

THE HIGH COURT

[2013 No. 3244 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

LIAM FAHEY AND FINOLA FAHEY

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of April, 2016

1. The plaintiff seeks summary judgment against the defendants for €2,771,745.27.
2. The plaintiff claims that by letter of sanction dated the 2nd December, 2008 the Bank agreed to provide two relevant loan facilities to the defendants. It is said that the letter of sanction was executed by the defendants on the 27th February, 2009.
3. The first facility, the subject of these proceedings was in the amount of €2,420,000.00 the purpose of which was to finance the purchase of the "Briar Rose Bar and Restaurant", Douglas, Cork. The loan was repayable over 25 years by consecutive repayments of €13,775.00 per month commencing on the 2nd January, 2009. Any residual balance was repayable at the end of the period. The statement of account in respect of this loan facility is set out in loan account number 93608112440142 operated by the defendants at the plaintiff's Business Banking Department, 66 South Mall, Cork.
4. The next relevant facility in the letter of sanction was in the amount of €1,100,000.00 the purpose of which was to finance the purchase of a 9 acre site with dwelling house at Inchydoney, Co. Cork costing €1,000,000.00 plus stamp duty and costs. A statement in respect of this loan account number 93608112440225 operated by the defendants at the plaintiff's Business Banking Department at 66 South Mall, Cork was exhibited. Mr. Richard Stafford, a bank official employed by the plaintiff, submitted an affidavit as manager of the plaintiff's Financial Solutions Group based at Matthew House, Fr. Matthew Street, Cork. He made the affidavit on the plaintiff's behalf and upon their instructions and did so from facts within his own knowledge "and from inspection of the plaintiff's books and records pertaining to the defendants."
5. At paragraph 8 of the affidavit he states that the defendants are in default of their repayment obligations in respect of each of the loan accounts and that the last payment made by them in respect of either account was the 6th January, 2012. He further deposes that by separate letters of the 29th August, 2013 the plaintiff, through its solicitors, demanded repayment of the aggregate sum of €3,431,995.27 from each of the defendants separately which they failed to discharge.
6. The letters of demand are in identical terms. They were issued by the solicitors on behalf of the Bank and state as follows:-

"We confirm that we act as solicitors on behalf of Allied Irish Banks Plc who have instructed us to collect from you the sum of €3,431,995.27 due on foot of the above accounts as at the 27th August, 2013.

Kindly note that if the above sums due are not discharged to this office immediately, our instructions are to issue proceedings against you without further notice..."

The letter of sanction offering the loan facilities specifically stated that the offer was subject to the terms and conditions set out in the letter but also subject to the Bank's General Terms and Conditions Governing Business Lending, a current copy of which was enclosed.

The letter adds in bold type **"these are legal documents and should be read very carefully"**.
7. The relevant terms of the "General Terms and Conditions Governing Business Lending" (June, 2008) relied upon are:-

"Section 3

Loan Account...

Repayable on Demand

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 anytime, 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...

Events of Default

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 on the occurrence of any of the following events:

(i) On the failure by the Borrower to make any repayment of principal or interest on the date it is due..."

8. The application for judgment in default of defence was initially resisted on the basis of an affidavit sworn by Mr. Liam Fahey on 19th November, 2014. The merits of the plaintiff's claim are not addressed in any detail. The following assertions are made:

- (1) It is said that the contents of Mr. Stafford's affidavit are hearsay and not admissible in evidence and that it does not explain his authorisation to swear an affidavit on behalf of the plaintiff.
- (2) The plaintiff is put on full proof of any alleged agreement of loan or debt.
- (3) It is said that copies of documents are inadmissible in evidence.
- (4) It is said that the plaintiff has not proved any letter of demand and that any letter sent on the 29th August, 2013 did not comply with the terms of any alleged agreement and is not a letter of demand within the meaning of any alleged agreement. In the circumstances therefore it is averred that "any debt owed to the plaintiff may not be properly due as alleged".
- (5) It is claimed that Mr. Fahey has a bona fide defence to the plaintiff's claim. However, he declines to set that defence out. He says that he is prejudiced and embarrassed "in more fully setting out my defence to the within claim without an opportunity to seek discovery of the records in the possession of the defendant". He states that his previous solicitors wrote to the plaintiff on the 14th November, 2013 requesting information and he awaited a reply. In the circumstances he claimed that it might be necessary to file a further affidavit once the relevant information was provided. No details of any proposed defence on the merits were advanced.
- (6) He says that he is advised and believes that he "may be entitled to rely on the defence of contributory negligence on the part of the plaintiff and discovery is necessary to establish his defence more fully". There is no indication as to any possible basis for the alleged contributory negligence.

