THE HIGH COURT

[2016 No. 27 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

ALAN BURNS

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 21st day of December 2017,

Loan:
1. Pursuant to a credit agreement of 1st October, 2007 the plaintiff advanced to the defendant the sum of €250,000. The period of the loan was for five years and repayment was to be made by instalments over nineteen quarters.

2. The purpose of the loan was to enable the plaintiff to invest in CHC Prime Property Fund 1, being a fund of Custom House Capital Property Funds PLC. This fund was a Qualifying Investment Fund and it is referred to as "QIF1".

3. The monies were drawn down in March/April 2008. However, they were not invested in QIF1 but were used to acquire other assets outside QIF1. These assets were transferred to the said fund in 2010. However, by that stage their value had collapsed. It is a fact that QIF1 was not established until December 2009 some 20 months after drawdown. In May 2009 the defendant had received what can only be described as a bogus statement from Custom House Capital stating that the value of his portfolio in QIF1 stood at €250,000.

4. In these proceedings the plaintiff is seeking judgment against the defendant in the amount outstanding on foot of the said credit agreement. Needless to say, the value of the defendant's investment in QIF1 is worth nothing.

5. In an affidavit of the defendant, sworn 16th January, 2017 he states that in entering into the credit agreement he relied upon the regulated nature of the investment in QIF1 and the plaintiff's role in that regard. The prospectus for the investment identified the plaintiff as being the "custodian" of the QIF1. The prospectus states:-

> ""custodian"
>
> the governor and company of the Bank of Ireland or such other person as may be appointed, in accordance with the requirements of the financial regulator notices, to act as custodian to the company.."

and

> ""custodian"
>
> the company has appointed the governor and company of the Bank of Ireland, as custodian of its assets pursuant to the custodian agreement dated 22nd September, 2006, between the company and the custodian. The custodian provides safe custody for the company's assets pursuant to the Act.." (p. 20)

The "custodian" was responsible for, *inter alia*, holding the assets of the fund and reporting on its net asset value.

6. In the event, it would appear that the plaintiff did not, in fact, act as "custodian".

7. The defendant maintains that he has a defence to the plaintiff's claim and seeks to have the Court remit the matter to plenary hearing.

Custom House Capital Limited (CHC):
8. On 15th July, 2011 the High Court (Hogan J.) appointed two inspectors to CHC, pursuant to the relevant legislation. The inspectors delivered their report on 19th October, 2011 and, subsequently, by order of the High Court, CHC was wound up.

9. In giving his judgment directing the winding up of CHC, *In The Matter Of Custom House Capital Ltd (No.2), In Re* [2011] IEHC 399, Hogan J. stated:-

> "8. The Inspectors' findings make for grim and disturbing reading. They concluded that in almost every respect that there had been systematic abuse of client funds for improper purposes and that this misconduct was pervasive within CHC. CHC's core activities related to the purchase of investment properties, principally in countries such as France, Switzerland and Germany. But many of the investors were unaware that their cash funds were being used for this purpose. In other cases, money was taken from accounts where there were positive cash balances in order to meet the redemption call amounts due on other accounts.
>
> 9. In fact, the report describes a long litany of general misfeasance and wrong doing, ranging from the systematic deliberate misuse of funds, gross impropriety, corporate misfeasance and false accounting to trading in a fraudulent manner. Under ordinary circumstances the contents of this report would be regarded as deeply shocking, save that, sadly, our capacity to be shocked by nefarious conduct in the financial world has been diluted by incredible and remarkable events over the last three years both at home and abroad, of which the Madoff scandal is only perhaps the most notorious international example. It was, nevertheless, in its own way telling that Ms. McGrath, counsel for the CHC, expressly stated that the company did not dispute the inspectors' findings and conclusions…"

10. Later in his judgment Hogan J. stated:-

> "18. One might elaborate on the latter observation by noting that in the latter years of its operation, CHC's trading

system exhibited some classic features of a typical Ponzi scheme…"

Correspondence:

11. Following the issue of a notice of motion by the plaintiff seeking recovery of its loan, the solicitor for the defendant, Crowley Millar, by letter dated 29th June, 2016 wrote to the plaintiff's solicitors stating:-

> "arising from that meeting we would be obliged if you would address the following issues to assist us is drafting the replying affidavit:-
>
> 1. Bank of Ireland was the valuer and trustee of the QUIF1 in respect of which the loan, the subject matter of these proceedings was made to Mr. Burns. We would be obliged if you would please furnish us with details of the appointment of the bank to that position and details of the bank's resignation from that position;
>
> 2. kindly confirm why the bank resigned from that position as trustee and valuer of the QUIF;
>
> 3. kindly confirm what steps were taken by the bank to ensure that a replacement trustee and valuer was appointed in its place to the QUIF;
>
> 4. kindly confirm how many customers of Bank of Ireland were introduced to this QUIF and how many loans were made by the bank to facilitate investment in the QUIF;
>
> 5. kindly confirm whether or not any commission was paid by Bank of Ireland to Custom House Capital or its servants or agents with respect to the lending made by Bank of Ireland in respect of the QUIF;
>
> 6. kindly confirm whether or not Bank of Ireland undertook due diligence with respect to the QUIF and the investments proposed by it and if so kindly furnish us with copies of the relevant due diligence report(s)…"

