THE HIGH COURT

Record No: 2015/1070S

BETWEEN:

ALLIED IRISH BANKS plc

Plaintiff

–and –

ANTHONY MCNAMARA

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 5thApril, 2016.

Part 1

Overview

1. AIB has lost Mr McNamara's title documents, and Mr McNamara is considerably aggrieved. Mr McNamara has defaulted on his AIB loan, and AIB wants to recover the monies now owed. AIB has come to court by way of summary proceedings. Mr McNamara maintains that the matters arising are more appropriately dealt with at full plenary hearing.

Part 2

A Brief Chronology of Events

A. The Debt Outstanding.

2. By loan agreement made in writing on or about 24th August, 2009, AIB agreed to lend Mr McNamara close on €116,000. This was repayable over 13 months by quarterly repayments of €1,185.64, commencing on 30th September, 2009, with a final repayment of just over €112,000 due on 30th September, 2010. Just over €111,000 was advanced to Mr McNamara under the loan agreement on 31st August, 2009 at an APR of 5.22%. Thereafter, Mr McNamara defaulted on the loan. By notice of 6th January, 2015, AIB terminated the loan facility and demanded repayment of all amounts owing there under. At the present time, the amount owing is just in excess of €113,000 for which summary judgment is now sought.

B. AIB Loses the Title Deeds.

3. By way of security, Mr McNamara was to provide a charge over certain lands in County Clare. As part of his doing so, Mr McNamara had his solicitor provide certain Registry of Deeds documents and land registry certificates to AIB. In what was not a shining moment for AIB, it has since lost all of these title documents. Eventually, and not until a suitably assertive letter issued from Mr McNamara's solicitor, AIB admitted that it had lost the documentation – though (perhaps a point for all solicitors to note) no admission was forthcoming until that solicitor, clearly a prudent gentleman, was able to produce the An Post certificate for the registered parcel by which he sent the title documents in question to AIB.

Part 3

The Law as Regards Recovering Debt by Summary Proceedings

4. Mr McNamara contends that in all the circumstances arising, adjudication on his debt ought to go to plenary hearing. The hurdle that he must cross to succeed in having matters sent to plenary hearing is low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 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?"*

5. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised the relevant principles when a court approaches the issue of whether to grant summary judgment or leave to defend:

> *"(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…*
>
> *(iii) in so doing 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…*
>
> *(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?'…

(viii) this 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 is 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."

6. It does not appear that there is any disagreement between the parties as to the above-stated law. Where they do disagree is that, by virtue of AIB's having lost the title documents, Mr McNamara claims that he has a cross-claim that gives rise to a defence in equity in these proceedings. AIB disputes this.

Part 4

Set-Off in Equity.
7. The best recent statement of applicable principle as regards the issue of set-off in equity is that of Clarke J. in *Moohan & Anor v. S & R Motors (Donegal) Ltd* [2007] IEHC 435, his judgment in this regard being grounded in part on the seminal decision of Kingsmill Moore J., almost sixty years ago, in *Prendergast v. Biddle* (Unreported, Supreme Court, 21st July, 1957). Having considered matters at some length, Clarke J. summarises the applicable approach as follows, at para.4.6 of his judgment:

"[1]…It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off…

[2] If, and to the extent that, a prima facie case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim…

[3] If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast…".

Court Note:

[4] The principles referred to in [3], might be summarised as follows. A judge in exercising her or his discretion may take into account, *inter alia*, (i) the apparent length of the counter claim, (ii) the answer suggested to it, (iii) the conduct of the parties, (iv) the promptitude which they have asserted their claims, (v) the nature of their claims, and (vi) the financial position of the parties.

[5] To all of the foregoing might be added, and some reference is made to this by Clarke J., at para.4.5 of his judgment in *Moohan*, that the right of set-off is equitable in nature and thus the maxims and rules of equity come in play as regards determining the availability of this equitable relief, like any other.

Part 5

Application of Principle
8. As the court understands Mr McNamara's case concerning the lost property documents, it is as follows. In the event that someone should offer to buy Mr McNamara's property, perhaps for an amount in excess of that owed to AIB, his property has been rendered largely unsaleable or would likely need to be sold at a reduced price given the title concerns now presenting. AIB has commenced setting about 'reconstructing' the title and this may prove a straightforward matter, but it is not unknown for problems to present when it is sought to effect such a 'reconstruction'.

9. Turning then to the tests as identified above:

- as to [1], it seems that the court can view matters in one of two ways. It can view (a) the loan and security arrangement as a single set of circumstances, or (b) the debt, and it is solely the debt that is being sued upon at this time, as separate from the security arrangement (and thus issues arising in connection with the security documentation as arising from a related but different arrangement). It seems to the court, however, that it would be artificial and inequitable to follow the line of logic suggested by (b). The provision of the loan was conditional on the provision of the security and thus the loan and the security are inexorably linked. Pursuant to a condition of the loan agreement, the security documentation went to AIB, and was lost by AIB. It would not therefore be inequitable to allow the asserted set-off. It is not clear to the court that, at least to this time, there will be much by way of set-off but that seems more a matter for the court at plenary hearing, than for the court deciding whether the matter should go to plenary hearing.

- as to [2], there is no dispute between the parties that AIB has lost the title documents and, in consequence, a *prima facie* basis on which to ground a claim of the type identified by Mr McNamara appears to present. Coupled with the court's conclusions re. [1], Mr McNamara falls to be treated as having established a defence and hence liberty should be

given to him to defend the claim.

- as to [3] and [4], given the court's conclusion re.[1], these does not apply.

- as to [5], it does not appear to the court that Mr McNamara has offended against the principles of equity in any way that would justify the court in refusing to send this matter to plenary hearing.

Part 6

Conclusion

10. For the reasons stated above, it appears to the court, by reference to *Moohan*, that Mr McNamara has asserted a form of cross-claim that arguably gives rise to a set-off in equity, and hence established an arguable defence to these summary proceedings. Consequently, by reference to *Aer Rianta*, AIB's application for summary judgment in the within proceedings must be declined. In this regard the court is mindful, *inter alia*, of McKechnie J.'s observation in *Harrisrange* that the power to grant summary judgment should be exercised with discernible caution. The court will therefore remit this matter to plenary hearing.

11. Notwithstanding that the court considers itself to be coerced by law to refer these proceedings to plenary hearing, it would respectfully encourage each of AIB and Mr McNamara to consider, even now, whether some compromise cannot be arrived at between them. It really does not seem in anybody's interest that a debt of €113,000 – which, though very large, is not the largest of debts – should be the subject of costly High Court proceedings when, for example, a consent to judgment, conditional upon and with due allowance for resolution of the issue presenting as regards the title documentation, might better serve all. However, it is, of course, entirely a matter for the parties as to how they now proceed.