THE HIGH COURT

[2015 No. 677S]

BETWEEN

ALLIED IRISH BANKS PLC AND AIB MORTGAGE BANK

PLAINTIFFS

AND

TADGH O'BRIEN

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 15th February, 2017.

I. Introduction

1. The plaintiffs seek summary judgment for the amounts now outstanding under each of the loan arrangements described hereafter.

II. The Test for Summary Relief

2. The hurdle to be surmounted by Mr O'Brien as regards having this matter sent to plenary hearing is a low one. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623:

> *"[T]he 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?"*

3. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, at 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."*

III. Loan #1

a. Detail of Loan #1

4. By letter of sanction dated 23rd December, 2010, (Letter #1), Allied Irish Banks plc (AIB) offered to make available to Mr O'Brien a loan facility (Loan #1) in the amount of €360k, subject to various terms and conditions. The offer was accepted by Mr O'Brien on 6th January, 2011. Letter #1 approves an overdraft facility and a further facility (Loan #1) described as follows:

> *"FACILITY: Loan Account 1*
>
> *AMOUNT: EUR360,000 (Three hundred and sixty thousand Euro)*

PURPOSE: Renewal of existing facility sanctioned in relation to equity

release on [named property] to fund deposits on various property purchases.

INTEREST: Base Lending rate varying, plus 3% per annum, currently

4.014% per annum.

REPAYMENT: Review/Refinance by 20/12/2011."

b. Nature of Loan #1

5. In its special indorsement of claim, AIB indicates that, in its view, Letter #1 has the following effect:

> *"[Letter #1] provided inter alia that the loan was to be reviewed or refinanced by 20 December 2011, and further provided inter alia for the applicable interest rate*."

6. Notably absent from the above-quoted text is whether Loan #1 was a 'loan account' or 'term loan' or, e.g., some form of so-called 'evergreen' overdraft financing. The exact category of the loan financing is of potential relevance because the letter of sanction also states that Loan #1 is subject to AIB's 'General Terms and Conditions Governing Business Lending' (the 'General Terms and Conditions') and these make differing provision in respect of different categories of financing.

7. At first glance, the text *"FACILITY: Loan Account 1"* would suggest that Loan #1 is a loan account facility within the meaning of Section III of the General Terms and Conditions. However, in his written submissions to the court, and consistent with the affidavit evidence placed by AIB before the court, counsel for AIB asserts, *inter alia*, that "*After the expiry of the express review/refinance date on the loan, there was an obligation to repay the loan*". If that is so, then what AIB appears to consider itself to have been providing, albeit that this is not expressly stated in Letter #1, was a term loan within the meaning of Section IV of the General Terms and Conditions, the applicable term being from the date of acceptance to 20th December, 2011, with an agreement to "*review/refinance by* 20/12/2011".

c. Repayment of Loan #1

8. Mr O'Brien points to the fact that he continued to make monthly interest repayments after the purported expiry date. To this, AIB responds in its affidavit evidence, not that the loan was a capital plus interest facility but that "[A] *borrower cannot unilaterally purport to change the express terms of a loan by making payments*". This is true, provided the relevant contract does not provide otherwise. But has Mr O'Brien in any event purported unilaterally to change the express terms of Loan #1? The Letter of Sanction makes provision as regards interest payments only. It makes no provision as regards the repayment of capital, whether over the term of the loan or by a 'bullet' repayment at some defined date or otherwise. Nor does the court see any clause in the General Terms and Conditions providing that the default repayment obligation is 'capital plus interest'. So it is possible that he may not have done so.

d. "Review/Refinance"

9. What does the phrase "Review/Refinance" in Letter #1 mean? If AIB is correct and the term loan expired on 20th December, 2011 what is there left to 'review'? The repayment date, if AIB is to be believed, has come and the borrower must repay or face enforcement proceedings. Some wider review of relations with the customer does not appear to be contemplated – the special indorsement of claim is quite clear that "[Letter #1] *provided* inter alia *that the loan was to be reviewed or refinanced*" (emphasis added). And if there is nothing left to review, is AIB obliged to refinance as an alternative to doing a review? Offhand, this last possibility would seem unlikely to be what was agreed.

