Neutral Citation Number: [2011] IEHC 75

THE HIGH COURT

COMMERCIAL

2010 5690 S

BETWEEN

ZURICH BANK

PLAINTIFF

AND

JIM McCONNON

RESPONDENT

Judgment of Mr. Justice Birmingham delivered the 4th day of March 2011

In this case the plaintiff, Zurich Bank ("the bank") seeks summary judgment in the sum of €31,883,565.56, together with continuing interest.

The bank claims to be entitled to judgment on the basis that money was lent by it to the defendant on foot of a Facility Letter dated 15th June, 2007, which was accepted by the defendant on 18th June, 2007, which remains outstanding.

By that Facility Letter, the bank had offered to advance to the defendant the sum of €32,522,613 subject to the terms and conditions set out in the letter. The letter identified the final repayment date as twelve months from the date of initial disbursement.

It is not in dispute that the defendant availed of the facility and drew down the available funds and that the loan has not been repaid. However, the defendant says that there are a number of defences available to him which will enable him to defeat the bank's claim. Moreover, he says that in respect of the defences on which he relies, that while there may not be sufficient information available at present so that the Court would be satisfied that the defences will ultimately succeed, that certainly it is the case that the various defences relied on are of sufficient substance that it is clearly appropriate that he should be permitted to defend the case and that the matter should go for trial and the application for summary judgment should be refused.

Legal principles

There was broad agreement between the parties on the legal principles that apply to applications for summary judgment. Those principles have been the subject of discussion in a number of Supreme Court cases. In *First National Commercial Bank Plc v. Anglin,* [1996] 1 I.R. 75, Murphy J. dealt with the issue in these terms on pp. 78-79:-

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the *bone fides* of the defendant or to doubt whether the defendant has a genuine cause of action… In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Report 21, which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank Plc v. Daniel [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:-
>
> '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; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bone fide defence.'

In the *National Westminster Bank* case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matters as follows:-

> 'I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case at p. 23,
>
> > 'Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?' The test posed by Lloyd L.J. in the *Standard Chartered* Bank case … "Is what the defendant says credible?" amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence'.

The matter was again considered by the Supreme Court in the well known case of *Aer Rianta CPT v. Ryanair Limited*, [2001] 4 I.R. 607 wherein, the test laid down in *First National Commercial Bank v. Anglin* was endorsed by McGuinness J. on p. 615. She commented:-

> "Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence… The Court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self-contradictory as not to be credible".

The issue is also the subject of a judgment from Hardiman J. in the same case. In the course of his judgment he observed, on pp. 621-622:-

> "… I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the

late nineteenth and early twentieth centuries. The formulation used in *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The "fair and reasonable probability of the defendants having a real or bona fide defence" is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable". Later, Hardiman J. went to on to say, at p. 623:-

> "In my view, the fundamental questions to be posed, on an application such as this remains; 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?"

The issue was again under consideration by the Supreme Court in the case of *Danske Bank a/s trading as National Irish Bank v. Durkan New Homes and Others* IESC 22 (Unreported, Supreme Court, 22nd April, 2010). That was a case where the plaintiff bank had made loans to the appellants. The loan agreements contained limited recourse terms. The essential issue between the parties was whether the limited recourse terms of the agreement availed the borrowers in providing a defence to the claim or whether the bank could recover the moneys lent. In the High Court the trial judge had commented, as set out on p. 8 of the Supreme Court judgment:-

> "If the addition of evidence can assist in any material way in the construction of a document, then, I agree, the matter should be put for plenary hearing. If, on the other hand, the question of law arising on affidavit evidence can be as well considered on a motion for summary judgment as at a plenary hearing, then I feel it is the obligation of the court to resolve it on hearing that motion."

Dealing with this passage Denham J. with whom the other members of the Supreme Court agreed commented on p. 9:-

> "The learned High Court judge appeared to find that if a question of law arose, it was the obligation of the trial court to resolve the matter on the hearing of the motion… While a court may resolve questions of law there is no obligation to do so. The test, as stated previously, is whether the appellants have established an arguable defence."

The Supreme Court members were satisfied that the appellants had an arguable defence on the construction of the agreement documentation.

