**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 55

**Appeal No. 2014/271**

**[Article 64 Transfer]**

**Kelly J**
**Peart J.**
**Mahon J.**
**BETWEEN**

**The Governor and Company of the Bank of Ireland**

**Plaintiff/Respondent**

**- and –**

**John Flanagan**

**Defendant/Appellant**

**Judgment of the Court delivered on the 19th day of March 2015**

1. This is the Defendant's appeal from an Order of the High Court dated 14th March 2011 (and perfected on 21st March 2011), which granted summary judgment to the Plaintiff in the sum of €53,576.20, together with the costs of the proceedings. A helpful note of the *ex tempore* judgment of O'Neill J. delivered on 14th March 2011 has been made available to this Court.

2. The Defendant maintained a current account with the Plaintiff (Account No. 54817817) at its branch at Ennistymon, Co. Clare. This account operated from 1999 and on 19th July 2010 it was claimed by the Plaintiff that there was a principal sum due and owing on the account in the sum of €53,405.78, together with €77.01 in interest. On 19th July 2010 the Plaintiff's solicitors wrote to the Defendant demanding payment of the sum of €53,171.28, being the amount outstanding as of 19th July 2010. This was in fact an incorrect figure; it should have been €53,482.79. The Plaintiff maintains that the Defendant has no defence to the claim.

3. In the course of the proceedings before the High Court, a number of affidavits were sworn by the Defendant. A perusal of these affidavits indicate that the Defendant's opposition to the Plaintiff's claim can be usefully summarised as follows:-

> *i. While it is accepted that the current account number 54817817 has a debit balance of €53,405.78 (as of 19th July 2010), it is denied that such sum is due and owing to the Plaintiff.*
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> *ii. The said current account "was maintained and operated under verbal agreement for the purposes of lending financial support to other commercial facility agreements entered into between the Plaintiff and the Defendant and/or his partners and/or co-directors."*
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> *iii. If the amount owing on the said current account became repayable on demand (which is denied), the term providing for such repayment "was replaced by the discussions and agreements in or around October/November 2009 on the consolidation of all connected commercial facilities of your deponent with the Plaintiff."*
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> *iv. Discussions relating "to the consolidation of the commercial facilities" has "not progressed and finalised."*
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> *v. The facility letter dated 8th July 2008 was not accepted by the Defendant, and it is not accepted that the signature thereon is the signature of the Defendant.*
>
> *vi. The issue relating to the current account intrinsically linked to commercial accounts numbered 40136260 and 70896877.*

4. It is noteworthy that the said accounts numbered 40136260 and 70896877 are in the joint names of the Defendant and Mr. Gerard Lillis (who, with the Defendant is a co-Defendant in a related Appeal against a separate summary judgment in favour of the Plaintiff), whereas the account number 54817817, (the subject matter of this Appeal), is in the Defendant's sole name.

5. Twenty one grounds of appeal were submitted by the Defendant in his Notice of Appeal to this court, dated 7th April 2011.

6. For its part, the Plaintiff contends that the Defendant signed a *Form of Acceptance* of an overdraft facility letter on 8th July 2008, and that this facility letter provided that the overdraft facility was repayable on demand, and that in accordance therewith, the repayment of the overdraft facility was lawfully demanded by the Plaintiff. Specific reference is made to an oral agreement in 2006 when the then overdraft limit of €50,000 was raised to €100,000, with the expiry of that revised limit being 14th December 2006. The Plaintiff maintains that the overdraft limit reverted to €50,000 on 14th December 2006, and that the amount in respect of which summary judgment was granted by the High Court in excess of €50,000 represents interest accrued on the account. The Plaintiff maintains that the signature on the facility letter of 8th July 2008 is the signature of the Defendant. Reference is made to the fact that the Defendant denied that the signature was *by his own hand*, and as such was not a simple denial that it had been signed by him. It is contended that even if the Defendant had not signed the acceptance of the facility letter dated 8th July 2008, he would nevertheless remain bound by its terms, and the terms of an earlier facility letter, on the basis that the overdraft facility was at all material times processed and utilised by the Defendant in accordance with the terms and conditions thereof. It is further pointed out on behalf of the Plaintiff that the Defendant has not denied that the overdraft facility was used by him, or that he had the benefit of so using that facility over a number of years. On the basis of the note of the *ex tempore* judgment of O'Neill J which he delivered on 14th March 2011, the following is evident:-