10. Mr O'Brien's actions do not bring a great deal of clarity to matters. He appears, from the evidence, to have viewed his acceptance of Letter #1 as establishing some form of enduring financing whereby the existing terms continued or rolled-over on 20th December 2011, absent some contrary arrangement coming into play between himself and AIB. And this is not just a clever claim on his part at this time: his continuing repayments, albeit of interest only, are suggestive that he had a genuine understanding (or misunderstanding) of his obligations under the credit agreement. Quite, however, when he considers that the capital must be repaid, and it must be repaid, is unclear.

11. What the court considers to be the most likely reading of the term "Review/Refinance" is that by 20th December, 2011, there would be a meeting between the parties to consider (a) whether the repayment obligations under the continuing loan agreement were being and/or had been complied with, and (b) whether the bank would be minded to extend further credit in the circumstances then presenting. However, there is a degree of uncertainty arising as to precisely what was agreed in this regard, thanks to the somewhat shorthand wording of the letter of sanction and the absence of suitable curative text in the General Terms and Conditions.

e. Cross-Default/On Demand Repayment

12. Notwithstanding the above, the amount now sought by AIB in the within proceedings pursuant to Loan #1 is nonetheless recoverable by way of summary judgment. This is because if the loan is a term loan, then the cross-default provisions under clause 4.2 of the General Terms and Conditions apply and, for example, Mr O'Brien presently stands in default of his repayment obligations under Loan #3. Clause 4.2 provides as follows:

> *"4.2 A term loan though expressed to be repayable over or within a specified period may be terminated by the Bank and the Bank may demand early repayment at any time with or without notice to the Borrower upon the occurrence of any of the following events…*
>
> *(xi) On the breach, non-performance or non-observance by the Borrower of any of the terms or conditions, or covenants attaching to any facility whatsoever."*

13. What if the loan is not a term loan? Then the loan is either a loan account, repayable on demand pursuant to cl. 3.1.1 of the General Terms and Conditions ("*Loan account facilities are repayable on demand*") or, alternatively, some form of evergreen overdraft financing, repayable on demand pursuant to cl. 2.1.1 of the General Terms and Conditions ("*Overdraft facilities are repayable on demand*").

14. There is no doubt as to the amount of the initial loan or the applicable interest arrangements and so no doubt as to the amount now owing.

f. Conclusion

15. When it comes to Loan #1, it is very clear, to borrow from the wording of Hardiman J. in *Aer Rianta* that Mr O'Brien has no case. There is either no issue to be tried or such issues as arise to be tried are simple and easily determined by this Court. His affidavit evidence fails to disclose even an arguable defence. So Mr O'Brien has failed to surmount even the limited hurdle identified by Hardiman J. in *Aer Rianta* for those seeking a plenary hearing of a matter in respect of which summary relief has been sought. Though mindful of that "*discernible caution*" to which McKechnie J. refers in *Harrisrange* when it comes to the power to grant summary judgment, the court sees no alternative but to grant the summary judgment now sought against Mr O'Brien in respect of Loan #1.

IV. Loan #2
a. Detail of Loan #2

16. By letter of sanction dated 9th February, 2010, (Letter #2), Allied Irish Banks plc offered to make available to Mr O'Brien a loan facility (Loan #2) in the amount of €876+k, subject to various terms and conditions. The offer was accepted by Mr O'Brien on 18th February, 2011. Letter #2 approves an overdraft facility and a further facility described as follows:

> *"FACILITY: Loan Account*
>
> *AMOUNT: EUR 876,809.00 (Eight Hundred and Seventy Six*
>
> *Thousand Eight Hundred and Nine Euro)*
>
> *PURPOSE: EUR820,000 originally sanctioned towards purchase of*
>
> *[named properties]….*
>
> *INTEREST RATE: Base Lending rate varying, plus 3% per annum, currently*
>
> *3.711% per annum, and includes a Funding Premium of*
>
> *1.2%.*
>
> *REPAYMENT: Review/refinance by 09/02/2011 18/5/2011. In the interim*
>
> *the loan is subject to monthly payments of EUR5,175.95 by way of standing order commencing 09/03/2010 18/7/2010, calculation based on repayments over a 20 year term."*
>
> *We will not automatically adjust the amount of the instalments if the interest rate rises or falls. This may mean that these instalments may become insufficient to clear the credit facility on schedule. If you want to make an adjustment to keep pace with an interest change, please ask us."*

b. "Review/refinance"