The role of the Court in determining questions of law was discussed by Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203. At p. 210 he commented:-

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

I take these cases to which I have referred, as indicating that while the jurisdiction to refuse leave to defend and proceed to summary judgment undoubtedly exists, it is a jurisdiction to be exercised very sparingly indeed.

The background to the proceedings

In order to give some context to the defences that have been advanced it is helpful to give some context to the relationship between the plaintiff and defendant. This background summary draws heavily on the narrative set out by the defendant in his affidavits.

The defendant has in recent times owned and operated a supermarket and hardware shop at Caseleblayney, Co. Monaghan. He had purchased the business in 1996. Unfortunately the supermarket/grocery was damaged by fire in 1998. Following the fire, the defendant rebuilt and thereafter operated the supermarket business; the Supervalu business on the ground floor and a hardware franchise on the first floor.

In late 2003, the plaintiff considered purchasing a site known as "Coogan's site" which was situated behind his shop. This was a site in which there were some derelict buildings. He purchased the site for approximately €3.2m in 2004, with Allied Irish Banks advancing the entire purchase price. It seems that initially, his interest centred on the provision of car parking there. Thereafter, the defendant consulted and engaged a number of professionals including an architect, and a firm of project management consultants/engineers. At this stage the question of extending retail space had moved centre stage. As the project began to take shape, it became clear that building a shopping centre would cover the entire site available and that there would be no space for a car park. In those circumstances, an approach was made to the owner of another site that was close by, known as "Tavey's site", and this was purchased in late 2005 for the sum of €3.3m and again this purchase was financed by Allied Irish Banks.

Groundwork commenced and indeed approximately €1.6m was spent on these works. The defendant was informed by his advisers that the entire project would cost approximately €32million. In late 2006, AIB appeared to have decided that the project was not a viable one and indicated that they would not be providing any further funding. At that stage the defendant owed AIB approximately €10million, which he had spent on the project.

The defendant's response to the withdrawal of funding by AIB was to engage a firm of accountants to put together a proposal for the development and, as part of that exercise it was decided to engage the services of CBRE Richard Ellis.

Armed with this proposal, the plaintiff seems to have approached a number of financial institutions, seeking to interest them in the project, but up until April, 2007, only one institution was willing to consider becoming involved and then only on terms which the defendant felt made the process unaffordable and uneconomic.

In April, 2007, the defendant received an unsolicited phone call from an official of the plaintiff bank. On the following day, two officials of the bank travelled to Castleblayney and met with the defendant. While there would seem to be some disagreement as to what precisely was said at the Castleblayney meeting, the only direct account that has been given is that which is offered by the defendant and it is this, which must be accepted at this stage. He indicates in his affidavit that he showed the officials the plan that had been prepared, and it was stated in argument that the defendant was speaking here about the architect's plan for the development, and the officials inquired about his financing needs. According to the defendant he told them that he had received an offer of funding from another institution, but did not show them, nor was he asked to show them, any documentation in relation to that other offer. The defendant says that he did discuss with them the terms of the loan required. According to the defendant, at the end of the meeting, the officials told him that he would have a Term Sheet from the bank within 24 hours and this was forthcoming.

Approximately two months later on the 15th June, 2007, the loan offer issued and was accepted by the defendant on the 18th June.

There is an amount of disagreement between the parties as to the significance of certain provisions of the facility letter and I will return to this when discussing the defences that have been indicated.

Thereafter, the defendant proceeded to draw down the available funds in various instalments between December, 2007 and the end of March, 2009. In passing it may be noted that on the 5th January, 2009, the loan agreement was amended which saw the term extended by some five months and the facility was increased by €580,000 to a total of €33,102,613.

As the economy stalled the project encountered major difficulties. In the course of his affidavit, the defendant comments "in late 2009 it became clear to us all that the monies expended on the development of this centre in Castleblayney were never going to be recovered. This was a harsh economic fact and is and was at that time unassailable". The enormity of the difficulties that the project encountered may be seen from the fact that the defendant has averred that the current value of the Castleblayney centre is in the region of €1m to €2million.

