Neutral Citation: [2014] IEHC 202

THE HIGH COURT

[2012 No. 306 Sp]

BETWEEN

BANK OF SCOTLAND PLC

PLAINTIFF

AND

ANNE HICKEY

DEFENDANT

JUDGMENT of Mr. Justice Ryan delivered on the 11th April, 2014

By special summons dated 31st May, 2012, the plaintiff seeks a declaration that by virtue of an Indenture of Mortgage and Charge dated 27th September, 2001, made between the plaintiff and the defendant, the plaintiff is entitled to and holds a mortgage and charge over all the lands at No. 19 Pairc Mhuire, Saggart, County Dublin (Folio No. 38788F); a declaration that there is due by the defendant the sum of €155,841.73; judgment in respect of this sum; costs and other consequential orders and reliefs.

By a cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 of Ireland and the Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom approved by the High Court of Ireland on the 22nd October, 2010 and approved by the Scottish Court of Session on the 10th December, 2010, all of the assets and liabilities of Bank of Scotland (Ireland) Limited transferred to the plaintiff on the 31st December, 2010 and Bank of Scotland (Ireland) Limited was dissolved without going into liquidation.

As the mortgage in this case pre-dated the commencement of the Land and Conveyancing Law Reform Act 2009, this case is considered on the basis of the law as it stood before that legislation came into effect.

1. Background

By letter dated 21st September, 2001, Bank of Scotland (Ireland) Limited entered into two loan facilities with the defendant, Ms. Hickey, and her then partner, Mr. Declan Porter. A loan of IR£212,000 was for the purchase of No.19 Pairc Mhuire, Saggart Village, Co. Dublin and the other, IR£100,000, was to be used to refurbish the neighbouring property, No. 20 Pairc Mhuire.

The defendant and Mr. Porter were required to provide security in the form of first legal mortgages over three properties, including No.19 Pairc Mhuire. These terms were accepted in writing on the 24th September, 2001. The defendant's then solicitor, Mr. David Walsh, gave an undertaking to the Bank that the defendant would acquire good, marketable title to the property and would put in place a first legal charge over the property in favour of the plaintiff prior to negotiating the loan cheques or proceeds. The defendant completed this action on 27th September, 2001. The schedule to the mortgage described the property as:-

> "ALL THAT AND THOSE the dwelling-house and premises at No. 19 Phairc Mhuire, Saggart, County Dublin comprised in Folio 38788F of the Register of Freeholders County Dublin".

The loan repayment terms were varied by agreement set out in a letter dated 28th November, 2006, which was accepted by the defendant and Mr. Porter on the 30th November, 2006. The loan in respect of the purchase of No. 19 Pairc Mhuire fell into arrears in January, 2009, with the Bank demanding repayment from the defendant and Mr. Porter by letter dated 22nd December, 2009. No repayments have been made since that time and the defendant and Mr. Porter remain indebted to the Bank in the sum of €155,841.73.

The plaintiff has been unable to secure registration of the mortgage on Folio No. 38788F and seeks to rely on the equitable charge which they argue was created in their favour by; (1) the terms of the loan agreement; (2) the provisions of the mortgage which allowed for the creation of security over the property in favour of the Bank; (3) the terms of the undertaking; and, (4) the payment of loan money pursuant to the loan agreement.

The defendant in her replying affidavit dated 8th May, 2013, does not dispute these particulars. She deposes to the following facts as a basis for contending that the plaintiff is not entitled to seek an equitable mortgage and that she has a bona fide defence:-

> (i) Although the money was borrowed to fund the refurbishment of No.20 and the purchase of No.19, nothing was spent on No.19 and only a small amount went to No.20.
>
> (ii) Mr. Porter spent the great bulk of the money for his own purposes exclusively.
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> (iii) The defendant "executed the relevant documents at the behest and direction of Mr Porter."
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> (iv) Mr. Porter and the defendant did not have legal advice and she was not advised by the plaintiff or Mr. Porter to get independent legal advice.
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> (v) Because the funds were drawn down to benefit Mr. Porter solely, any money now due and owing is exclusively owed by Mr. Porter.

The plaintiff's position is that none of the issues raised constitutes a defence to the reliefs sought nor do they justify the matter being adjourned to plenary hearing. The plaintiff argues that as equitable mortgagee of No.19 Pairc Mhuire, in circumstances where the defendant has failed to repay a demand facility, it is entitled to enforce its security without the requirement for a plenary hearing.

