

**THE HIGH COURT**

**COMMERCIAL**

**[2012 No. 1665 S]**

**[2012 No. 139 COM]**

**BETWEEN**

**ACC BANK PLC.**

**PLAINTIFF**

**AND**

**MIKE O'DWYER MOTORS LIMITED, MICHAEL O'DWYER AND CAROLINE O'DWYER**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 12th day of February, 2013**

1. The plaintiff seeks summary judgment in the sum of €1,959,678.79 and interest thereon from 1st May, 2012, against Mike O'Dwyer Motors Ltd., the first named defendant. It also seeks judgment against Michael O'Dwyer ("Mr. O'Dwyer") and Caroline O'Dwyer ("Mrs. O'Dwyer") pursuant to contracts of guarantee and indemnity in respect of the debts of the Company on a summary basis in the sum of €1,945,273.87 and interest thereon from 1st May, 2012.

2. At the hearing of the application for summary judgment, the plaintiff ("ACC") had filed affidavits and legal submissions and was represented by solicitor and counsel. Similarly, the first named defendant ("the Company") and Mr. O'Dwyer were jointly represented by solicitor and counsel and had filed affidavits and legal submissions. Mrs. O'Dwyer initially had also been represented by the same solicitor and counsel, but prior to the date of the hearing had discharged same and represented herself. She also had filed an affidavit in the proceedings.

**Background to Claim**

3. The Company is a motor trading company and operates from premises in Limerick. Mr. and Mrs. O'Dwyer are the directors and shareholders of the Company. ACC's claim in the proceedings arises out of four facilities granted by ACC to the Company as follows:

28th July 2003 T802713-2003 : €751,875.00

28th July 2003 T8022714-2003 : €751,875.00

21st December 2005 10035351-2006 : €320,000.00

10th December 2007 10045409-2007 : €106,000.00

4. The claim in the summary summons is made pursuant to a letter of demand dated 2nd November, 2011, in which it was contended that each of the said facilities were then in arrears; were repayable on demand and repayment was demanded with specified redemption figures which, as of that date, aggregated €1,925,463.25. Payment was sought within seven days. No payment was made pursuant to the letter of demand and the summons issued on 3rd May, 2012.

5. In the intervening period, letters of demand had been made on Mr. and Mrs. O'Dwyer as guarantors and indemnifiers.

6. An order was made on 30th July, 2012, admitting the proceedings to the Commercial List and giving directions in respect of the application for summary judgment. Several affidavits were sworn on behalf of the plaintiff and the defendants. One matter of some relevance is that ACC delivered and filed an affidavit from a Mr. Seamus Cleary who was an employee of the plaintiff and is one of the two persons with whom Mr. O'Dwyer states he dealt in relation to the first two facilities the subject matter of these proceedings. That affidavit was not before me at the hearing of the application for summary judgment. It was referred to in subsequent affidavits, and upon enquiry I was told that following the delivery of same, a notice to cross-examine was served in respect of Mr. Cleary and that the plaintiff was not now relying upon the affidavit of Mr. Cleary in the application for summary judgment.

**Summary Judgment**

7. There is no dispute between the parties as to the principles which must be applied by the Court in determining ACC's application for summary judgment against each of the defendants. The applicable principles are those set out by the Supreme Court *per* Denham J. in *Danske Bank a/s trading as National Irish Bank v. Durcan New Homes & Ors.* [2010] IESC 22, and certain earlier decisions including those referred to therein and *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1.

8. In *Danske Bank*, Denham J. at paragraphs 13 to 16 of her judgment, summarised the applicable law as follows:

"13. Order 37r.7 of the Rules of the Superior Courts, 1986 provides:-

'Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just'.

14. Several cases were opened before the Court which have addressed this jurisdiction. These included *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-

'Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had "a real or bona fide defence", whether based on fact or on law, he was bound to afford them an opportunity of having the issued tried in the appropriate manner'.

15. In *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded at p.623:-

'In my view, the fundamental questions to be posed on an application such as this remain: 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?'

16. In *McGrath v. O'Driscoll* [2007] 1 ILRM 203, Clarke J. described the law as follows, at p.210:-

'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'."

9. In *Danske Bank v. Durcan*, the primary question on the appeal was whether the appellants had satisfied the Court that they had an arguable defence in relation to the construction of certain contracts upon which the plaintiff's application for summary judgment was grounded.

10. In the present case, the defences contended for on behalf of the Company and also Mr. and Mrs. O'Dwyer rely on facts which appear to be in dispute. In considering whether the defendants have raised an arguable defence in such circumstances, the Court must also have regard to whether the evidence upon which the defendants rely is mere assertion or whether there is other evidence, particularly evidence contemporaneous to the facts in dispute which supports the credibility of the assertions made by or on behalf of the defendant. See *inter alia Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, per McGuinness J at p.614 and per Hardiman J at p.622 and *Harrisgrange Ltd. v Duncan* [2003] 4 I.R. 1 at pp. 7, 8.

