of the Bank, but in each case that provision was made expressly "subject to" clearance in full by 30th September, 2009. In my view, the use of the phrase "subject to" as a matter of plain language, and without a need to engage in complex grammatical analysis or analysis of syntax, indicates that the earlier more general provisions are to be constrained, delimited or read to be understood as being dependent upon, or conditional upon, or contingent upon, the express requirement that repayment be made by the date identified. The terms of repayment in their clear and ordinary meaning, and subject to what I say below, must be read as meaning that the intention of the parties was that the monies would be repaid on or before 30th September, 2009.

42. I do not consider that the absence from the express repayment provisions that repayment be made immediately upon the happening of identified events leads to the conclusion that payment was therefore not due on 30th September, 2009. The express words are clear, and identify a date for repayment, and the inclusion of the word "immediately" or of a similar word, could have added nothing to the sense of the clause because the date was identified by day, month, and year. Payment became due on that date without demand, and, to borrow the language of Clarke J in *Irish Life & Permanent plc v. Dunne*, the right to take action on foot of a failure to pay on the agreed date happened automatically.

**The construction might lead to an absurdity?**
43. The plaintiff argues that the construction for which the second defendant contends is one that would lead to an absurdity, in that the loans would have been advanced and become repayable within less than three months of drawdown. The letter of loan sanction was made on 14th July, 2009 and accepted on 20th July, 2009.

44. That argument might find favour were one to ignore some of the other elements of the loan sanction. Both loan sanctions were by way of a "continuation of existing loan facility". It was anticipated, or at least hoped, in the context of each of the facilities that the loan amounts would be either repaid or refinanced. These therefore were short term facilities, and in the case of the second facility not merely by way of continuation of existing loan facilities, but also in the context where interest had been capitalised from the periods between December, 2008 and June, 2009 inclusive, a total of seven months. It is clear in those circumstances that the two sanctions were given in a context where there were already arrears of interest and capital payments, at least in respect of the second loan. There is in the circumstances nothing intrinsically absurd or contrary to good commercial or common sense that persuades me that the facilities could not reasonably be interpreted as being short term, or indeed very short term. On the contrary, I construe both facilities as being short term facilities which were intended to be refinanced or repaid on or before 30th September, 2009.

**The provision for instalment payments**
45. Counsel for the plaintiff argues that the facilities are not to be interpreted as being repayable within the short timeframe for which the second defendant contends, because provision is made for instalment payments by the express terms of the first sanction, by which monthly reductions (the plural is used) of €5,000 are to apply "in the interim". In the second facility none such is provided.

46. It is accepted that the monthly payment of €5,000 was not sufficient to meet payment of capital and interest on the loans on an ongoing basis. The special conditions of the first facility were intended as an interim measure, and the existence of such a provision does not make it absurd, the loan facility being one of a short term nature. In that context the fact that provision was made for instalments in respect of one facility only suggests that the instalment was not an important factor in the arrangements, and this is consistent with the express provision for repayment in full on the redemption date. Instalment payments would almost always be found in a long term facility, but would not be required as a matter of commercial sense in a short term facility.

47. I do not consider that the provision for instalments varies or relaxes the agreement that repayment in full be made by the redemption date, and it does not persuade me that demand was necessary before the right of action accrued.

**The general conditions – events of default**
48. Counsel for the plaintiff identifies general condition 4.2 as being of particular importance. It provides that a term loan may be terminated by the Bank at any time without notice to the borrower on the happening of certain events. It does not provide that demand must be made once the redemption date has passed, but identifies other events of default giving rise to an entitlement of the Bank to seek repayment in full. It does not assist the plaintiff with regard to when and how default occurs when payment is not made on the agreed date.

49. Clause 3.1.1 does provide that loan account facilities are "repayable on demand". That general proposition is subject to the *proviso* that "in normal circumstances" the Bank expects that the loan will be available as stated in the letter of sanction. That general condition is further qualified by clause 3.1.2 by which the Bank reserved unto itself the right to demand payment on the happening of an event of default.