2. The Plaintiff's response

In an affidavit sworn on the 5th June, 2013, Ms. Ruth Halpin, Assistant Manager, in the Customer Debt Management department of the plaintiff refers to the defendant's deposition about the use of the funds and deposes that by virtue of clause 6 of the Bank's General Conditions, the defendant and Mr. Porter undertook that they would only use the loan for the purposes stated in the loan agreement. Further, by the letter of variation of the 28th November, 2006, executed by the defendant and Mr. Porter on the 30th November, 2006, the parties agreed that the loan was subject to the conditions set out in the Bank's Standard Conditions which provide at clause 8(1)(a) that the borrower undertakes that the loan will only be used for the purpose for which it was granted.

Ms. Halpin argues that the defendant is in breach of covenant insofar as the loan money was not used for the agreed purpose. This deponent says that any other use of the funds borrowed is inconsistent with the loan agreement under which the defendant and Mr. Porter are jointly and severally liable. In respect of the defendant's claim that she did not have legal advice, Ms. Halpin deposes that Mr. David Walsh was the defendant's solicitor when the loan agreement was entered into. Ms. Hickey irrevocably authorised Mr. Walsh to act on her behalf in giving the Bank an undertaking in connection with the purchase of No. 19 Pairc Mhuire.

3. Plaintiff's Argument and Submissions
The plaintiff submitted that O. 3, r. 15 RSC provides that a claim for "sale, delivery of possession by a mortgagor, or redemption, reconveyance, or delivery of possession by a mortgagee, otherwise than under the Land and Conveyancing Law Reform Act 2009" may be commenced in the High Court by special summons. Because the material facts of this case have not been disputed there is no necessity for a plenary trial.

Mr. David Whelan BL, for the plaintiff, argues that there is an entitlement to an equitable mortgage over the property at No. 19 Pairc Mhuire and referred to Wylie's definition of the three principle methods of creating an equitable mortgage in Ireland; (i) execution of a mortgage by a mortgagor holding an equitable interest in land; (ii) an agreement for a legal mortgage; and (iii) an equitable deposit of the title deed.

In *ACC Bank Plc v. Malocco* [2000] 3 I.R. 191, Laffoy J held at p. 204:-

> "The true position, in my view, is that by the combined operation of the loan agreement, under which the defendant agreed to give a first charge on the property at Clanbrassil Street to the plaintiff, and the solicitors' undertaking, including the authority given by the defendant embodied in it, on the 9th July, 1991, an equitable mortgage over the interest of the defendant in the property at Clanbrassil Street was created and the money payable to the plaintiff under the loan agreement became secured on the defendant's interest in that property."

Counsel argued that the loan agreement, the solicitors undertaking, the mortgage and payment of the loan money all combine to the effect that an equitable mortgage was created in favour of the plaintiff over the property. Pursuant to s. 62(2) of the Registration of Title Act 1964, a full legal mortgage over registered land will only be created where a charge is executed and registered. Section 62(2) provides:-

> "There shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form (or an instrument in such other form as may appear to the Registrar to be sufficient to charge the land, provided that such instrument shall expressly charge or reserve out of the land the payment of the money secured) but, until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land."

In *ICC plc v. M&J Gleeson & Co. Ltd & Anor.* (Unreported, High Court, 18th February 1992), Carroll J concluded that the payment of money on foot of a loan agreement was sufficient to create an equitable charge which enjoyed priority over registered judgment mortgages:-

> "In my opinion the payment of the loan moneys pursuant to the loan agreement created an equitable charge which predated the registration of the judgment mortgages. The execution of the instrument of charge did not affect the existence of the equitable charge. When the judgment mortgages were registered they took subject to that equitable charge as it would be contrary to s. 71(4) if they were to have priority."

Mr. Whelan submitted that the defendant's claim of undue influence along the lines of Royal *Bank of Scotland v. Etridge (No. 2)* [2001] 4 All E.R. 449, in no way comes close to meeting the *Etridge (No. 2)* criteria. In *ACC Bank Plc v. McEllin* [2013] IEHC 454, Birmingham J outlined the distinction between the *Etridge (No. 2)* authorities and cases where co-borrowers acted together in acquiring and using loan money at para. 30:-

> "This was a question of individuals coming together, putting a proposal together and borrowing funds to bring the proposal forward. If this was a situation of elderly parents becoming guarantors for an offspring's commercial debts arising from a business enterprise with which they were not involved, the situation might be very different…
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> [L]oans were advanced at the request of the three borrowers, the loans were for the purposes of the three borrowers and to advance the interests of the three borrowers. In these circumstances, I cannot see any arguable basis for suggesting that the second and third named defendants are absolved from the obligation to repay the loans that they had borrowed, because they had chosen to be represented by the same solicitor as was representing their son."

