THE HIGH COURT

[2014 No. 1838 S.]

BETWEEN

BANK OF IRELAND (UK) PLC

PLAINTIFF

AND

SIMON CORCORAN

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 20th day of December, 2017.

Background:
1. The plaintiff's claim is for judgment against the defendant in the sum of €257,039.39 (together with continuing interest) being monies due and owing by the defendant to the plaintiff on foot of a facility letter dated 16th October, 2007 between the defendant and the governors and company of the Bank of Ireland ("the Bank").

2. The purpose of the loan was to assist the defendant in the purchase of shares in Custom House Capital (CHC) Munich Parkstadt Property to the amount of €250,000. In addition, there was an arrangement fee of €2,500. The loan was up to a maximum term of five years. However, the facility letter also stated that the loan was to be subject to the general terms and provisions of the Bank. These general terms and provisions provided, *inter alia*:-

> "10. The bank reserves the right to terminate the facility immediately by notice and to call for repayment of all of the indebtedness on demand at any time in its entire discretion especially (but not only) if one or more of the following events shall occur
>
> 10.1.1. There shall be any breach of any term, condition, covenant, representation or warranty outlined in these general terms or in any document; or
>
> 10.1.2. The borrower shall fail to repay the indebtedness when due or if any interest is in arrears and unpaid for seven days after the date fixed for payment thereof; or
>
> 10.1.3 The indebtedness or any other obligation of the borrower becomes due and payable or liable to be preformed prior to the specified due date thereof of as a result of any default or is otherwise not paid or preformed when due…"

3. As security for the said loan, the facility letter provided that the Bank would have security by way of a first and only legal charge over the shares in Custom House Capital Munich Parkstadt Property fund.

4. The facility letter and the general terms were to be governed and interpreted in all respects in accordance with the laws of England.

5. By order of the High Court of England and Wales (Henderson J.) dated 29th October, 2010 the business of the Bank specified therein was transferred to the plaintiff pursuant to part IIV of the Financial Services and Markets Act 2000.

6. By letter dated 15th October, 2013 the plaintiff informed the defendant that he was in breach of the terms of the said facility letter and, in particular, in breach of clause 10.1.2, set out above. Therefore, according to the plaintiff, the loan was due for repayment.

7. By a notice of motion dated 16th November, 2015, returnable before the Master of the High Court, the plaintiff sought liberty to enter final judgment against the defendant in the sum of €257,039.39 together with continuing interest.

Proceedings before the Master of the High Court:
8. The notice of motion was adjourned before the Master of the High Court from time to time. However, on 15th February, 2017, following an exchange of affidavits between the parties, the plaintiff made an application to transfer the matter for judgment to the judges list for hearing. The Master of the High Court refused the application and dismissed the notice of motion. He did so on the grounds that the affidavit of Mr. Jenkins, sworn 22nd October, 2015, was defective because the address at which it was sworn was not specified in the jurat.

9. In the course of the exchange of affidavits between the parties the defendant sought and obtained leave from the Master to issue a notice of motion seeking discovery from the plaintiff. On 16th February, 2016 the Master granted the defendant's application for discovery.

10. Both the Master's order dismissing the plaintiff's motion for liberty to enter final judgment and the order for discovery have been appealed to this Court. Therefore, the following are the reliefs sought by the plaintiff:-

> 1. an order pursuant to O. 63 r. 9 of the Rules of the Superior Courts, discharging the order of the Master of the High Court made on 15th February, 2017 dismissing the plaintiff's notice of motion for liberty to enter final judgment;
>
> 2. an order pursuant to O. 37 of the Rules of the Superior Courts, granting the plaintiff summary judgment against the defendant in the sum of €257,039.39, together with continuing interest thereon.
>
> 3. an order pursuant to O. 63 r. 9 of the Rules of the Superior Courts, discharging the order of the Master of the High Court made on 15th February, 2017 dismissing the plaintiff's notice of motion to discharge the order for discovery made by the Master of the High Court on 16th February, 2016.

11. In the course of the hearing before the Master there were a number of affidavits filed on behalf of both the plaintiff and the defendant.

12. Although there are a number of applications before this Court, the central issue that must be decided is whether the plaintiff is entitled to summary judgment against the defendant for the sum sought or whether the defendant has established a basis for defending these proceedings thus requiring the Court to direct a plenary hearing. It is only in the event of a plenary hearing that the issue of discovery would arise.