11. In this application, the only issue before the Court is whether the plaintiff is entitled to summary judgment against each of the three defendants or whether one or more of the defendants has raised an arguable defence in the sense outlined above such that the Court should exercise its discretion to remit the matter to plenary hearing and allow the issues in dispute be tried upon a full plenary hearing.

## Conclusion

12. On the affidavit evidence and submissions made to me, I have concluded that I should not give judgment in favour of the plaintiff for the amount sought on this summary application as the Company and Mr. and Mrs. O'Dwyer as guarantors/indemnifiers, on the facts deposed and having regard to the documents exhibited and legal submissions, have raised an arguable defence which entitles them to have the issues in dispute between ACC and each of them tried and determined in a plenary hearing. Having reached that conclusion, the order to be made will be that the matter is remitted for plenary hearing and I will give the parties an opportunity of addressing me in relation to the directions in respect of pleadings and otherwise.

13. I wish to emphasise that the decision I have reached does not involve the present determination of any issue between the parties. As those issues will have to be determined at a future date, I propose only shortly setting out the reasons for which I have formed the view on the affidavits and exhibits thereto and submissions made to me that the defendants have met the threshold of an arguable defence which entitles them to have the claim against them determined in a full plenary hearing.

14. ACC's claim is that it is entitled to judgment in the amount sought in accordance with the express written contractual terms in the facility letters between it and the Company, as the person to whom the loans were made, and as between it and each of Mr. and Mrs. O'Dwyer pursuant to written contracts of guarantee and indemnity. It relies upon the fact that each of the facilities was in arrears on the date of the demand letter, 2nd November, 2011. The arrears specified in the letter of demand do not make clear whether they are alleged arrears of interest alone or of interest and principal, but having regard to the explanations given in the affidavits and statements of account referred to therein, it appears probable that the amount of the arrears in 2011 included alleged arrears of both principal and interest. For the purposes of this summary application, I am making that assumption.

15. The primary defence sought to be made out on behalf of the Company is that notwithstanding the terms of the written contracts between ACC and the Company, ACC is estopped from seeking repayment of principal prior to sale of the property purchased with the monies advanced pursuant to the two 2003 facilities. It is further contended that ACC is estopped from seeking repayment of principal on the third facility as it was advanced on the same terms, and the fourth facility which was, in reality, a refund of principal repaid by the Company on facilities numbers one and two in the years 2006 and 2007.

16. In reliance upon similar facts, counsel for the Company and Mr. O'Dwyer submitted that each has a counterclaim against the plaintiff for damages for negligent misrepresentation.

17. It is common case that the first two facilities of the same date in 2003 were treated as two separate facilities by reason only of two differing interest provisions. Collectively, it was a facility of €1.5m sought and agreed to for the purpose of the purchase of premises then being rented by the Company from which it operated its motor business. It appears to be common case that the employees of ACC with whom Mr. O'Dwyer dealt in connection with those facilities were Mr. Seamus Cleary and Mr. Ray Nicholas. Affidavits from neither were in evidence before me at the hearing of the application for summary judgment. As previously explained, an affidavit had been delivered from Mr. Cleary but was withdrawn after the service of a notice to cross-examine.

18. Mr. O'Dwyer, in the affidavit sworn by him in August 2012, avers that since 2002, the Company had been renting premises at the Dock Road in Limerick and that the revenues of the Company were just about sufficient to cover the rent on the premises. Further, he avers that the premises were for sale at that time. He states that the rent being paid approximated to interest payments on an interest only commercial mortgage, and on that basis he set about seeking finance to purchase the premises on the basis of an

interest only commercial mortgage. He failed to obtain such financing from Bank of Ireland and Ulster Bank and then approached ACC through Mr. Cleary and Mr. Nicholas whom he had come to know. He avers at paragraphs 6 to 8 of that affidavit:

"6. I say that I met with Mr. Seamus Cleary and a Mr. Ray Nicholas, employees of the Plaintiff, on various dates with respect to a potential interest only loan. I say that I was somewhat surprised, given the reaction of Bank of Ireland and Ulster Bank, when the Plaintiff offered to lend the First Named defendant money, on the terms sought. I say that I made it clear that the First Named Defendant did not have the ability to pay back the principal portion of the loans except from the eventual sale of the property. In particular, I made it very clear, at all times, that the First Named Defendant would not be in a position to service the loans other than on an interest only basis. I expressed concern and sought clarification that the amounts being offered to the First Named Defendant were in fact being offered on the terms I had specifically sought, that is, interest only with the principal to be cleared when the property was sold, as this was the only viable option for the First Named Defendant and the only repayment plan that it could realistically afford to meet.