As the scale of the difficulties emerged, the situation was discussed between the bank and the defendant. On the 23rd November, 2009, the bank offered a "standstill period" of three months and that period was subsequently extended. Certain proposals were put by the defendant but these were rejected by the bank and on the 30th November, 2010, a summary summons was issued.

The defences

Four possible defences have been identified on behalf of the defendant and it is said that each of these, at a minimum, provides a basis for refusing summary judgment and allowing the matter go to a trial. In summary, these might be described as

- The condition of contract point;
- Estoppel;
- Frustration;
- Code of conduct point.

Condition of Contract

The defendant contends that as a condition of the loan contract, the plaintiff agreed to satisfy itself as to the form and content of an independent valuation which they had required to be carried out on both the "Coogan's site" and the Tavey's site. It is contended that this was a condition that the defendant was entitled to rely upon and did in fact rely upon. It is said that the condition is described as a condition precedent of the agreement and the defendant submits that the plaintiff failed to conduct any or any adequate investigation or analysis in relation to the valuations it received and that in so failing, the plaintiff breached an essential term of the agreement. The defendant says that the valuations obtained by the bank from CBRE Richard Ellis "were so off the mark as to be derisory". The key factors set out in the reports are, he says, "wholly nonsensical"

The background to this issue is that, as I have already referred to, the defendant had approached a firm of accountants to put together a proposal when Allied Irish Banks had withdrawn from further involvement, and as part of that exercise had sought and obtained reports from CBRE Richard Ellis. At one level the reports obtained by the defendant gave the appearance of being quite detailed and elaborate. The reports, it should be noted, had placed a value of €15,500,000 on the main street property, the Coogan's site, and €14,500,000 on the New Street site, the Tavey's site.

Clause 18 of the facility letter accepted by the defendant on the 15th June, 2007, was, so far as material in these terms:-

> "18. Conditions precedent
>
> 18.1 The Borrower may not request an Advance under the Facility until the Bank has received in form and content satisfactory to it:
>
> (e) an independent valuation on the shopping centre site at Main Street, Castleblayney, Co. Monaghan, of not less than €14,500,000 addressed to the Bank.
>
> (f) an independent valuation on the Tavey's site at New Street, Castleblayney, Co. Monaghan, of not less than €15,500,000 addressed to the Bank.
>
> 18.2 The Bank has the right to waive any and all of the conditions precedent".

The plaintiff points out that the condition in question is not described as a condition precedent <u>of the agreement</u> rather, clause 18 deals with matters that are condition precedent to the borrower requesting an advance under the facility. It is said that whether the bank is satisfied in relation to the various matters listed in clause 18, is a matter for it and it alone. The defendant is constrained from requesting an advance until the bank has received listed documentation "in form and content satisfactory" to it.

For my part I can see no basis whatever for the suggestion that clause 18.1 is one on which the borrower can rely. If there was ever any doubt about that and I do not believe there was, any such doubt would be entirely removed by clause 18.2 which says "the Bank has the right to waive any and all of the conditions precedent". I regard the suggestion that the defendant is entitled to rely on an alleged failure on the part of the bank to subject the valuations to scrutiny as fanciful. It must be appreciated that it was the defendant who first caused CBRE to become involved. It was the defendant and his advisors who prepared a proposal document that was grounded on the valuations that he had sought and obtained. In those circumstances, it seems strange to find the defendant asserting that even a perfunctory analysis of the valuations by the plaintiff would have revealed that the valuations were not based on any discernible fact or objective basis, but rather that they were based on untruths and conjecture.

The threshold to be overcome if the defendant is to be given liberty to defend is a very low one, but, on this issue, low as it is, has not been made out. In my view, the question which Hardiman J. says is to be posed, namely, whether it is very clear that the defendant has no case admits of only one answer – so far as this suggested defence is concerned, the defendant has no case.