Possible defences:
13. A number of defences to the plaintiff's claim have been put forward by the defendant both on affidavit and in submissions. I will deal with each of these defences.

Defective grounding affidavit of the plaintiff:
14. The Master held that the jurat of the affidavit of Mr. Jenkins, sworn 22nd October, 2015 was defective because the address at which it was sworn was not specified in the jurat. At the hearing before the Master, counsel for the plaintiff confirmed to the Master that the address at which the affidavit was sworn was the same as the address of the solicitor specified in the jurat. The Master was requested to exercise his discretion under O. 40 r. 15 of the Rules of the Superior Courts whereby an affidavit sworn for the purpose of being used in any cause or matter may be received notwithstanding any defect in the jurat. The Master declined to do so.

15. In light of the explanation given and the nature of the mistake in the jurat, I am satisfied, pursuant to the provisions of O. 40 r. 15, to receive the affidavit of Mr. Jenkins.

Deponent's means of knowledge:
16. In his affidavit sworn 22nd October, 2015, grounding the application for liberty to enter finial judgment, Mr. Jenkins deposed that:- "I am employed by the plaintiff as a director of business banking…" This was not correct and was relied upon by the defendant to show that Mr. Jenkins had no authority to swear the grounding affidavit. This, it was submitted, afforded a ground of defence to the proceedings.

17. In response, by way of a further affidavit, Mr. Jenkins accepted the error but stated that by virtue of a board meeting of the plaintiff held on 14th July, 2016 he was appointed an "authorised officer" entitled to give evidence by way of affidavit on the plaintiff's behalf. In pursuance of this authorisation Mr. Jenkins deposed to the following:-

> "7 Since receiving authorisation to act in the manner outlined above on the plaintiff's behalf, I have reviewed the plaintiff's books and records concerning the defendant's liabilities and I verify that the averments contained in my grounding affidavit sworn on 22nd October, 2015 are true and accurate…"

18. In light of the foregoing, I am satisfied that the aforesaid averment corrects the error in the grounding affidavit and does not constitute a ground for defending these proceedings.

The plaintiff does not have *locus standi* to enforce the loan:
19. The defendant contends that the loan was with the Bank and that there is not sufficient evidence of its transfer to the plaintiff.

20. In response, Mr. Jones in his affidavit of the 1st December, 2016 sets out in considerable detail exactly how the loan facility in question was acquired by the plaintiff. He refers to an order in the High Court of Justice, Chancery Division, (Henderson J.) dated 29th October, 2010.

21. This order provided at (a):-

> "On and with effect from the effective date, the business shall, by virtue of this order, be transferred to and vested in the transferee, in accordance with and subject to the terms of the scheme." The scheme defined the "transferor" as being the Bank and the plaintiff as being "the transferee".

22. "Business" is defined as:-

> "Business means part of the business of the transferor carried on from establishments in the UK as at the effective date and comprising… (iii) business banking…"

23. "Business banking" is in turn defined in clause 1.1 of the scheme as:-

> "The transferor's business banking in the UK, including the products listed in part c of schedule 1, but excluding for the avoidance of doubt any contingent facilities provided to, or in indemnity is provided by, customers in relation to the excluded business"

24. Part C of schedule 1 lists a number of matters included in the definition of "business banking", including a number of fixed and variable rate loans.

25. Clause 1.1 of the scheme also contains the following definition of "transferred loans":-

> "Each loan, overdraft or other lending or finance arrangement relating to the business other than the transferred mortgages (including for the avoidance of doubt credit facilities provided to customers though the UK card business), under which any liabilities to the transferor remained unsatisfied or outstanding at the effective date (but excluding the excluded loans)"

26. The loan to the defendant was not an "excluded loan" as defined in clause 1.1. The "effective date" was 1st November, 2010.

27. The said order provided for "evidence of transfer" as follows:-

> "the production of a copy of the order with any modifications and/additions made under paragraph. 13, shall for all purposes be evidence of the transfer to, and vesting in, the transferee of the business, the transferred assets, transferred liabilities, residual assets and residual liabilities…"

28. It appears to me, having regard to the clear terms that said order referred to, that the plaintiff is entitled to enforce the loan as per the facility letter of 16th October, 2007 and has *locus standi* to maintain the proceedings herein. Therefore, in my opinion, the defendant does not have a defence to the proceedings on this ground.