50. The provisions of clause 3.1.1 and 3.1.2 are an expression of the general intention of the parties that, while the Bank could demand payment at any time, the Bank would not demand payment early against a compliant borrower. The general conditions further qualify that general proposition by identifying a number of events, the happening of which entitle the Bank to make demand,

irrespective of whether an argument could be made that the borrower is otherwise compliant.

51. I read the provisions of clauses 3.1.1 and 3.1.2 as qualifying the nature of the Bank's entitlement to demand payment at any time, and not as a provision which when properly interpreted means that formal demand is required at any time when a borrower is in default. That approach is consistent with another canon of construction, namely the obligation that the court would look at the relevant words in the context of the entirety of the contract.

**Conclusion**
52. I cannot accept the argument of the plaintiff that taking the contract as a whole the loan facility was repayable only on demand. I consider in all the circumstances that it was repayable on or before 30th September, 2009, that it was a contract for a fixed term at the end of which the money became repayable in full, either from the resources of the borrowers or by refinance. There was, in those circumstances, no requirement that the Bank demand payment on 30th September, 2009.

53. As a consequence, I consider that the cause of action accrued on 30th September, 2009. The action therefore is one which existed at the date of death of the deceased, Thomas Pollock, who died on 7th November, 2010, and in respect of which the two-year time period provided by s. 9 of the Act of 1961 applies.

54. I consider that the argument that I would consider this contract in the context of the *contra proferentem* rule is not correct, as the rule is a "last resort" to be used by the court in aid of the construction of an ambiguous clause: *ICDL GCC Foundation FZ-LLC v. European Computer Driving Licence Foundation Limited* (per O'Donnell J. at para. 166).

55. No ambiguity arises which requires that this principle be called in aid of construction.

**Was there an acknowledgment?**
56. The plaintiff argues that the estate, through the second defendant, made an acknowledgment and/or an admission against interest. Two relevant affidavits are referred to. One is an affidavit sworn on 10th April, 2014 in the context of the application to remove a *caveat*, and the other is the Inland Revenue affidavit sworn on 8th November, 2013.

57. Section 58(2)(b) of the Statute of Limitations Act 1957 provides as follows:

> "[An acknowledgement under s. 56] shall be made to the person or the agent of the person whose title, right, equity of redemption or claim (as the case may be) is being acknowledged."

58. I accept the argument of the second defendant that the Inland Revenue affidavit and the affidavit grounding the application to remove the *caveat* are not, and could not, be characterised as an acknowledgment to the Bank or any agent of the Bank. In that I follow the judgment of the Court of Appeal for England & Wales in *Bowring-Hanbury's Trustee v. Bowring-Hanbury* [1943] 1 Ch. 104 which held that the Revenue probate affidavit was not an acknowledgement to the relevant creditor. I also note the judgment of Slade J. in *Re Compania De Electricidad De La Provincia de Buenos Aires Ltd*. [1980] 1 Ch. 146, where he noted that a written acknowledgement had to be made to a creditor or his agent.

59. Neither affidavit could be said in any sense to have been made to the Bank nor any agent of the Bank, and neither can for that reason be characterised as an acknowledgement in writing of the indebtedness of the estate to the Bank.

60. I was advised at the closing of the submissions that documentation may exist in the form of correspondence on which the Bank might wish to rely, but subject to hearing from counsel with regard to any other argument that an acknowledgement was made such that the running of time is to be differently construed, I answer the preliminary issue in this case as follows.

**Decision**
61. The cause of action of the Bank against Thomas Pollock, deceased accrued on 30th September, 2009. Mr. Pollock died on 7th November, 2010 and as a result of the provisions of s. 9(2)(b) of the Act of 1961, as amended, the action against the deceased was required to be brought within two years of his death. The action was one which, pursuant to s. 8 of the Act of 1961, did subsist against the deceased and survived against his estate but only for the period of two years provided by s. 9.

62. The action against the second defendant is barred by statute.