7. I say that the Plaintiff, its servants or agents, stated that this was not a problem and that that repayments on the loans would always be on an interest only basis until the property was sold. I say that I was somewhat concerned as the representations made by the Plaintiff, its servants or agent, appeared not to accord with the written terms produced, particularly when the Plaintiff sought this Deponent and the Third Named Defendant, as directors of the First Named Defendant, to act as guarantors on the loans. I raised this with the Plaintiff, its servants or agents, and was told not to worry that it would all be looked after and that the loans were interest only until such time as the property was sold. I say that the First Named Defendant, the Third Named Defendant and this Deponent relied on this representation and agreed to the loans and the guarantees on that basis. Had this Deponent known that the Plaintiff, its servants or agents, would not abide by the representations made or that payments of principal would be sought prior to the sale of the property, then the First Named Defendant would not have proceeded to draw down the loans and this Deponent and the Third Named Defendant would certainly not have agreed to guarantee same.

8. I say that, based on car sales, the First Named Defendant would not have been able to service the loans of the size granted, other than on the terms at all times sought by this Deponent. I further say that this Deponent and the Third Named Defendant would not have put my business or our family's financial future or security in jeopardy by agreeing to accept or guarantee loans on terms other than those sought (that is, other than interest only with the principal to be repaid on the sale of the property) as there was no realistic prospect of the First Named Defendant being able to comply with anything else and this was at all times known to and accepted by the Plaintiff, its servants or agents."

19. The letters of loan sanction and agreement of 28th July, 2003, are in similar terms, save in respect of interest. They state that the term of the loan facility is twenty years. Under repayment, it is provided:

"Repayment

The Loan Facility is repayable on demand. Until demand is made or the Loan Facility (including both Principal and Interest) is repaid in full, repayments by the Borrower of Principal and Interest shall be payable by monthly instalment by direct debit on the first day of each month (the "Due Date"). Commencing on the first day of the first month following loan drawdown and on the first day of each month thereafter for a period of **12** months in total, repayments of **Interest Only** will be due and payable by direct debit. Thereafter, commencing on the first of the **13th** month of the Loan facility, repayments of **Principal and Interest** will be payable as a monthly instalment by direct debit."

20. In accordance with the written terms, repayment of principal and interest were to commence thirteen months after drawdown of the first two facilities which occurred in October 2003. This did not occur and there are facts, some of which are not in dispute and some, the characterisation of which, are in dispute, which may, on a full hearing, be considered as supporting the evidence of Mr. O'Dwyer as to the representation allegedly made to him on behalf of ACC in 2003. I wish to make clear that I am not making any finding in relation to same, but simply refer to them to explain that in my judgment, the evidence adduced by the defendants goes beyond mere assertion by Mr. O'Dwyer as to the representations allegedly made to him and relied upon and requires this Court in accordance with the principles set out above to remit the matter to plenary hearing.

21. First, is the evidence of ACC that it extended the interest only period in respect of the first two facilities for a further twelve-month period to 1st November, 2005. Mr. O'Dwyer disputes that there was any "decision to extend" and submits that the extension was pursuant to the original representation. At the summary hearing, there was no evidence before the Court of any decision by ACC to extend the interest only period in November 2004, nor any communication to the defendants to that effect.

22. Principal and interest was then paid on the loans by the Company for a period of approximately two years commencing at the end of 2005.

23. In the meantime, a third facility was granted in the sum of €320,000 upon the terms set out in a letter of loan sanction and agreement of 21st December, 2005. The term of the facility was again for twenty years. The purpose of the facility was stated to be to "restructure ACC Bank existing loans, reference no.'s 10012534 and 10025926". It was agreed in the course of submissions that the existing loans were personal liabilities of Mr. O'Dwyer. The repayment clause again stated that the loan facility was repayable on demand. It also provided "until demand is made or the Loan Facility (including both Principal and Interest) is repaid in full, Principal and Interest shall be payable by **monthly** instalments by direct debit commencing one month from the date of drawdown of the Loan Facility". This facility was drawn down in May 2006, and it appears probable that principal and interest was paid initially.

24. Mr. O'Dwyer at para. 9 of his affidavit of August 2012 states that this third loan was granted "by way of equity release on the same terms as the first two loans".

25. The fourth facility is, ACC contends, a facility granted in accordance with the terms set out in a letter dated 10th December, 2007. That letter records the facility as for the sum of €106,000 and the term as sixteen years from the date of drawdown "unless a demand for earlier payment is made in accordance with clause 6 below". The purpose is stated to be to provide working capital and the repayment clause provides:

"Repayment

The Facility shall be repayable immediately on demand being made by the Bank on the Borrower. Unless and until such demand is made (and without limiting the Bank's right to make demand at any time) interest only shall be payable by monthly instalments by direct debit commencing one month from the date of draw down for a period of 24 months.

