

## THE HIGH COURT

[2014 No. 2186 S.]

BETWEEN

ALLIED IRISH BANKS PLC

APPLICANT

AND

PAUL BRISCOE AND AISLING DOWNEY

DEFENDANT

**JUDGMENT of Mr. Justice Robert Eagar delivered on the 28th day of July, 2017**

1. The proceedings in this case were initiated by way of summary summons seeking the sum of €154,183.28 being money payable by the defendants to the plaintiff for money lent in advance by the plaintiff to the defendant at their request, and for interest agreed to be paid on money due to the plaintiff by the defendants. The amount due was initially €157,003.28, however repayments of €2,820 were repaid, leaving the sum claim in the summary summons at €154,183.28.

2. The defendants entered appearances in relation to the matter.

3. By notice of motion dated 5th February, 2015 the plaintiff sought an order seeking summary judgment. This was grounded on the affidavit of Audrey Nicholson, the assistant manager and employee of Allied Irish Banks Plc. She says the defendants maintain a loan account no. 4757705 with the plaintiff at the plaintiff's branch office at Drogheda, Co. Louth, subject to the plaintiff's terms and conditions which include *inter alia* that any monies advanced by the plaintiff to the defendants bear interest until repayment, and further that the monies due to the plaintiff on foot of the said accounts are repayable on demand. She says that sums of money have from time to time been advanced by the plaintiff to the defendants and the defendants have been accommodated by the plaintiff in the way that the plaintiff generally accommodates its customers.

4. Ms. Nicholson swore that on the 15th December, 2011 the defendants were indebted to the plaintiff in the sum of €157,003.28 on foot of the said loan account, full particulars of which have been furnished by the defendants by means of regular statements. The plaintiff's solicitors demanded repayment of the sum on 28th April, 2012. She said that despite the demands, the sum of €2,820 had only been repaid. The defendants had failed and neglected to repay to the plaintiff the balance of the said sums. She sought an order to enter a final judgment against the defendants in the sum of €154,183.28.

5. The defendants swore a joint affidavit dated 11th November, 2015. Mr. Briscoe said that he was self employed and ran two businesses, Paul Briscoe Electrics and Classic uPVC both of which have closed since the downturn. He said that he built the family home in 2002 with a granny flat attached, where his father-in-law lives. Due to cancer, his father-in-law had his stomach removed and Mr. Briscoe states that he had to become his full time carer. He said that he and the second defendant were initially introduced to the AIB Bank Manager through his eldest brother who knew him personally, and that everything had been very informal, even in his first application for a loan to build his family home. A house became available in the local village Termonfeckin, and over informal discussions, the defendants sought to buy it as an investment. Again, he states that his interactions with the bank manager were always informal and actually took place mainly over the phone. The paperwork was formulated with the defendants when they applied for a loan, and was described as a "home improvement" loan. The remainder amount was raised on a separate loan. He states that the business loan came about when a new manager came to the branch, and asked if Mr. Briscoe if he had ever considered opening a business, concerning boarding kennels, a grooming parlour and a hydrotherapy pool. Mr Briscoe states that a simple business plan was drawn up, and again the majority of the discussions were held over the phone. Mr. Briscoe stated that when the loan was finalised, the two defendants were asked to go to the bank to sign for the loan. Mr. Briscoe states that he now knows that they signed a document to allow their buy-to-let property to be used as security for the loan. He said that no legal advice was offered given or made aware of.

6. He says that around 2009, the time of the downturn, he approached the bank. Frank O'Reilly was appointed to cover his business interests, and the defendants applied for remedial actions for short term.

7. He said that the bank's description of the loan was that it was a housing facility loan and this is the loan the subject matter of the proceedings. The security for the credit facility was over 1 Orchard Villas, Termonfeckin, Co. Louth. This is the buy-to-let property referred to above.

8. On the 27th of April, 2012 Messrs. Joynt and Crawford solicitors on behalf of AIB Banks plc. wrote to the defendants referring to their recent demand for possession of the premises on foot of their indebtedness to the bank.

