



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 49

APPEAL NO. 147/2013

(ARTICLE 64 TRANSFER)

**Peart J.
Irvine J.
Mahon J.**

BETWEEN:

AIB MORTGAGE BANK

PLAINTIFF/RESPONDENT

AND

GEORGE TRACEY AND KAREN TRACEY

DEFENDANTS/APPELLANTS

JUDGMENT OF THE COURT DELIVERED BY MR JUSTICE MICHAEL PEART ON THE 13th DAY OF MARCH 2015:

1. By order of the High Court dated 20th March 2013 AIB Mortgage Bank ("the bank") obtained judgment against Mr and Mrs Tracey for the sum of €3,364,961.00 on a joint and several basis, and the costs of these proceedings when taxed and ascertained.

2. Mrs Tracey alone has appealed against that order. She asks this court to set aside that judgement and to refer the proceedings to plenary hearing on the grounds that she has established on affidavit a reasonable probability that she has a real or bona fide defence to the Bank's claim against her.

Background

3. There is an unfortunate background to the parlous position in which Mrs Tracey now finds herself. Sadly, her marriage broke down in March 2004, whereupon Mr Tracey left the family home and moved to a house he had bought in Mullingar, leaving Mrs Tracey and their two children in the family home in Foxrock, Co. Dublin.

4. Mr Tracey was a property developer, and had for many years enjoyed a good relationship with AIB who assisted him with funding for the many properties he purchased over the years. According to his own affidavit filed in the High Court, he had been dealing with AIB for over 20 years, and had established a reputation as a customer who always met his obligations to the Bank in relation to his business activities. His affidavit goes on to describe how, as with many property developers, difficulties arose between him and the Bank after 2008, and how between then and 2011 he tried unsuccessfully to rescue the situation.

5. Thereafter a number of proceedings were issued by the bank who sought to recover the outstanding borrowings, including those the subject matter of the present proceedings.

6. The present proceedings were commenced against both Mr Tracey and Mrs Tracey in respect of the recovery of monies borrowed by them, on a joint and several basis, for their purchase as co-owners of a substantial house on Westminster Road, Foxrock known as 'Hillside', into which Mrs Tracey and the two children moved when that purchase was completed at the end of 2006. Their previous family home in Foxrock was sold yielding net proceeds of sale of circa €1.8 million which assisted with the purchase of Hillside which was bought at auction for the sum of €6.6 million. The bank approved a loan of €3.7 million for this purchase which is evidenced by a Letter of Loan Offer dated the 15th September 2006.

7. This loan facility is expressed to be for a term of 8 years. A condition of the loan was that mortgage protection insurance was required in respect of the lives of both Mr and Mrs Tracey in the amount of the loan and covering a period of 8 years. However, a special condition contained in the same loan facility letter stated:

"Please note that the Bank is agreeable to forgo its requirement for life cover on Mrs Karen Tracey subject to receipt of a written request of all parties to the borrowing and an acknowledgement that borrower(s) are aware of all possible implications arising from this request [sic]".

8. Mr and Mrs Tracey wrote to the Bank to that effect by letter dated 14th September 2006.

9. It appears that Mr Tracey already had existing life cover in place for 8 years, and the Bank agreed to accept that policy for the purpose of this facility, given that he had difficulty obtaining 20 year life cover. Accordingly, while the loan specified that it was to be an 8 year term it was agreed also that following the drawdown of the loan, it would revert to a 20 year facility which resulted in the loan repayments reducing pro rata. Mrs Tracey places some reliance upon this aspect of the loan arrangements and it is referred to in the High Court's judgment.

10. The trial judge concluded that there was no doubt that when Mr Tracey agreed to purchase Hillside at auction, he did so with the intention that it would provide secure accommodation for Mrs Tracey and the children. Mrs Tracey has averred to that also in her supplemental affidavit which she filed in the High Court. She also stated that Mr Tracey had assured her at the time of the purchase that he would transfer Hillside into her sole name as part of the settlement of their marital difficulties in due course.

11. Mrs Tracey relies on the fact that what she describes as her equity from the sale of the previous family home was put towards the purchase of Hillside after she and her husband separated, and it appears that she has commenced her own proceedings against her husband in which she seeks, inter alia, a declaration that she is the sole beneficial owner of Hillside on an unencumbered basis.

Those proceedings have not yet concluded.

12. In her replying affidavits in the High Court, Mrs Tracey also stated that the purchase of Hillside was just one of many properties purchased by her husband, and that in relation to Hillside *"the various papers in respect of the purchase of the property were simply put in front of me for my signature, including the acceptance and consent dated 15th September 2006"*. She made the point also that her husband made all the repayments and that when the bank sent letters to Hillside (which were addressed to both Mr and Mrs Tracey) she brought them to her husband's attention, and that having done so she would hear no more about the matter.