The defendant described herself as a "company director" on the loan documentation and in the facility letter of 21st September, 2001, she confirmed that she was acting in the course of her business or trade. Therefore the loans were advanced to the defendant for a specific purpose to advance her interests, as was the situation with the defendants in *McEllin*.

It is submitted that the decision of Clarke J in *Ulster Bank Limited v. Roche & Anor.* [2012] 1 I.R. 765 has no direct application to the facts of this case because of the commerical element of the defendant's loan application. Clarke J stated at p. 781:-

> "…I am satisfied that the general principle, which underlies *Royal Bank of Scotland plc v. Etridge (No. 2)* [2001] UKHL 44, is to the effect that a bank is placed on enquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee."

While the defendant has not suggested that she did not understand the content of the loan agreement documents, Clarke J in *Roche*, following Kelly J in *Irish Bank Resolution Corporation Limited v. Quinn & Anor.* [2011] IEHC 470, held that a person who signs a document which may have legal effect and does so without reading it or understanding it, "must accept the consequences of having signed a commercially binding agreement in those circumstances" and will, prima facie, be bound by what they have signed.

4. Defendant's Argument and Submissions
Mr. Richard Downey BL, for the defendant, submitted that the defendant parted company with Mr. Porter in 2009, and such was the relationship between them, she required a High Court order preventing him from watching and besetting the family home. He was excluded from Skeagh House in Kildare at that time but since then there has been a reverse in the situation and now Ms. Hickey resides at No. 19 Pairc Mhuire and Mr. Porter at Skeagh House.

Counsel submitted that Mr. Porter was the person in control - he made the defendant sign the documents but he was the beneficiary of the money. The defendant agrees that she signed the documentation but says she did so on behalf of Mr. Porter She did not respond when the plaintiff's exhibited the documentation with her signature attested by solicitor and with the undertaking given on her behalf but says that was because she did not have legal advice.

Mr. Downey referred to *Ulster Bank v. Roche & Buttimer* [2012] IEHC 166 in which Clarke J applied the principles enunciated in *Royal Bank of Scotland v. Etridge (No. 2)* [2001] UKHL 44, which may be summarised as follows so far as is relevant to this case; in a situation where a wife or cohabite offers to stand surety using her interest in the family home for her husband or partner's indebtedness, or that of his company, her solicitor has a duty to explain the consequences and potential risks associated with the transaction but is not required to be satisfied that she is free from undue influence. In that kind of transaction the lender is placed on enquiry and should ensure the guarantor receives independent legal advice and confirm with her that the situation has been explained in full.

Counsel submitted that this test put an onus on the plaintiff and the issue of constructive notice arises. Mr. Downey submitted that from Roche, the following can be deduced; A bank is placed on enquiry where it is aware of facts that suggest, or ought to suggest, that there may be a non-commercial element to a guarantee. There was no commercial relationship between the defendant and Mr. Porter in this case so therefore the Bank was placed on enquiry;

> 1) The general principle that a bank should be on enquiry goes far enough to cover where the bank was aware of the existence of a personal relationship. It is obvious from the documentation in this case that the plaintiff was aware of a personal relationship between Ms. Hickey and Mr. Porter;
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> 2) Where there exists a non-commercial setting and a personal relationship between the parties, a bank is on enquiry to ascertain whether there is any vulnerability in the person proffering or providing the security.

In *Roche*, Clarke J was satisfied that the bank was on enquiry and referred to a level of steps a bank must take in those circumstances. Applying *Etridge (No. 2),* he found that the bank took no action at all and, for that reason, their claim failed in its entirety against the person who provided the security.

Counsel submitted that in this case the plaintiff took no steps in relation to Ms. Hickey. They were aware that she was in a personal relationship with Mr. Porter and that it was a non-commercial transaction. The defendant is described in the plaintiff's documentation as a "company director" and while Mr. Whelan inferred that this meant she had some business knowledge, Mr. Downey argued that that is not sufficient – the relationship between the defendant and Mr. Porter was personal and therefore non-commercial.

Counsel submitted that there is a conflict in relation to the facts and that if the court is faced with a difficult legal question at this stage of proceedings, it is acceptable to refer it to plenary hearing as outlined in *Danske Bank (t/a National Irish Bank) v. Durkan New Homes & Ors* [2010] IESC 22.