12. This letter was replied to by McDowell Purcell, solicitors for the plaintiff on 7th July, 2016 as follows:-

> "Dear Sirs,
>
> We refer to the above mentioned matter and to your letter dated 29 June 2016. We note the contents contained therein.
>
> Please note that for your own reference that the correct spelling of the fund referred to in your letter is "QIF" and not "QUIF".
>
> In relation to the requests for information raised in your letter, we believe that your client should be in a position to answer these queries or to raise any disputed points in his replying affidavit.
>
> Please refer to the statement of account already exhibited in the grounding affidavit of Paul Trainer which sets out the interest amounts and rates applied…"

13. By letter also of 7th July, 2016 the defendant's solicitor wrote to the plaintiff's solicitor:-

> "In order for our client to file a meaningful affidavit in response to your client's Grounding affidavit, we require the information and documents sought in our letter of the 29th June, 2016. These are obviously relevant to the matters at issue in the proceedings and we respectfully suggest it would be in ease of the parties if these issues were addressed now. You might kindly reconsider your position…"

14. The solicitors for the plaintiff responded and enclosed a letter sent by the plaintiff to the defendant of 19th March, 2014 in which the plaintiff stated:-

> "The bank did not introduce you to Custom House Capital (CHC). The bank's role was limited to adjudicating on requests for credit, referred to us by CHC and to provide term debt facilities to potential investors, which was sourced independently by CHC and/CHC's professional contacts. You willingly provided financial information to enable the bank to adjudicate on your request…
>
> In conclusion it is clear from the above, the bank in offering at your request to provide term debt facilities to fund your proposed investment in CHC QIF fund, made no representations about CHC and/or QIF fund it was a matter for you and you alone to satisfy yourself in that regard"

15. There was further correspondence between the parties. Ultimately, the solicitors for the plaintiff, by letter dated 6th October, 2016 wrote:-

> "We note you have also set out a number of queries raised on foot of our letter of 16th August, 2016. We respond as follows:-
>
> 1. as our client had no involvement in the issuing of the Custom House Capital documentation to your client, we cannot comment on the comments therein. However, as detailed in our letter of 16th August, 2016, as far as we are aware, Bank of America Custodial Service Ireland Limited acted as the custodian of the fund. This information is a matter of public record and we would refer you to the final report to the High Court by court appointed inspectors in *Re Custom House Capital Ltd* dated 19th October, 2011 which sets out this information in full.
>
> 2. The bank was not involved with, and therefore cannot respond to the queries listed at 2-7 of your 29 June, 2016 letter.
>
> With regards to all of the other queries raised in your letter of 4 October, 2016, this is tantamount to a request for particulars. If you believe that any of the queries raised are relevant to the defence of the proceedings, all assertions

should be set out in a replying affidavit to which our client will then respond if it deems necessary to do so..."

Affidavits:
16. In his replying affidavit of 16th January, 2017 the defendant did set out the queries raised in correspondence.

17. The defendant in the course of his affidavit stated:-

> "10. there is a further – and more fundamental – issue. The bank's response ignores that fact that I relied upon the regulated nature of the investment and the bank's particular role in that regard. The prospectus for the investment identified the bank as being the Custodian of the QIF... the custodian was responsible, *inter alia*, for holding the assets of the funds and reporting its net asset value.."

18. Having quoted from the inspector's report the defendant further stated:-

> "13. In fact, it was not established until December 2009, some twenty months after drawdown and 6 months after the bogus statement exhibited above. By the High Court inspector's reckoning, as of that date CHC transferred assets worth €118 million Euro into the fund. CHC had paid €138 million for those assets. The inspectors identified a litany of irregularities in relation to the operation of the QIF's and in relation to the business of CHC generally.
>
> 14. The crucial feature of the forgoing, insofar as I am concerned, is that there is evidence that the bank was on notice of the governance issues with the QIF. As adverted to above, the prospectus stated the bank was the custodian of the QIF a fact upon which I placed reliance in making my investment. In fact, the bank did not act as Custodian. Such information as I have about the circumstances in which that occurred is drawn from the evidence of Harry Cassidy (Chief Executive of CHC until his resignation on 13th July, 2011), which can be assumed to be unreliable;
>
> *"We had significant difficulties getting trustees and custodians for the QIF s. We had been lead to believe and had it on strong authority that Bank of Ireland security services were going to act as our trustees and custodians. We then spent an inordinate amount of time and fees tying to establish exactly how they would take security of the assets that were going to be held to the extent that they then turned around and said, 'oh well, we don't like that. We don't know how to hold property and we are not going to act.' And we were left literally high and dry. And then we approached I think North Trust Bank and halfway during the discussions with them they got taken over or taken out or the people we were dealing with got laid off and we were left high and dry a second time. And then Bank of America or whoever was the forerunner of Bank of America stepped in…""*