13. Mrs Tracey also states that the bank was at all times aware that it was Mr Tracey who was going to be responsible for making the loan repayments, and that this was agreed between her and Mr Tracey also.

14. In her supplemental affidavit Mrs Tracey states that in or around the 15th September 2006 she attended her husband's solicitor's office, and signed the loan acceptance, but that she did not obtain any independent legal advice before doing so, even though she accepts that she had by that time consulted her own solicitor in relation to her separation. She says that the bank never advised her that she should obtain her own independent legal advice before signing the loan acceptance, even though the bank was fully aware that she had no capacity to service the loan being given for the purchase of Hillside.

15. She went on to state that during her marriage she was a housewife and mother and that she was not involved in her husband's business and financial dealings, and that she trusted her husband in relation to such matters, knowing that he was a good businessman who made sound investments. She stated that she allowed her husband look after the purchase of Hillside and the sale of her previous family home, and that she had no discussions with the bank in relation to such matters. She signed all documents which she was asked to sign in the belief that, as promised by her husband, Hillside in due course would be transferred by him unencumbered into her sole name.

16. She has averred in her supplemental affidavit that prior to the completion of the purchase of Hillside her own solicitors, McCann Fitzgerald (who she says she consulted in relation to her separation) had by letter dated 5th September 2006 addressed to Mr Tracey's solicitor, sought to have him sign a Declaration of Trust in her favour in respect of his interest in Hillside, but that never materialised. That letter is exhibited. It refers to the proposed purchase of Hillside as a home for Mrs Tracey and the children. It refers to the fact that the existing family home was to be sold and the proceeds used as part of the financing arrangements. It refers also to the fact that while the property would have to be purchased in joint names, it was nevertheless understood by Mrs Tracey that the mortgage would be paid off by the end of 2007 at which stage the property would be transferred to her sole name. The letter suggested the Declaration of Trust already referred to, and that she would cooperate with the sale of the existing family home on this basis.

17. In this Court's view, it is clear that while the bank may not have specifically advised and required that Mrs Tracey obtain her own independent advice in relation to these matters, the fact is that she did so. In this regard, the trial judge, having noted that she signed the loan acceptance, stated:

"While Ms Tracey says that she was not independently legally advised, it cannot be overlooked that she signed a family home declaration which had been prepared by Michael Campion & Co [her husband's solicitors], in which she is described as a client along with Mr Tracey. She also signed a retainer and authority form on the same day authorising this firm to act for her".

18. While that is undoubtedly so, it is also clear from the aforementioned letter of the 5th September 2006 that Mrs Tracey had consulted her own solicitor concerning the implications for her arising from the sale of the existing family home and the intended purchase of Hillside. Insofar as that letter refers to the financial and legal basis upon which Hillside was to be purchased it must be assumed that Mrs Tracey had available to her any independent legal advice which she required in order to make a fully informed decision in relation to those transactions, and their implications for her.

19. As noted by the trial judge in his judgment, these proceedings relate only to whether the bank is entitled to obtain judgment against Mr and Mrs Tracey for the amount which they borrowed, and therefore, to the extent that the present appeal is by Mrs Tracey alone, it relates only to whether the trial judge was incorrect in concluding that the basis on which she seeks to defend the bank's claim against her does not amount to a bona fide defence which would entitle her to a full plenary hearing.

20. The trial judge concluded that while the bank may have been well aware that it was Mr Tracey who alone had the capacity to service the loan, and that Mrs Tracey had no means to do so, and that part of the financing of Hillside was emanating from the sale of the previous family home, and that the parties had separated, none of this could avail Mrs Tracey by way of a defence to the bank's claim for judgment. He concluded in that regard:

"The stark fact remains, however, that Ms. Tracey knowingly executed the loan transactions in circumstances where, it bears repeating, no suggestion has been made that the Bank misrepresented its terms and effects or that she entered into this agreement by reason of some inducement or promise on the part of the Bank or by reason of some form of collateral contract on foot of such a misrepresentation. She assumed at the time that Mr Tracey would make good on his promise to assign the property to her on an encumbrance free basis, as, indeed, a letter from her then solicitors McCann Fitzgerald to her husband's solicitors, Lavelle Coleman on 5th September 2006 makes clear. It is probably fair to assume further that Mr Tracey would have done just that had financial circumstances so permitted."

21. The trial judge concluded that none of the matters upon which Mrs Tracey relied could deny the bank an entitlement to obtain judgment for the amount of the loan outstanding, and that the case should not be sent to a full plenary hearing. He specifically referred to the point relied upon in relation to the waiver by the Bank of the requirement for life cover in respect of Mrs Tracey, and to the fact that following drawdown the loan reverted to a 20 year loan as opposed to the 8 year term specified in the facility letter. But he concluded, correctly in this Court's view, that *"[he could] not see how this affects the bank's entitlement to recover the sums in respect of this property which are now long since overdue"*.