17. Again, in his written submissions to the court, counsel for AIB asserts, *inter alia*, that Letter #2, in providing for "*Review/refinance by 09/02/2011 18/5/2011*" had the result "*that the loan period expired on 18 May 2011*". So, despite the letter of sanction referring to the Facility as a "*Loan Account*", it appears, on AIB's own account, that Loan #2 was a term loan within the meaning of Section IV of the General Terms and Conditions, the applicable term being from the date of acceptance to 18th May, 2011, with an agreement to "*review/refinance*" by the later date. Oddly, in the special indorsement of claim (and this is repeated in the affidavit evidence), it is stated by and for AIB in respect of Loan #2 that "[Letter #2] *provided inter alia that the loan term was subject to review or refinance by 18 May 2011*" (emphasis added). It will be recalled that, when it came to Loan #1, AIB indicated in the special indorsement of claim that ""[Letter #1] *provided* inter alia *that the loan was to be reviewed or refinanced*" (emphasis added). It is not clear to the court whether this is just a 'slip' in the drafting or whether, when it comes to Loan #2, some narrower form of review/refinance was always intended by the parties.

c. No Review Provided

18. Mr O'Brien's particular complaint as regards this loan is that he was not provided with a review (he does not specify the nature of the review) by 18th May, 2011. However, there is nothing by way of evidence to support this assertion. And the court is mindful in this regard of the observation in Clarke J., at para. 23 of his judgment for the Supreme Court in *Irish Bank Resolution Corporation Ltd. (in special liquidation) v. McCaughey* [2014] 1 I.R. 749, that in summary debt proceedings "*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 [of which there is none here] that evidence might be available…*". The court is mindful too that AIB clearly indicates in a letter of 22nd August, 2012 and has shown considerable forbearance as regards enforcement of the loan: if there was a re-structuring to be agreed, there was time galore to agree it and no such agreement has been arrived at.

d. Cross Default/On Demand Repayment

19. When it comes to Loan #2 it appears from the evidence that there was a complete failure to comply with the repayment obligations, i.e. there was no repayment of capital or interest. (Again, the loan agreement refers to the interest arrangements only, though one can doubtless work backwards from the agreed monthly repayment obligations to discern when and how the capital fell to be repaid; no calculation of this form was provided to the court). As with Loan #1, regardless of exactly what was agreed in Loan #2 as regards the substance of the review to be done by 18th May, 2011, the full amount owing under Letter #2 is now in any event repayable pursuant to the cross-default or on-demand provisions of the General Terms and Conditions referred to previously above.

e. Conclusion

When it comes to Loan #2, it is very clear, to borrow from the wording of Hardiman J. in *Aer Rianta* that Mr O'Brien has no case. There is either no issue to be tried or such issues as arise to be tried are simple and easily determined by this Court. His affidavit

evidence fails to disclose even an arguable defence. So Mr O'Brien has failed to surmount even the limited hurdle identified by Hardiman J. in *Aer Rianta* for those seeking a plenary hearing of a matter in respect of which summary relief has been sought. Though mindful of that "discernible caution" to which McKechnie J. refers in *Harrisrange* when it comes to the power to grant summary judgment, the court sees no lawful alternative but to grant the summary judgment now sought against Mr O'Brien in respect of Loan #2.

V. Loan #3
a. Detail of Loan.

20. By letter of offer of mortgage loan dated 21st November, 2005, (Letter #3), AIB offered to make available to Mr O'Brien a mortgage loan (Loan #3) in the amount of €1.542m, subject to various terms and conditions. Although it was indicated at the hearing that Mr O'Brien was a business borrower, Letter #3 was issued to Mr O'Brien qua consumer. Thus it contains on its face most of the details required under s.129 and the Third Schedule of the Consumer Credit Act 1995. There is also a signed consent that is clearly drafted with s.46 of the Act of 1995 in mind. Letter #3 is signed but undated; however AIB indicates in its affidavit of evidence that its offer of 21st November, 2005, was accepted on 30th November, 2005, and this appears to be undisputed. Nor is it disputed that Mr O'Brien has since defaulted under this mortgage loan agreement.

b. Complaints Made.