9. In the exhibits to the affidavit of Paul Briscoe and Aisling Downey there is correspondence from the plaintiff to the defendants dated the 20th June, 2014 in which the arrears support unit state they assessed their case and determined based on the information available at the time that the mortgage was unsustainable. It would appear that the defendants appealed that decision to the mortgage appeals board, who reviewed their case and agreed with the decision of the arrears support unit.

10. The next affidavit is that of Aoife Scanlon sworn on the 16th of April, 2015. She said she was the manager and officer employed by the plaintiff in its Financial Solutions Group at the Bank centre Ballsbridge. She said the subject account 47577052 is indeed the loan governed by the letter of offer dated the 16th of February, 2010 part of which is exhibited by the defendants in their affidavit. The letter advises the defendant to take legal advice and states that it would not be responsible for them not to do so. The loan was used to clear the accounts identified in the letter and is secured by the by-to-let residential premises at 1 Orchard Villas, Termonfeckin, Co. Louth.

11. She says that the defendants feared that their home is at risk because payment of the subject loan has been demanded. However, she said this is an ungrounded fear, as the defendants' mortgage to AIB Mortgage Bank, and not to the plaintiff AIB Plc. The subject loan is not secured on the defendants' house. She also says that a considerable number of the documents exhibited in the affidavit of the two defendants refer to accounts other than the subject of the account, correspondence with MABS, standard financial statements, MARP, the mortgage appeals office, the mortgage appeals board and information given to the defendants concerning their rights to appeal to the Ombudsman. These documents do not concern the subject account.

12. A supplemental affidavit was sworn by the first named defendant. Whilst it strongly rebuts the points made by the affidavit of Aoife Scanlon, it does not deal with the issues relating to the loan in this case.

13. The next affidavit is that of Paul Briscoe and Aishling Downey sworn on the 22nd of October, 2015, in which the defendants say they had made a data disclosure request. It had only transpired to them that there were different accounts with different entities at different addresses, and they say that they are now dealing with AIB Mortgage Bank and AIB Bank plc. They state that the applicant's solicitor has refused to provide them with the data disclosure.

14. The next affidavit is that of Jim Fehan who sworn on the 24th of November, 2015, who is a financial advisor. He refers to the letter dated the 23rd of October, 2015 from the plaintiff wherein they state they are not willing to furnish a complete data disclosure with respect to the specific account number for the Court. He says that it would be impossible for him to ascertain a transparent and accurate account schedule of the debt and says that AIB Bank or their representatives never reverted back to him in writing. He says that they have withheld relevant information.

15. The next affidavit is that of Aisling Briscoe in which she says that at no time did she have a business loan, and she states that she never signed as a guarantor for a business loan with AIB plc. She said she had never gone to a solicitor to seek independent legal advice.

16. The next affidavit is that of Ian Smith, assistant manager of Allied Irish Banks plc. in which he says that it was common ground between the plaintiff and the first named defendant that the subject account is governed by the terms and conditions set out in the plaintiff's letter of offer, dated the 16th of February, 2010. Part of this was exhibited by the first defendant in the affidavit sworn by him on the 11th of March, 2015. Attached to his affidavit by way of exhibit is the letter of offer dated the 16th of February, 2010.

17. He says that prior to the letter of offer dated the 16th of February, 2010:

(a) The first defendant was in debt to the plaintiff;

(b) His indebtedness was secured by the second named defendants written guarantee dated the 12th of February, 2008 whereby she had guaranteed payment to the plaintiff of all sums due by the first named defendant provided her liability would not exceed the sum of €135,000.00 together with interest; and

(c) The first defendant's debt and the second defendants guarantee were secured by deed of mortgage dated the 25th of June, 2008 whereby both defendants mortgaged the property known as 1 Orchard Villas, Termonfeckin to the plaintiff as security for all their present and future debts.

18. He referred to the letter of guarantee which he exhibited. This appears to the Court to be in standard form, and it is clearly signed by Paul Briscoe and Aishling Downey. He also exhibits the mortgage dated the 25th of June, 2008. He says that the premises were purchased by the defendants as a by-to-let and the defendants live elsewhere. The premises were held as security for a separate loan advanced by AIB Mortgage Bank and he says that the claim is simply for repayments and monies due to the plaintiff on foot of account 47577052.

