

## THE HIGH COURT

[RECORD NO.2016/1034S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

JAMES KELLY

DEFENDANT

**JUDGMENT of Mr. Justice Meenan delivered on the 14th day of December, 2018****Background**

1. This is an application by the plaintiff for summary judgment in the amount of €1,023,501.86, being monies due and owing by the defendant on foot of two loan agreements.

2. The first loan agreement is dated 8 December 2008 on foot of which the plaintiff advanced the sum of €700,000 to the defendant and one Mr. Brendan Kelly for the purposes of funding a public house in Letterkenny, County Donegal and acquiring and/or developing a site in Letterkenny, County Donegal. The terms upon which this loan was advanced are set out in the letter of sanction. The second loan agreement, on foot of which the plaintiff advanced to the defendant the sum of €178,029.75 is dated in or around October 2007. The sum was advanced to the defendant for the purposes of clearing a previous loan from the plaintiff. This loan was repayable in accordance with the terms of the agreement.

3. By letter dated 11 November 2015 the plaintiff made a formal demand of the defendant to discharge the sum of €789,444.59, together with interest, in respect of the first loan. On the same date the plaintiff made a demand of the defendant to repay the sum of €161,065.27, together with interest, in respect of the second loan.

**Statement of affairs**

4. On 20 September 2016 the defendant provided a statement of affairs to the plaintiff. This document stated, under the heading "Liability and Security":-

"€164,158.27 owed – J Kelly

€801,170.45 owed – B Kelly J Kelly 50%"

Importantly, this document was sworn before a Commissioner for Oaths and the defendant further states:-

"I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1938."

5. In the application before the Court, the defendant seeks to have the plaintiff's application for summary judgment remitted to plenary hearing on the grounds that he has established a real or *bona fide* defence to the claim. In my view such a stance is entirely inconsistent with what the defendant swore to in the statement of affairs. The terms of the statement of affairs, a sworn document, together with a declaration for the purposes of the Statutory Declarations Act 1938 are sufficient of themselves to satisfy the Court that the plaintiff is entitled to judgment. Without prejudice to this, however, I will consider the defences as put forward by the defendant.

**Test to be applied**

6. The test to be applied by a court in deciding whether to accede to an application for summary judgment is well-established, I refer to *Aer Rianta CPT v. Ryanair Ltd.* [2001] 4 I.R. 607 wherein it was established that to remit a matter to plenary hearing the defendant must have established that he has a fair or reasonable probability of having a real or *bona fide* defence to the plaintiff's claim.

7. In the instant case, the defence put forward is based on three grounds. First, the defence contends that the documentation relied upon by the plaintiff is incomplete. Second, a defence under s. 17 of the Civil Liability Act 1961, as amended ("the Act of 1961") and thirdly a claim that the plaintiff's action is statute barred. In my view, I can deal with these matters in the context of a motion seeking judgment. I refer to *McGrath v. O'Driscoll and Ors* [2007] 1 ILRM 203, where Clarke J. (as he then was) stated 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"

In my view, the issues raised by the defendant can be so resolved.

**Consideration of defences:-**

8. As to the defence based upon the documentation before the Court, I am satisfied that the affidavit grounding the application has exhibited all of the necessary and relevant documentation. The loan agreements, bank statements and letters of are all exhibited. Alleged issues concerning documentation on the security given for the loan were referred to but I am satisfied that they do not have relevance to the claim being made before me. Therefore, it follows that this defence falls short of being a real or *bona fide* defence.

9. The defendant seeks to rely on the settlement agreement between the plaintiff and Mr. Brendan Kelly, the defendant's co-borrower, in the first loan as a defence to the claim being made by the plaintiff. The defendant submits this settlement amounts to "an accord and satisfaction" for the purposes of s. 17 of the Act of 1961 and thereby discharges the defendant of his liability.

10. Section 17 provides:-

"(1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord

indicates an intention that the others are to be discharged.

(2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest."

11. The Court was referred to a number of authorities on s. 17 in the context of a debt recovery action such as this. In particular, I refer to *ACC Bank PLC v. Malocco* [2000] 3 I.R. 191, wherein Laffoy J. stated at p. 201:-

"I have no doubt that the submission made by counsel for the plaintiff that the effect of the settlement between the defendant's wife and the plaintiff on the liability of the defendant on foot of the loan agreement falls to be determined by application of s. 17 of the Act of 1961 is correct. What s. 17 means in the context of a wrong which is a breach of contract in the form of non-payment of a debt for which two debtors are concurrently liable and of a settlement agreement with one of the debtors is that, if the settlement agreement indicates an intention that the other is to be discharged, the settlement agreement effectuates his discharge, but, if it does not, he gets the benefit of the settlement agreement and his liability is reduced accordingly. In the application of s. 17 to such a situation, in my view it is immaterial whether the debtors are jointly liable or jointly and severally liable for the debt, although in the instant case it seems to be common case that the defendant and his wife were jointly and severally liable. As to whether an accord or settlement agreement 'indicates', within the meaning of that word in s. 17, that a co-debtor is to be discharged, it seems to me that it does so indicate if such outcome is agreed expressly or by necessary implication"

12. In the instant case the wording of the settlement agreement is clear. The following is a term of the agreement:-

"No release or effect on third parties

This agreement is not a release or accord within the meaning of s. 17 of the Civil Liability Act 1961...or otherwise. This agreement does not release, reduce, discharge or otherwise effect the liability of J K or any third party to the bank, howsoever arising."

"J K" is a reference to James Kelly, the defendant herein. It follows therefore that the provisions of s. 17 the Act of 1961 afford the defendant no defence.

13. The defendant submits that the plaintiff's action is statute barred. I have already referred to the statement of affairs, dated 20 September 2016. Section 56(1) of the Statute of Limitation Act 1957 ("the Act of 1957") provides:-

"(1) Where—

(a) any right of action has accrued to recover any debt, and

(b) the person liable therefor acknowledges the debt,

the right of action shall be deemed to have accrued on and not before the date of the acknowledgment."

and,

"58.—(1) Every acknowledgment shall be in writing and signed by the person making the acknowledgment."

If there was an issue on the Statute of Limitations concerning the loan agreements I am satisfied that the statement of affairs is an "acknowledgement" for the purposes of the Act of 1957. Thus the date of acknowledgment is 20 September 2016 and therefore it is clear that there is no defence under the Act of 1957.

## **Conclusion**

14. By reason of the foregoing I am satisfied that the plaintiff is entitled to the sum sought herein.