5. Discussion / Analysis
The issue before the Court is whether the defendant has an arguable defence. The threshold is low: *Aer Rianta v. Ryanair* [2001] 4 I.R. 607. The question is whether the defendant might have a defence assuming that the facts she alleges were to be found in her favour. There is some room for a test of credibility depending on the circumstances of the case but the principle is that if there is any basis of a credible defence, the case must go to plenary hearing. In *Aer Rianta*, McGuinness J identified the issue "whether the proposed defence is so far fetched or so self contradictory as not to be credible." Hardiman J asked at p. 623:

> "…[I]s 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 Court took the nature and context of the dispute into account. Hardiman J referred to the facts of the cases in the authorities cited and observed that in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75:-

> "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."

The Supreme Court endorsed two tests from the English jurisprudence that the Court had previously adopted in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In the latter case, Murphy J, delivering the judgment of the Court, said:

> "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 bona fides of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. v. Ralph* (1958) 95 I.L.T.R. 70).
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> "In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 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:-
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> > '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 *bona fide* defence.'
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> 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 matter as follows:-
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> '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, Court of Appeal (Civil Division), Transcript No. 699 of 1990 '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.'"

It appears therefore that while the circumstances do not dictate the nature of the test by which the defence is judged, they influence the application of the criteria. In *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1 McKechnie J summarised the Courts' approach to summary judgment in twelve propositions, of which the following are particularly applicable in this case:-

> "(iii) the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
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> (xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;
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> (xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

The Court's task is not simply to examine the affidavits and exhibits to discover whether there is a conflict of fact on a decisive point. Neither is it to weigh conflicting depositions in the balance to decide which is more probable. It has to apply the above credibility test to the proposed defence. That is what the courts did in *First National Commercial Bank* and *Aer Rianta*. In *Banque de Paris v. de Naray* Lord Ackner said:

> "It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of the defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or *bona fide* defence."

It is not a defence for Ms. Hickey to show that most of the money went on purposes other than those for which it was borrowed. Applying the loans to different purposes was in breach of covenant but that is not the essential point for this purpose, which is that a defendant cannot escape liability by using the money for a different purpose than that specified in the loan agreement or by consenting to such diversion. Pursuant to Clause 25.1 of the Bank's General Conditions, the defendant and Mr. Porter agreed to be jointly and severally referred to as "the Borrower". It therefore follows that they are jointly and severally liable for the outstanding liabilities now owing to the plaintiff. It does not matter whether it was Ms. Hickey or Mr. Porter who spent the money on the extraneous purposes, the liability to the lender remains for each borrower.

Ms. Hickey says that she "executed the relevant documents at the behest and direction of Mr. Porter" which counsel, Mr. Downey, interprets as a claim of undue influence or domination of Ms. Hickey by Mr. Porter. This is the only evidence put forward to establish that this defendant was not in control of her own destiny in taking out these loans. It is hopelessly inadequate as evidence and goes nowhere near establishing the case. As the plaintiff submitted, the defendant has provided no proof or detail of any fact or circumstance to suggest that Mr. Porter exerted undue influence over her. Moreover, she was at all times represented by a solicitor. No information is provided, no example is given of how the alleged coercion was exercised and it is impossible to deduce from the bald and brief statement the overbearing of will that would be necessary to avoid liability. Taking the statement entirely at face value, it does not amount to coercion or undue influence.

It is clear that the defendant did have legal representation in the execution of the loan and mortgage documents. Any question of seeking separate advice was a matter for the defendant and not for the plaintiff unless there were some circumstances that brought into operation the principles established in *Etridge (No. 2).* Those principles are briefly set out above and acknowledge that a lender may be under a duty to satisfy itself as to the independent decision making capacity of one borrower in view of the relationship that exists with another. There is however nothing in the circumstances of this case that would attract the obligation recognised in *Etridge (No. 2).* The loan was for a commercial purpose. This was a case of joint borrowing by a person describing herself as a company director and confirming that she was acting in the course of her business or trade.

The decision of Kelly J in *Irish Bank Resolution Corporation Limited v. Quinn & Anor.* [2011] IEHC 470 as outlined above also applies. A person who signs a potentially legally effective document without properly considering it or understanding it, will be *prima facie* bound to accept any consequences which may later arise.

6. Conclusion

In the circumstances, the defendant has not established the existence or potential existence of any defence to the plaintiff's claim. On this basis I grant the reliefs sought by the plaintiffs.