9. At this time no affidavit had been filed on behalf of Mrs. Finola Fahey. A separate firm of solicitors came on record for Mrs. Fahey on the 4th June, 2015. An affidavit was filed on her behalf on the 12th October, 2015. This affidavit purports to place the Bank on "strict proof" of any alleged loan agreement including strict compliance with the provisions of the Bankers Books Evidence Acts 1879 (as amended). The following points are made:-

- (a) She alleges a failure to comply with the provisions of the Bankers Books Evidence Acts (as amended).
- (b) She states that the signature on the execution of the letter of sanction "appears on a "blank" page". She requires sight of the full original documentation. She claims that she does not recall agreeing to a loan of this nature "nor would have I had any reason to borrow that kind of money in my own name".
- (c) She claims she has no business interest of her own "in respect of the alleged loan the subject matter of these proceedings" and that she is a "consumer" within the meaning of the Consumer Credit Act 1995 (as amended).
- (d) She states that it was a provision of the plaintiff's general terms and conditions for mortgage loans that the plaintiff could not demand repayment of the alleged loan without giving prior "due notice" to the Borrowers of any alleged breach and without complying with all statutory requirements. In that regard Mrs. Fahey claims that she was not given any prior "due notice" as required nor did the plaintiff comply with the statutory requirements including the provisions of the Consumer Credit Act 1995 and the Consumer Protection Code for issuing the demand of the 29th August, 2013. She claims that she "may be able to rely on the provisions of s.44 of the Central Bank (Supervision and Enforcement) Act 2013 in relation to the plaintiff's failure to comply with its obligations under the Consumer Credit Act 1995 and the Consumer Protection Code.
- (e) Mrs. Fahey claims therefore that she is wrongfully joined in these proceedings and that both defendants have a bona fide defence in the circumstances.

Mrs. Fahey does not offer any detailed defence to the merits of the claim made.

10. Both of the defendants' affidavits are noticeable for their failure to engage with the central facts outlined in the affidavit of Mr. Stafford. They do not deny that they received the monies advanced under the two loan facilities. They do not deny that they accepted the loan facility agreement by affixing their signatures to the letter of sanction. They do not deny that they are in default of the terms of the agreement or that they have failed to repay the money due.

11. In a further affidavit, Ms. Mary Whelan, a bank official, states that she is an employee of the plaintiff's Financial Solutions Group and makes the affidavit from the inspection of the plaintiff's books and records pertaining to the defendants. She states at paragraph 4 that the first named defendant wrote to the plaintiff's solicitors seeking additional particulars in respect of the claim. Replies to these particulars, together with relevant documentation, were delivered to the first and second named defendants' solicitors on the 15th June, 2015. In addition the first defendant made a request under the Data Protection Acts in respect of his accounts with the plaintiff. Documentation the subject matter of that request was collected from the plaintiff's branch at Douglas Road, Cork on the 9th March, 2015. Full and up to date statements of account were furnished in those particulars and exhibited in Ms. Whelan's affidavit. A reduction was made in respect of the liability on account number 93608112440225 in the amount of €582,385.00 on the 5th March, 2015 which represented the proceeds of sale of property located at Youghal, Inchydoney Road, Clonakilty, Co. Cork which had been held as security by the bank.

The Law

12. The legal principles governing an application for summary judgment are now well settled. In *Harrisrange Limited v Duncan* [2003] 4 I.R.1 McKechnie J. summarised them as follows:-

- "(i) The power to grant summary judgment should be exercised with discernible caution;
- (ii) In deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
- (iii) In so doing the court should assess not only the defendants' 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;

(iv) Where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) Where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) Where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) The test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?" – which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) The test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) Leave to defend should be granted unless it is very clear that there is no defence;

(x) Leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(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;

(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."