19. The next relevant document is a notice of motion dated the 10th of June, 2015 by the defendants seeking:

(1) a six month adjournment;

(2) an order compelling the plaintiff to enter into earnest, practicable and meaningful negotiations; and

(3) an order compelling the plaintiff to fully document and record the negotiations.

This was grounded on the affidavit of Paul Briscoe, the first named defendant. He said that he has attempted to get the plaintiff to engage in meaningful negotiations in order to resolve all matters, however he is being ignored. He states that the plaintiff has continually mixed up the accounts, evaded the question of balancing the accounts and applying the presence of a third account on their records and books. He exhibits the affidavit of Jim Fehan already referred to. He also exhibits correspondence from AIB Mortgage Bank, who is not the plaintiff in this case.

20. The motion came before Hedigan J. on the 15th of June, 2015 for a six month adjournment, and for an order compelling the plaintiff to enter into earnest, practicable and meaningful negotiations. These were refused.

21. The final notice of motion was that dated the 5th of October, 2016 by the defendants where the defendants seek an order granting full disclosure of the:

(1) original documents the plaintiff is relying on;

(2) an order that the plaintiff disclose all accounts held on the defendants; and

(3) an order compelling the plaintiff to fully document and record the negotiations.

This is on foot of the grounding affidavit of Paul Briscoe.

22. This motion was heard before Twomey J. on the 14th of November, 2016. The defendants had sought an order granting:

(1) full disclosure of the original documents the plaintiff is relying on;

(2) an order that the plaintiff disclose all accounts held on the defendants;

(3) an order compelling the plaintiff to fully document and record the negotiation.

This application was refused by Twomey J.

The next notice of motion was dated the 23rd of January, 2017 where the first named defendant applied to have the summary summons adjourned into a plenary hearing.

He says that there is no credible evidence before the Court that he has any valid contract with the alleged entity. He refers to the judgment of *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. He asks the Court to refuse the application for summary judgment sought by the plaintiffs.

23. The plaintiff's application is in relation to the loan account No. 47577052. The Court has viewed the loan offer signed by the two defendants and in which the sum of €154,183.28 is owing. There may have been additional links to the by-to-let premises, but this is not the defendants' residence. This is clear in the affidavit of Aoife Scanlon sworn on the 16th of April, 2015 in which the by-to-let premises is identified at 1 Orchard Villas, Termonfeckin, Co. Louth. No other properties are relied upon as security for this loan.

24. The legal test to be applied in an application for summary judgment is set out in the Supreme Court decision in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 where Murphy J. stated:

"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:—

"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.""

In *Aer Rianta v. Ryanair Ltd.* [2001] 4 I.R. 607, Hardiman J. noted that a fair and reasonable probability of a real or *bona fide* defence is not to be equated with a defence which will probably succeed, or even a defence whose success is not improbable. At p. 621 of his decision, Hardiman J. states that "the defendant's hurdle on a motion such as this is a low one and the jurisdiction is one to be used with great care".

25. The court applies the principles set out by McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1:

- (1) The Court first of all will exercise and has exercised caution with regard to any application for summary judgment.
- (2) The Court has looked at the entirety of the situation and considered the particular facts.
- (3) The Court has satisfied itself of the cogency of the evidence adduced on behalf of the plaintiff.

The issues in this case are easily determinable, and the Court finds that summary procedure is suitable in these proceedings.

26. There are no real issues of fact in relation to the particular loan account. The Court is not satisfied that the defendant has a fair or reasonable probability of a real or *bona fide* defence.

27. This Court is mindful of the constitutional right of a person to respond to litigation, in order to achieve a just result.

28. In this case the Court is satisfied that a just result will be achieved by granting the plaintiff judgment in the sum of €154,183.28. The Court will not order any interest to be paid thereon, but the Court will order the costs of the application to be awarded to the plaintiff in this case.