The estoppel point

This point arises out of the defendant's agreement to a standstill period. Central to this issue are the terms of the letter of 23rd November, 2009, offering the standstill period. It is appropriate to set out the terms of that letter:

> "Many thanks to both you and John for taking the time to meet with Colm and I on Thursday last. We found the meeting very useful and look forward to building a strong working relationship with you and your team.
>
> I thought it would be helpful for all of us if I set out below my understanding of what was agreed on Thursday in terms of how we should best progress. Where specific dates have not already been agreed, I have made some suggestions which are in parentheses.
>
> You agree to:
>
> 1. Sign an Engagement letter with ACT within the next five days.
>
> 2. Undertake to have KMR provide ACT with the management accounts and projections required to complete their feasibility study by (latest) Friday 11th of December, 2009. Whilst we originally had discussed setting Monday 14th December as the deadline, on reflection, it would make more sense to set Friday 11th as the deadline instead, as it would give ACT the weekend to review the numbers prior to commencing meetings with you the week of Monday, 14th of December.
>
> 3. Ask your accountants to perform a detailed VAT reconciliation to be provided to ACT by Friday 11th of December, 2009.
>
> 4. Ensure that you and your team (including KMR) will be available to meet and work with ACT as required the week of 14th of December.
>
> 5. Work with KMR, ACT and Zurich Bank to produce a business plan and financial model which we are all comfortable with by [January 15th, 2010];
>
> 6. Keep us updated as to any potential problems or issues which you foresee might result in agreed deadlines not being met.
>
> In return, the Zurich Bank will agree to grant a Standstill Period of three months from the date of this letter [i.e. 23rd February, 2010] in order to enable you, KMR and ACT to complete the business plan and feasibility study outlined above and to enable Zurich Bank to devise revised repayment schedules and Loan Offer letters for your two loans based on the finding of the study. During the standstill period, Zurich Bank undertakes to take no action in relation to the enforcement of your loans.
>
> Please confirm by return of post that you are in agreement with the proposal outlined above and with the proposed timeline". (Emphasis as in original letter).

The letter was signed by the Head of Portfolio Asset Management of Zurich Bank. The reference to ACT was to a company recommended by Zurich which was seen by the bank as expert in the field of financial due diligence and restructuring. KMR is a reference to the firm of accountants that were advising the defendant and this was the same firm that had prepared the proposal document to which reference has been made.

Counsel on behalf of the defendant has referred to the case of *Central London Property Trust Ltd. v. Hightrees House Ltd*. [1947] 1 K.B. 130, a case very familiar to every law student of a particular generation and has referred to the discussion of the topic of Promissory Estoppel in McDermott's Contract Law (Dublin: Butterworths, 2001). At paragraph 2.104, the author of that text commented:-

> "The key elements of a claim of promissory estoppel are as follows.
>
> (i) A pre-existing legal relationship between the parties.
>
> (ii) An unambiguous representation.
>
> (iii) Reliance by the representee (and possible detriment).
>
> (iv) Some element of unfairness or unconscionability.
>
> (v) The estoppel is being used not as a cause of action, but as a defence or as a rule of evidence to stop the other party raising a defence.
>
> (vi) The remedy is a matter for the court."

The legal argument raised is an interesting one. However the defendant has failed to ground the interesting legal issue, and in this context of this case, largely uncontroversial legal issue in the facts of this case. As Dr. McDermott has pointed out, Cheshire and Fifoot, have suggested of promissory estoppel that:

> "Few doctrines are at once so potentially fruitful and so practically unsatisfying. It is more often cited than applied, and more often applied than understood."

In this case, the bank offered a standstill and honoured that offer during both the original and extended standstill period. The defendant places particular emphasis on this phrase that appears in the penultimate sentence of the operative part of the letter of 23rd November, 2009:

> "… and to enable Zurich Bank to devise revised repayment schedules and Loan Offer letters for your two loans based on the findings of the study."

The defendant says that the bank has not met its obligations, whereas he says that in all material respects, he has fully honoured his side of that agreement.

This was a standstill agreement, no more and no less. A standstill was effective until 30th June, 2010. A report with suggestions as to how matters might be progressed was put forward by the defendant but was rejected by the bank by letter dated 20th July, 2010. The bank was not obliged to offer a standstill, but did so. Having done so, the bank was obliged to honour its promise and did so. I can see no basis for suggesting that there was, even arguably, any greater obligation on the part of the bank. It seems to me that the defendant's arguments fundamentally misunderstand the nature of the relationship between the bank and the defendant. The relationship was not that of partners with a common interest, sharing a risk, rather, the relationship was that of lender and borrower.