13. More recently, Clarke J. delivering the judgment of the Supreme Court in *Irish Bank Resolution Corporation (In Special Liquidation) v McCaughey* [2014] IESC 44 (Laffoy and Dunne J.J. concurring) reaffirmed that the fundamental question to be posed on such an application is whether it was "very clear" that the defendant has no case or there is no issue to be tried or only issues which are simple and easily determined and whether the defendant's affidavits disclose even an arguable defence.

14. It was emphasised that the issue of credibility in this context has a somewhat narrow meaning. Clarke J. stated:-

"5.4 It is important, therefore, to reemphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta* [2001] 4 I.R. 607, be clear that the defendant has no defence. If the issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are statable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context and subject to the inherent limitations on the summary judgment jurisdiction identified in *McGrath v O'Driscoll* [2007] ILRM 203, the Court may come to a final resolution of such issues. That the Court is not obliged to resolve such issues is also clear from *Danske Bank v Durkan New Homes* [2010] IESC 22.

5.5 Insofar as facts are put forward, then, subject to a very narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta*. It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

Proposed Grounds of Defence - Decision

15. The technical points raised against the plaintiff's claim are without substance. The plaintiff has established a prima facie entitlement to judgment on the basis of the evidence set out above. However, the defendants have proposed a number of grounds of intended defence.

16. The evidence establishes that letters of demand issued in respect of the monies said to be due and owing. It is not denied that these letters were received but it is said their issuance does not comply with the terms of the alleged loan agreement. I am satisfied that the bank has fully complied with its duty under the demand process set out in the terms of the loan agreements quoted above. I am satisfied that Mr. Stafford and Ms. Whelan had full legal authority to make the affidavits submitted as to the facts set out therein, including the bank records and other records relating to the loan facilities granted (including the letters of demand).

17. Mrs. Fahey attempts to imply that her signature on the acceptance of the terms of the loan facilities was not proven as part of the agreement. She implies that she is not bound by the terms of the loan agreement and that she can avail of the "non est factum" defence. The matter is not directly addressed. She claims she does not recall agreeing to a loan of this nature "nor would I have any reason to borrow that kind of money in my own name". She claims she has no business interest of her own in respect of the alleged loan and thereby implies that she would not have been a party to it. She does not disavow her participation in the loan process or the signing of the document and no positive factual assertion is made seeking to establish this defence in any meaningful way.

18. It is well settled that in seeking to raise the defence of non est factum, a defendant must demonstrate that there is a fair or reasonable probability based on credible and cogent evidence which extends beyond a mere assertion that there was a radical or fundamental difference between what he/she signed and what he/she thought they were signing. There must be a mistake as to the general character of the document as opposed to its legal effect. There must be a lack of negligence in that he/she must take all reasonable precautions in the circumstances to ascertain what the document was. The defence is not available to those who sign a document without enquiring at least as to its general effect. In this case Mrs. Fahey does not even assert that she did not sign the document but simply maintains that her signature appears on a "blank" page and that she does not recall agreeing to a loan of this nature. There is a complete absence of credible cogent evidence to support the contention that the document was not signed by

Mrs. Fahey or had a character and effect which was quite different to that which she believed it to be, if she did sign it. (*Saunders v. Anglia Building Society* [1971] AC 1004; *Tedcastle, McCormack and Company Ltd. v. McCrystal* (unreported High Court 15th March, 1999 per Morris J.); *IBRC v. Quinn* [2011] IEHC 470 per Kelly J.; *Allied Irish Banks Plc. v. Yates* (unreported, High Court 5th February, 2016, Noonan J.)). I am not satisfied that the defendants have advanced any facts which suggest a credible basis for believing that evidence is, or may be forthcoming to establish that Mrs. Fahey is not a party to the loan facility agreement and did not understand its terms and conditions. Averments in her affidavit implying or hinting that she has a defence of non est factum are based on mere assertions unsupported by any further evidence and are insufficient to give rise to a bona fide or arguable defence.