21. Mr O'Brien makes two complaints in the context of Loan #3, viz. (i) that he borrowed the monies from AIB but is now being pursued by AIB as agent for AIB Mortgage Bank (AIBMB) as creditor; and (ii) that there was a want of compliance with the demand provisions contained in cl. 8 of the General Terms and Conditions appended to the letter of offer.

22. When it comes to (i) the process whereby AIB came (a) to be substituted by AIBMB as creditor and (b) acting for AIBMB as agent, this can be readily explained and is entirely proper. By virtue of (a) the Asset Covered Securities Act 2001 (Approval of Transfers between Allied Irish Banks plc and AIB Mortgage Bank) Order 2006 (S.I. No. 60 of 2006), (b) a scheme dated 8th February, 2006, between AIB and AIBMB for the purposes of s.58 of the Act of 2001, (c) a transfer agreement of 8th February, 2006, between AIB and AIBMB, and (d) Schedules Nos 1 and 4 dated 8th February, 2006, and 24th February, 2011, made for the purposes of the scheme and by AIB and AIBMB, AIBMB was substituted as the creditor in respect of, *inter alia*, Mr O'Brien's mortgage loan. Consequent upon this arrangement there is also a formal agency agreement extant between AIBMB and AIB; no legal difficulty presents in this regard.

23. As to (ii), cl. 8 of the General Terms and Conditions appended to the letter of offer, provides as follows: "*The Bank may, subject to due compliance with any statutory requirements, if applicable, exercise the right to demand early repayment of the Mortgage Loan balance outstanding and accrued interest thereon if the customer is in breach of the terms of this offer or of the Bank's deed of mortgage over the property where, after due notice is given by the Bank, the Customer fails to remedy the breach*." No issue was taken in this regard but the court understands the just-quoted text to mean any (if any) "*statutory requirements*" concerning the making of demand. No such requirements were identified to the court, let alone any breach of same being suggested. The only argument raised by Mr O'Brien concerning cl. 8 was whether the "*due notice*" required under that provision has in fact been given. As the court understands the complaint made by Mr O'Brien in this regard, it is that, pursuant to cl. 8, AIB may only demand early repayment if it has previously given due notice of the breach and the customer has failed to remedy the breach. In this regard, the court notes that a letter of 22nd August, 2012 from AIB to Mr O'Brien states, *inter alia*, that: "*We refer to ongoing discussions in relation to your facilities with the Bank….[U]nless we receive a satisfactory reply within 10 days from the date of this letter we will have no option but to take whatever action is deemed necessary to recover the debt*." Though perhaps somewhat oblique, it appears to the court that there is enough in this last-quoted text to satisfy the due notice requirements of cl.8.

c. Conclusion

24. When it comes to Loan #3, it is very clear that Mr O'Brien, to borrow from the wording of Hardiman J. in *Aer Rianta*, has no case. There is either no issue to be tried or such issues as arise to be tried are simple and easily determined by this Court. His affidavit evidence fails to disclose even an arguable defence. So Mr O'Brien has failed to surmount even the limited hurdle identified by Hardiman J. in *Aer Rianta* for those seeking a plenary hearing of a matter in respect of which summary relief has been sought. Though mindful of that "discernible caution" to which McKechnie J. refers in *Harrisrange* when it comes to the power to grant summary judgment, the court sees no lawful alternative but to grant the summary judgment now sought against Mr O'Brien in respect of Loan #3.

VI. Loan #4
a. Detail of Loan

25. By particulars of offer of mortgage loan dated 16th May, 2007, (Letter #4), AIBMB offered to make available to Mr O'Brien a mortgage loan (Loan #4) in the amount of €205k, subject to various terms and conditions. On 22nd May, 2007, this offer was accepted by Mr O'Brien.

b. Demand Absent Default?