At the heart of the doctrine of estoppel is the requirement that there would be an element of unfairness or unconsionability in permitting the promissor to welch on what he has offered. Leaving aside that what the bank offered was limited to offering a standstill period, I can find nothing unfair or inequitable or unconscionable in a party that has lent money seeking to be repaid.

I can see no arguable basis for suggesting that an equitable remedy would involve extinguishing the right of a bank that has lent a very large sum of money for a commercial development to be repaid.

Again, I am satisfied that the defendant has failed to make out even an arguable defence based on the invocation of the doctrine of estoppel.

The doctrine of frustration

The written submissions on behalf of the defendant which have referred to this defence, have singularly failed to relate the defence to the facts of the present case. Indeed, there was a certain vagueness as to what the radical and cataclysmic change of circumstances giving rise to the doctrine was supposed to be. It has now been clarified that the allegation is that the agreement has been frustrated by the dramatic collapse in property values. The defendant submits that the true intention of the parties to the loan agreement was the development of a shopping centre and the leasing out of the centre at rental levels indicated by CBRE. However, again, it seems to me that is to misunderstand the nature of the relationship between the parties. The bank's interest in this was in loaning money with the expectation that the loan would be repaid and that the bank would make a profit from the loan. Undoubtedly, the defendant's purpose in seeking funding from the plaintiff bank, and indeed, from the other banks that were approached, was so that he could proceed with the project on which he had already expended some €10 million. However, there is no basis whatever for suggesting that the parties had agreed to enter into a risk sharing partnership. Such a proposition is unstateable.

The defence of frustration was raised in the case of *Ringsend Property Ltd. v. Donatex Ltd. and Bernard McNamara* IEHC 568 (Unreported, High Court, Kelly J., 18th December, 2009), a case arising out of the purchase of the Irish Glass Bottle (IGB) site. The basis for invoking the doctrine there was that it was contended that as a result of various factors that had occurred, neither the Dublin Dockland Authority nor Dublin City Council were in a position to authorise the proposed development. Kelly J. commented that the defence of frustration is one of limited application and narrowness. He referred to a number of earlier decisions to demonstrate the narrow scope for the doctrine and quoted with approval, from p. 15, from *Chitty on Contracts* (Sweet & Maxwell, 30th Ed.), para. 23-003, where it is stated:

> "The courts do not wish to allow a party to appeal to the doctrine of frustration in an effort to escape from what has proved to be a bad bargain: frustration is 'not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains'."

In my view, it is just that which the defendant is seeking to do. The defendant first became involved with this project as far back as 2004, some three years before the plaintiff bank was on the scene. Thereafter it appears the plaintiff was assiduous in pursuing sources of funding. Like every development project, it contains within it the possibility of success and of failure. Certainly, with the benefit of hindsight, the project on which the defendant embarked was an overly ambitious one, but I can discern no basis whatever as to how invoking the doctrine of frustration could provide an arguable defence.

The "Code of Conduct" point

In addition, the defendant relies on the terms of the Financial Regulator's Consumer Protection Code ("the code"), issued by the Regulator in August, 2006. It is accepted that the plaintiff bank is a body that is subject to the Code. However, there are formidable and indeed, in my view, insurmountable difficulties preventing the defendant from relying on the Code by way of defence. First of all, the defendant is not a "consumer" within the meaning of the Code. The Code so far as material defines consumer as "a natural person acting outside their business, trade or profession".

The question of who is a consumer was considered in the case of *Allied Irish Banks v. Brian Higgins and Others* I.E.H.C. 219, (Unreported, High Court, Kelly J., 3rd June, 2010) though in the context of the provisions of the Consumer Credit Act 1995, rather than of the Code. Kelly J., on p. 26, referred to the decision of the European Court of Justice in the case *of Benincasa v. Dentalkit* (Case C-269/95) [1997] ECR 1-3767 and observed that the European Court of Justice clearly envisaged that the concept of consumer was confined to a person acting in a private capacity and not engaged in trade or professional activities, and went on to observe that the self-same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others and that only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive (Council Directive 87/102/EEC as amended by Council Directive 90/80/EEC of the 22nd February, 1990).