22. On this appeal, Counsel for Mrs Tracey has contended that the trial judge erred in his conclusion that the grounds of defence put forward by her could not amount to a defence to the bank's claim for judgment. He submits that there are a number of features of the loan which distinguish it from a normal residential home loan. He refers first of all to the sheer size of the loan - €3.7 million. He refers also to the fact that the term of the loan as set forth in the facility letter was 8 years, something which is said to be unusual and inconsistent with this being a normal home loan, albeit that it reverted to a 20 year loan following drawdown.

23. Reliance is placed also on the fact that Mrs Tracey signed all the legal documentation in connection with the loan and purchase at

the offices of Mr Tracey's solicitor.

24. Counsel has referred also to the fact that the Bank was at all times aware that Mrs Tracey could never herself service the loan repayments, and advanced the monies in full knowledge of that fact. In these circumstances it has been submitted that the loan should be seen as non-recourse to Mrs Tracey, and that this should be considered to constitute a sufficient bona fide defence at this stage of the proceedings in order to permit the matter to go to a full plenary hearing.

25. Counsel has submitted that in reality this loan was simply one of a number of purely commercial loans being made by the bank to Mr Tracey in the course of his business as a property developer, and that recourse should be to him alone, just as it was in relation to his other commercial loans. In Counsel's submission, the fact that life cover was required only in respect of Mr Tracey supports the contention that at all times the bank knew that its recourse was only against Mr Tracey.

26. It is quite clear from cases such as *Aer Rianta v. Ryanair* [2001] 4 IR 607 that before concluding that summary judgment should be given to the plaintiff, the Court must be satisfied that it is "very clear" that the defendant has no defence to the claim. Otherwise the matter should be adjourned to plenary hearing. It is also clear that the threshold of arguability which a defendant must surpass to achieve a plenary hearing is a low one. Nevertheless it is a threshold that amounts to more than mere assertion or stateability. There must be some perceivable potential substance to it. It must be based upon facts which if true and established would amount to a defence. It must be a credible defence.

27. Counsel for the bank has referred in this regard to a passage from the judgment of Clarke J. in *Irish Bank Resolution Corporation v. Gerard McCaughey* [2014] IESC 44 where, commencing at paragraph 5.4 of his judgment, Clarke J. stated:

"5.4 It is important therefore to re-emphasise 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, be clear that the defendant has no defence. If 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 stateable 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, 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.

5.5. In so far 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."

28. This Court considers that the trial judge was correct in concluding that the matters put forward by Mrs Tracey by way of defence did not meet the threshold for the purpose of sending the matter to plenary hearing. He clearly considered the matters put forward as amounting to a possible defence. He was entitled to view the fact that she had accepted that she signed the acceptance of the loan agreement as being a critical factor. This Court is satisfied that she took her own advice on the sale of her existing family home and the purchase of Hillside from her own solicitor who she was consulting in relation to her separation. That is clear from her solicitor's letter to her husband's solicitor dated 5th September 2006, which pre-dated her acceptance of this loan. For her to now assert that it was always understood by her and the bank that the loan would be non-recourse to her is inconsistent with the terms of the facility letter which she signed, and which makes no reference to such non-recourse.

29. The various matters to which she refers and relies upon, such as the fact that the loan was stated to be for 8 years, but reverted to being a 20 year loan in the absence of any 20 year life cover on her husband's life, or that she signed the legal documentation at her husband's solicitor's office, or indeed that she at all times trusted her husband in relation to his business matters and simply signed such documentation as she was asked to sign, cannot in this Court's view amount to even a possible defence to the bank's claim against her for the full amount of the loan advanced for the purchase of Hillside. Neither is there any reality to her contention that this loan was not a residential loan. The facility states clearly that the loan's purpose is to purchase Hillside. The bank knew that this was a house in which she and her children would be residing. The bank wrote to her and to her husband at that address when seeking repayments. The fact that her husband lived elsewhere does not alter the matter. It is a loan to both her and her husband. This distinguishes it from other commercial loans which he obtained from time to time either in his own name or the name of some corporate entity that he might own or have an interest in, such as those to which the two other proceedings determined by Hogan J. in his judgment referred, and in which Mrs Tracey was not involved in any way and was not named as a defendant.

30. This Court is satisfied that the evidence before the High Court met the test advised by the Supreme Court in *Aer Rianta* in that it demonstrated that it was very clear that Mrs Tracey did not have a defence, that there were no issues to be tried and that her affidavits had failed to disclose even an arguable defence. In such circumstances this Court must uphold the judgment of the High Court,

31. and dismiss the appeal.