19. Mr. Fahey maintains that he "may be entitled to rely on the defence of contributory negligence on the part of the plaintiff and discovery is necessary to establish his defence more fully". Though a defence of contributory negligence may be raised against a lender, as set out in *KBC Bank Ireland Plc. v BCM Hanby Wallace* [2013] IESC 32, in very limited circumstances, no evidence has been advanced to support any such defence beyond the speculative assertion set out in Mr. Fahey's affidavit. This does not provide the defendant with an arguable or credible defence.

20. It is suggested by Mrs. Fahey that, if she was a party to the loan agreement, she was a consumer within the meaning of section 2(1) of the Consumer Credit Act 1995 as amended by schedule 3 of Part 12 of the Central Bank and Financial Services Authority of Ireland Act 2004. It is claimed that because the protective provisions of that Act were not complied with by the plaintiff, the loans were not enforceable against her. A consumer is a "natural person" acting outside her business (which includes her trade or profession). The question of whether a party to a loan agreement is a "consumer" is determined by the position of the person entering the loan agreement, having regard to its nature and aims (per O'Malley J. in *Allied Irish Bank Plc. v. Fahy* [2014] IEHC 244 para. 65; per Kelly J. in *Allied Irish Bank Plc. v. Higgins & others* [2010] IEHC 219 applying *Benincasa v. Dentalkit* (case C-269/95 [1997] ECR I-3767)). It is clear that the purpose of the loan agreements in this case is commercial. There is nothing to suggest any other purpose. Indeed, having asserted that she had no reason to seek loans in relation to "that kind of money" Mrs. Fahey then claims to be a "consumer" in that she "had no business interest of her own in respect of the alleged loan" and that she is not properly joined as a party to these proceedings. It is clear that the loans were subject to "General Terms and Conditions Governing Business Lending". It is also clear that the security set out in the loan agreement is addressed to both parties and involves securing property by way of "legal charges" from both defendants over three separate substantial property holdings of which they are joint owners. There is nothing advanced by either defendant to suggest that the loans (even if acknowledged by the defendants) were for anything other than a commercial purpose. There is no credible or arguable defence open to the defendants, and in particular, Mrs. Fahey arising from her assertion that she is or was a "consumer" in her dealings with the plaintiff.

21. I am not satisfied that the second defendant has advanced any arguable factual basis upon which to construct a defence that as a consumer, the bank has failed in its obligations to her under the Consumer Protection Code of the Central Bank as a result of which she is entitled to some remedy such as rescission of the contract. Furthermore, no specific possible or potential factual allegation has been set out on affidavit identifying a precise basis upon which any possible defence under section 44 of the Central Bank (Supervision and Enforcement) Act 2013 arises. This states that a failure by a regulated financial service provider to comply with any obligation under the Financial Services Legislation is actionable by a customer of the bank who suffers loss or damage as a result of such failure. Mrs. Fahey suggests a defence may arise under the section but beyond that assertion provides no factual or legal basis upon which such a conclusion may be reached.

22. I am not persuaded by any of the submissions made in respect of the alleged hearsay or failure to comply with provisions of the Bankers' Books Evidence Act 1879 (as amended) arising from the affidavits submitted on behalf of the bank. It is clear that a prima facie case has been made out that a commercial loan facility was offered and accepted by both defendants and that the money was drawn down for the purposes set out in the loan facility. Letters of demand were issued by solicitors acting on behalf of the bank. The money was not repaid. The course of dealing with the bank is not denied and the defendants failed in their responding affidavits to engage with the central elements of the bank's claim. I am satisfied that the bank has established on the evidence adduced, including that advanced using the provisions of the Bankers' Books Evidence Act 1879 (as amended), the state of the loan accounts in respect of which it makes its claim. The liability of the defendants arising on foot of the loan agreement signed by each is not challenged by direct evidence or by denying the central factual events as to how and why the agreement was made (*Ulster Bank Ireland Ltd., v. O'Brien and Anor* [2015] IESC 96). Since the defendants have failed to raise an arguable or credible defence within the meaning of the established principles, the plaintiff is entitled to summary judgment.

23. I am therefore satisfied to grant summary judgment in the amount claimed.