It seems to me even harder to take seriously the suggestion that the defendant in the present case was a consumer given that he operated a supermarket and hardware franchise in Castleblayney for a number of years and what was involved here arose out of that and represented merely an extension, albeit on a dramatic scale of what he was already involved in.

Moreover, even if the defendant were a consumer and in my view he emphatically is not, the Code did not come into force until the 1st July, 2007, some two weeks after the defendant signed the acceptance of the Bank's offer on the 18th June, 2007.

It is true that the general principles referred to in Chap. 1 of the Code were in force on the 18th June, 2007, and the defendant places reliance on these. The defendant contends that the Code was breached by the plaintiff in the following respects:

- Failing to investigate or analyse the CBRE valuations;

- Failing to inform the defendant that it was not intending to scrutinise or otherwise consider the valuations;
- Misinforming or otherwise misleading its own decision making process.
- Informing its credit committee that another bank (AIB) had sanctioned loan approval when it had not;
- Misleading its internal process as to the net worth of the defendant.
- Failing to avoid or disclose conflicts of interest;

The defendant contends that the terms of the Code formed an implied term of the contract between the parties, a breach of which created rights for the defendant. Alternatively, it is submitted that the defendant was entitled to expect and did in fact expect that the terms of the Code would be fully complied with.

Assuming, without deciding, in favour of the defendant for the purpose of this stage of the proceedings that the bank breached the Code as alleged, it does not seem to me that of itself assists the defendant. At p. 2 of the document it is stated: "The Financial Regulator has the power to administer sanctions for a contravention of this Code, under Part IIIC of the Central Bank Act 1942". Entirely lacking is any suggestion that a breach of the Code renders the contract null and void or otherwise exempts a borrower from the liability to repay. The questions of sanctions is referred to in s.33AQ of the Central Bank Act 1942, as amended by s. 10(1) of the Central Bank and Financial Services Authority of Ireland Act 2004. This contains provisions for matters such as caution or reprimand, the payment of a monetary penalty to the financial regulatory authority, disqualification provisions and the like, but again there is no suggestion that a lender is prohibited from seeking repayment from its borrower. The contrast between the approach taken in the Code and the approach of the Consumer Credit Act 1995, is striking. Section 30 of the Act contains mandatory provisions concerning a credit agreement or contract of guarantee entered into by a consumer. Matters such as a requirement for the agreement to be in writing and for a cooling off period are dealt with. Section 38 of the Act deals with the consequences of failing to comply with the requirements of the section and provides that a creditor will not be entitled to enforce a credit agreement or contract of guarantee and that any security given shall not be enforceable. There are no comparable provisions whatever in the Code.

The defendant has argued that the Code forms an implied term of the contract. There are a number of fundamental difficulties with this argument. First of all the question arises by what method is it suggested that a term has been implied. It is not the case that any terms have been implied by statute. There is also the question of what term would be implied if a mechanism for doing so was found. The only implied term that would assist the defendant would be a term that the Bank was obliged to comply in all respects with the Code and that the consequence of non compliance was that the borrower was exempted from the liability to repay the loan. If one introduces the traditional officious bystander into the equation then it would be seen that such a suggestion has little reality. The notion that a bystander asking whether such a term formed part of the agreement would be hushed by the parties jointly and impatiently snapping "of course" seems more than improbable. In summary I can see no basis for suggesting that any alleged breach of the Code exempts the borrower from repaying his loan.

If I could just conclude with this general observation, viewed from the perspective of February 2011, the decision to advance funds in the amount involved seems extraordinary, indeed bordering on the bizarre. The speed with which the decision was taken to offer the loan seems quite remarkable. However that said, it must be stressed that this was not a question of a bank forcing funds on a reluctant, but gullible, borrower. Ever before the plaintiff bank ever entered on the scene, the defendant had embarked on the project and had expended €10m. The fact that the bank with which he had a long term relationship was not prepared to be involved and that it would appear that a number of other banks that were approached were likewise disinterested must have indicated to all concerned that this was not a project free of risk. The defendant decided to proceed and borrowed the money and I can see no arguable basis whatever for suggesting that he can be absolved from liability to repay. Accordingly, I am satisfied that this is one of the rare cases where a plaintiff is entitled to summary judgment.