> *i. The judge did not agree with the contention that if the Defendant had not signed the facility letter the Plaintiff was not entitled to pursue him in relation to the amount owing on the current account.*

*ii. The judge noted that the Defendant had availed of the overdraft facility and had used it very actively.*

*iii. That in relation to the contention by the Defendant that there had been a "consolidation agreement" concluded by the bank with him, the judge noted that, in particular, a letter from the Plaintiff dated 14th October 2010 had stated that it was unwilling to consolidate the accounts of the Defendant.*

*iv. That he was satisfied that no agreement, as contended for by the Defendant had been put in place. The judge remarked that even if the Plaintiff had agreed to consolidate the loans of the Defendant, this would not relieve the latter of his liability to repay the amount owing on the current account overdraft.*

*v. It was stated by the judge that the Defendant/Respondent has fallen well short of the threshold required in order to establish a credible bona fide defence.*

7. Generally, in circumstances where a customer of the bank is permitted to overdraw his account and, in doing so, to effectively borrow money from the bank, he is liable to repay the overdrawn sum to the bank, even in circumstances where the overdraft facility had not been formally sanctioned by, or agreed with, the bank. In *Lloyds Bank plc v. Voller* [2000] 2 ALL ER (COMM) 978 at 982 Wall J., in the course of his judgment, stated the following:-

> *"In my judgment the position is very simple and well established as a matter of banking law and practice. It is this. If a current account is opened by a customer with a bank with no express agreement as to what the overdraft facility should be, then, in circumstances where the customer draws a cheque on the account which causes the account to go into overdraft, the customer, by necessary implication, requests the bank to grant the customer an overdraft of the necessary amount, on its usual terms as to interest and other charges. In deciding to honour the cheque the bank, by implication, accepts the offer. It is plain that the account in question, the personal account, operated for a very substantial period of time, with cheques being drawn by Mr. Voller on the overdrawn account and the cheques being honoured by the bank. Thus, the only proper conclusion which can be drawn, in the absence of any evidence that there was a different agreement between Mr. Voller and the bank, is that the bank granted him overdraft facilities at the standard rate for overdrafts."*

8. On the facts of this case, the Defendant does not have a credible defence to the Plaintiff's claim. The funds provided to the Defendant by way of overdraft facility on the current account are acknowledged by the Defendant. He accepts that the funds were provided to him and that he used them for his own use and benefit. The arguments put forward by the Defendant in support of his contention that the Plaintiff is not entitled to judgment against him for the amount claimed are not credible. There is an absence of a reasonable probability that the Defendant has a real or *bona fide* defence. The Defendant fails to achieve even the very low threshold indicated as necessary to warrant a referral to plenary hearing in *Aer Rianta v. Ryanair* Limited [2001] 4 I.R. 607. That threshold was clearly explained in *First National Commercial Bank plc v. Anglim* [1996] 1 I.R. 75 at 78/79, when Murphy J. dealt with the issue in these terms:

> *"For the Court to grant summary judgment to a Plaintiff and to refuse leave to defend, it is not sufficient that the Court should have reason to doubt the bona fides of the Defendant or to doubt whether the Defendant has a genuine cause of action… In my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] 1 Lloyds Law Report 21, which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank v. Daniel [1993] 1 W.L.R. 153. The principle laid down in the Banque de Paris case is summarised in the head note thereto in the following terms:-*
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> > *The mere assertion in an affidavit of a given situation which was to be the basis of the defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the Defendant had satisfied the Court that there was a fair or reasonable probability of the Defendants having a real or bona fide defence."*

9. In the *National Westminster Bank* case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matters as follows.

> *"I think it is right to ask, using the words of Ackner L.J. in the Banque de Paris case at p. 23,*
>
> *Is there a fair or reasonable probability of the Defendants having a real or bona fide defence? The test posed by Lloyd L.J. in the Capital Standard Chartered Bank case …. "is what the Defendants says credible?" amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the Defendant having a defence."*

10. The court cannot accept that what is maintained by the Defendant is credible. It does not therefore believe that the Defendant has any reasonable prospect of successfully defending the Plaintiff's claim, or any part thereof. For these reasons the appeal is dismissed.