The loan facility of 16th October, 2007, was non recourse in nature:
29. If the defendant is correct in this submission then the plaintiff would not be entitled to judgment against him. The defendant relied upon certain matters in the said facility letter in support of this.

30. Firstly, the facility letter envisaged repayment of the loan by sale of the shares in Custom House Capital Munich Parkstadt Property.

31. Secondly, by way of security the Bank required a first and only legal charge over the shares in the said Custom House Capital fund.

32. Thirdly, the defendant claimed that "at all times it was understood" that the loan facility was to be non-recourse. However, in his affidavits the defendant deposed no facts nor identified any person in support of this contention. Therefore, other than the defendant's statement, there was no evidence of such an agreement or representation.

33. As for the terms of the facility letter, which the defendant relies upon, there could be some substance in this were it not for the fact that the facility letter expressly incorporated the general terms and provisions that the Bank operated for lending. In para. 2 above, I have set out the relevant term being clause 10.1 which clearly applies to the defendant's failure to repay the loan when required to do so.

34. In these circumstances, therefore, the defendant does not have a defence on this ground.

Offer by the plaintiff to restructure the loan facility in 2013:
35. By letter dated 11th September, 2013 the plaintiff offered to restructure the defendant's loan. The defendant felt that he was being pressurised into accepting a new facility in place of the original facility of October 2007.

36. In para. 6 of his affidavit of 25th January, 2016 the defendant states that he believed that the plaintiff may have had some underlying motive in offering this. Following his decision not to agree any new terms the defendant sought discovery of documentation from the plaintiff relevant to this, possibly in the belief that such documentation might substantiate his suspicions of the plaintiff's motives.

37. In addition, the defendant had already made a request under the Data Protection Acts for information concerning the defendant held by the plaintiff. This information was provided by the plaintiff albeit in redacted form.

38. In my view, given that there was no agreement for a new facility offered by the plaintiff the matter falls to be determined on the basis of the terms of the facility letter of 16th October, 2007, referred to above.

39. The submission that discovery might substantiate some defence is answered by the following passage from Clarke J. (as he then was) in *GE Capital Woodchester Limited v Aktiv Kapital Asset Investment Limited* [2009] IEHC 512:-

> "6.6 Likewise, there will always be cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like. That is not to say that it is open to a defendant, on a summary judgment application, to make a vague and generalized contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like. However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasized that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned…"

40. In my view, the reasons which the plaintiff may have had to restructure the loan facility and the motives for such is a "mere assertion" and no "credible basis" for such as been put forward.

41. I would make a similar finding as regard the redacted documentation furnished to the defendant under the Data Protection Acts. Insofar as the defendant has complaints concerning the plaintiff's compliance, the said Acts provide a mechanism to deal with such and do not fall to be dealt with by this Court.

42. Therefore, I am of the view that the circumstances under which the plaintiff offered to restructure the defendant's loan facility in 2013 do not afford grounds for defending the plaintiff's claim.

Jurisdiction:
43. The defendant challenges the plaintiff's entitlement to bring these proceedings before the courts in this jurisdiction. As stated above, the loan facility was to be governed by the laws of England. As the defendant resides in Ireland it was open to the plaintiff to bring the proceedings in this jurisdiction under the provisions of Regulation (EC) 44/2001, which were in force at the time the proceedings were commenced. Further, the defendant entered an unconditional appearance to the proceedings on 17th February, 2015.

44. As for the application of English law, the Court was furnished with a legal affidavit of Robert Fawke, solicitor, who deposed that following the sending of the letters of 16th October, 2013 and 22nd November, 2013 and the demand of 4th February, 2014 the sums demanded were, as a matter of the law of England and Wales, now due together with continuing interest.

45. Therefore, the defendant does not have a defence to the proceedings based on jurisdiction.

Applicable test:
46. The well established test the court should apply in determining whether to grant the plaintiff summary judgment or remit the matter to plenary hearing is set out *in Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 IR 607. This test requires the court to pose the question as to whether there is a fair or reasonable probability of the defendant having a real or bona *fide* defence to the claim.

47. In applying this test, I have looked at each of the various grounds put forward by the defendant. In each case, I have found that none of the grounds of defence amount to a real or *bona fide* defence. Therefore, the plaintiff is entitled to judgment in the amount claimed.

48. Having reached this conclusion it follows that the issue of discovery does not arise, so I discharge the order for discovery made by the Master of the High Court on 16th February, 2016.