26. Mr O'Brien complains that it is sought to enforce the provisions of Loan #4 against him when he is not in default thereunder. There is no basis to this complaint:

> (i) the applicable mortgage is, per clause 2.1 of the mortgage, an 'all sums due' mortgage, in that it secures the payment of the "*Total Debt*" outstanding from Mr O'Brien, the term "Total Debt" being defined in cl. 2.3 of the mortgage as including "*all amounts payable to the Mortgagor in respect of any loans or credits of any nature made or granted by that Lender to the Mortgagor now or at any time in the future…*"; so the mortgage is a mortgage for, inter alia, any and all of Loan #1, Loan #2, Loan #3 and Loan #4;
>
> (ii) clause 3.2 of the standard mortgage conditions applicable to the mortgage (and expressly incorporated into the mortgage by cl. 4 of same) provides that "*Notwithstanding the terms of the Mortgage Deed, the Total Debt owing to a Lender as shall for the time being remain unpaid shall immediately become due and payable on demand to the relevant Lender [be it AIB or AIBMB] on the happening of any Event of Default*"; so the question arises, 'has there been an 'Event of Default'?' and the answer to this question is that there clearly has because

(iii) the "*Events of Default*", as identified at cl. 8 of the standard mortgage conditions, include, at sub-paragraph (b) "*[i]f the Mortgagor fails to pay or discharge within three months of the due date any money repayable by him or any obligation or liability payable by him from time to time to a Lender*", and, at sub-paragraph (c) if "*[t]here is a breach by the Mortgagor of any covenant, condition or agreement contained in [inter alia] any Agreement for Credit*", with the term "*Agreement for Credit*" being defined at cl. 2.1 of the standard mortgage conditions as including "*any agreement of any nature involving the provision to the Mortgagor of any Total Debt*"; and, for example, there has been a breach of Loan #3;

(iv) as there has been an Event of Default under the mortgage, Loan #4 itself becomes repayable because clause 8 of the 'General Terms and Conditions of Offer of Mortgage Loan' provides that "*The Bank may…exercise the right to demand early repayment of the Mortgage Loan balance outstanding and accrued interest thereon if the customer is in breach of the terms of this offer or the Lenders' Mortgage over the property*".

27. The combined effect of (i) to (iv) is that Loan #4 may be enforced, notwithstanding that Mr O'Brien may have continued his repayment of the amounts owing thereunder. And, from a lender's commercial perspective, one can see why this would make sense: a lender looks to a borrower as a person to whom it has made multiple loans; it does not necessarily look to its loans as siloed extensions of debt to an unknown debtor; and it can rightly see default risk as a risk attaching more to the debtor than to debt, with this risk necessarily increasing, potentially to the point of commercial intolerability, when default on even a portion of the total debt outstanding from a particular borrower occurs.

c. Conclusion

28. When it comes to Loan #4, it is very clear that Mr O'Brien, to borrow from the wording of Hardiman J. in *Aer Rianta*, has no case. There is either no issue to be tried or such issues as arise to be tried are simple and easily determined by this Court. His affidavit evidence fails to disclose even an arguable defence. So Mr O'Brien has failed to surmount even the limited hurdle identified by Hardiman J. in *Aer Rianta* for those seeking a plenary hearing of a matter in respect of which summary relief has been sought. Though mindful of that "*discernible caution*" to which McKechnie J. refers in *Harrisrange* when it comes to the power to grant summary judgment, the court regretfully sees no lawful alternative but to grant the summary judgment now sought against Mr O'Brien in respect of Loan #4.

VII. Decision

29. There is always a sense in applications such as that now presenting of 'what might have been'. Mr O'Brien is clearly an enterprising gentleman who for a time was successful in property speculation. But the market turned and so did his luck. No doubt the plaintiffs would have been as pleased as Mr O'Brien had matters gone otherwise, if only because a successful customer is often a source of ever greater profit to an associated creditor. But matters went as they have, and, for the reasons identified above, the court is coerced as a matter of law into granting summary judgment to the plaintiffs in the amounts now sought in respect of each of Loan #1, Loan #2, Loan #3, and Loan #4.