19. The plaintiff in its affidavit dealt with the issues raised by the defendant as follows:-

> "7. The prospectus identifies the plaintiff as the custodian of the QIF. At this stage it is noteworthy to point out that the plaintiff did not produce or provide this prospectus to the defendant. It was a document created by a third party and the plaintiff cannot be held liable for any information or errors contained therein. Whilst Custom House Capital (CHC) may have originally marketed the Plaintiff as the QIF's custodian, the plaintiff did not act as the custodian of the fund; Bank of America Custodian Services held this role. The plaintiff was not a party to this transaction or subscriber to the QIF and as such, has no knowledge as to whether an updated or supplemental prospectus was issued to investors, as would be the normal practice when amendments are made to a financial product."

And

> "12. The defendant alleges that the plaintiff was on notice of governance issues with the QIF as it did not act as custodian, although originally marketed as such in the prospectus. This is purely speculatively on the part of the defendant. There are many commercial reasons why the plaintiff may not have acted as custodian of the QIF. In addition the High Court Inspector's Report made no finding or even suggestion that the plaintiff had any knowledge of any governance issues in the QIF and failed to act."

and

> "14. In order to invest in a QIF, an investor must certify that they are a qualified investor; that is an investor who can make a minimum investment of €100,000 and who must meet certain appropriate expertise/understanding tests. By holding himself out to be a qualified investor, this would indicate that the defendant considered himself an informed investor who had such knowledge or experience in financial and business matters as would enable him to properly evaluate the merits and risks of the prospective investment. I say that the defendants relationship in this regard was directly with CHC as their customer…"

Conclusions:
20. Based on the documentation before the Court, the naming of the plaintiff as the "custodian" and all that that entails in the prospectus issued by CHC was done with the full knowledge and consent of the plaintiff. Further, it seems more than probable that associating the plaintiff with CHC in the prospectus was designed to give confidence to potential investors, including the plaintiff.

21. The points made and queries raised both in correspondence and affidavits on behalf of the defendant are, to my mind, reasonable and deserving of a better and more detailed response than that given by the plaintiff. Further, it seems surprising that when requested to do so the plaintiff did not take the opportunity to give direct and specific details of, what it may consider to be, its lack of involvement in CHC.

22. The assertion by the plaintiff that the defendant was a "qualified investor" and thus "had such knowledge of experience in financial and business matters as would enable him to properly evaluate the merits and risks of the prospective investment…" is difficult to understand given the plaintiff's stated role as "custodian" in the prospectus.

23. It is to be noted that in his affidavit the defendant makes clear that in the ordinary course of events the plaintiff would have no liability to him in respect of the investment but contends that his case falls within the very narrow range of cases where it would be unconscionable for him to be required to repay the loan.

The test to be applied:
24. The test which the court should apply in remitting an action, such as this, to plenary hearing is well settled. I refer to the headnote of the Supreme Court decision in *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 IR 607:-

> "1. That the defendant's hurdle on a motion such as this was a low one and the jurisdiction to grant summary judgment was one to be used with great care.
>
> 2. That it was for the court to decide whether the defence set out in the affidavits together with the documents exhibited therewith, was credible, or in other words, whether there was a fair or reasonable probability of the defendant having a real or *bona fide* defence. In deciding whether the defendant had a credible defence, the court had to concentrate its attention on the matters put forward in the defence itself.
>
> *National Westminister Bank plc. v. Daniel* [1993] 1 W.L.R. 1453 followed.
>
> 3. That the fair and reasonable probability of the defendant having a real or bona fide defence, was not the same thing as a defence which would probably succeed, or even a defence whose success was not improbable.
>
> *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 considered.
>
> 4. That the fundamental questions to be posed on an application such as this remained: Was it very clear that the defendant had no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendant's affidavits fail to disclose even an arguable defence?
>
> *Crawford v. Gillmor* (1891) 30 L.R. Ir. 238 followed."

25. In applying this test to the matters set out in the affidavits together with the documents exhibited before this Court, it is clear to me that the defendant has established a real or *bona fide* defence which ought to be dealt with by way of a plenary hearing. I am satisfied that this is not an appropriate case to grant the plaintiff summary judgment.

26. I will hear the parties as to the appropriate directions for pleadings.