Thereafter, principal and interest will be payable by monthly instalments by direct debit."

26. It does not appear to be in dispute between the parties that €106,000 was the amount of principal repaid by the Company on the first three facilities between late 2005 and the autumn of 2007. What is in dispute is the reason for which ACC made the sum of €106,000 available to the Company in 2007. Mr. O'Dwyer, at para. 10 of his affidavit of August 2012, avers:

"10. I say that towards the end of 2007 it came to my attention that the Plaintiff had been charging the First Named Defendant principal and interest on the above loans contrary to the agreement set out above. I say that I therefore contacted the Plaintiff and demanded that the original agreement be honoured that is to say that interest only was to be charged until the sale of the property. I say that in order to repay the principal incorrectly charged to the first named Defendant, the Plaintiff granted the fourth loan in the sum of €106,000 being loan number 10045409 granted in December 2007. I say that while this was described as 'working capital', it was in fact a repayment to the first named Defendant of the principal that had been erroneously deducted from its account contrary to the agreement referred to above and was a recognition by the Plaintiff that the agreement on interest only payments until sale of property had in fact been reached and was honoured by them at that time. The method of repayment was not important to the First Named Defendant as the same principal amount was owed at a similar or better interest rate, and it was merely a device for the Plaintiff to correct their error in charging principal to the First Named Defendant's account and to enable it to repay the same."

27. ACC, through its deponent, Mr. Liam Crowe, who, by 2007 was dealing with the relevant accounts, disputes this characterisation. At paragraph 14 of his affidavit sworn on 10th September, 2012, he refers to a credit application and report dated 16th August which he and Ms. Oonagh Griffin prepared, which he states indicates that an application was made by the Company for the extension of interest only periods in 2007, and which he contends is at variance with the position contended for by Mr. O'Dwyer and the Company. This credit application, which is an internal ACC document not seen at the time by the Company or Mr. O'Dwyer, refers to a moratorium on principal for two years and equity release of principal paid on each of the first three facilities to return working capital to the Company. However, Mr. Crowe also exhibits a letter from Ms. Griffin dated 31st August, 2007, to Mr. O'Dwyer on behalf of the Company confirming the interest only collection for a period of two years commencing on 1st October, 2007, and stating "a refund of the principal amounts already paid will be requested and the amount will be credited to the account from which the direct debit is taken". It then sets out the balances on each of the first three accounts being the original amounts advanced. It appears that at that point in time, the intention of ACC was simply to refund the aggregate €106,000 into the first three facilities, but subsequently, the €106,000 was advanced as a separate facility for a period of sixteen years being the balance of the twenty years from the 2003 facilities.

28. The resolution of the disputes between the parties as to the reason and characterisation of the events of 2007 in relation to the refund of principal already paid, and the further extension of interest only provisions for a further two-year period are matters which will have to be resolved at a full plenary hearing. They have a direct bearing on the primary defence, which relies upon the alleged representations made on behalf of ACC at the time of advance of the first two facilities.

29. It is unclear whether ACC thereafter only sought interest for the full period of two years from October 2007. Mr. O'Dwyer, at paragraph 11 of the affidavit of August 2011, states that in early 2009, ACC sought repayments on a principal and interest basis. He avers that whilst the company could have continued to make interest only payments, that it had no ability to make repayments on a principal and interest basis and repeats the averment that that was at all times known to ACC.

30. Counsel for ACC sought, in the alternative, to obtain summary judgment upon the basis that in application of ACC's general conditions applicable to each of the facilities, a default in interest payment alone permitted ACC to demand repayment of principal and interest due under the facility. On the evidence before the Court, it cannot be in dispute that the Company has failed to make interest payments since 2010. Mr. Crowe has deposed that the interest payments made on the first, second and third loan facilities in 2010 represented approximately 50% of the interest due and owing. In my judgment, if, and I emphasise the word if, the Company were to establish, following a full hearing, that ACC were estopped from seeking repayment of principal prior to the sale of the premises or termination of the loan, there would have to be a full consideration of the communications between the parties in 2009, and the impact of any alleged demands for repayment of principal prior to a determination as to whether ACC is entitled to rely upon its general conditions as contracted for. Hence, it follows that ACC is not entitled summary judgment on this alternative ground.

31. As I have determined that the Company has raised an arguable defence which requires the remission of ACC's claim against the Company as principal debtor to be remitted to plenary hearing, it follows that the claims against Mr. and Mrs. O'Dwyer, as guarantors or indemnifiers, must also be remitted to plenary hearing. The fact that I have not considered the separate defences sought to be raised by Mrs. O'Dwyer does not mean that she is precluded from raising those defences in the plenary proceedings.

#### **Order**

32. There will be an order remitting the claim to plenary hearing and I will hear counsel on the further directions required.