Neutral Citation: [2016] IEHC 257

THE HIGH COURT

Record No. 2014/2858S

BETWEEN/

ALLIED IRISH BANKS PLC & AIB MORTGAGE BANK

Plaintiffs

– and –

JOSEPH HOGAN

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 26thMay, 2016.

Part 1

Overview

1. These are summary proceedings for the recovery of certain monies owed by Mr Hogan to AIB. Such monies as were owed by him to AIB Mortgage Bank (and previously sought by it) have latterly been repaid in full.

Part 2

Facts

2. On 24th June, 2013, AIB Bank plc wrote to Mr Hogan. The letter was headed "*Confirmation of Repayment of Indebtedness to AIB Bank*". It indicated that the Bank had reviewed Mr Hogan's loan facilities "*and now proposes the following restructure of same*". It then went on to describe the said restructuring of Mr Hogan's liabilities. The letter concluded by observing that further conditions additional to those identified in the letter might need to be satisfied as part of the "*proposed restructure*" and that any such additional conditions would be detailed in a formal Letter of Offer that was to follow. The penultimate sentence reads "*This letter does not constitute a Letter of Offer and details as set out above are subject to change."*

3. The letter makes for an unusual read. It purports to be a 'confirmation' as to how Mr Hogan's indebtedness is to be repaid, yet it 'proposes' how that indebtedness will be structured. It appears to be a letter of offer, yet states that a letter of offer is to follow. Mr Hogan comes now to court, claiming that the letter evidences an agreement between himself and the Bank as to how he is to repay his outstanding liabilities to AIB. He does not seem to see it as a letter of offer that he has accepted, but rather as testament to an agreement reached between himself and AIB previous to the issuance of the letter.

4. Whatever one makes of the drafting of the letter, it does seem to be more forward-looking to what may yet be executed, than backward-looking to what has been agreed – albeit that it is suggestive of some form of agreement that appears to have been begotten but somehow not yet made. Where Mr Hogan's claim fails, however, is that, in his dealings with AIB since the letter of 24th June, 2013, he has expressly and repeatedly rejected much of the detail of that letter. And while he wishes now to rely on the putative agreement that he contends the letter to evidence – perhaps because he realises that AIB has retreated from what it was initially minded to do – he has in the past repeatedly treated the letter of 24th June, 2013, as but a step in ongoing negotiations between himself and AIB, and not as an agreed set of terms which he acknowledges to have been concluded and is seeking to re-negotiate.

5. Thus, in a letter of 15th August, 2013, Mr Hogan states that "*I have reviewed the revised letter of offer from AIB [i.e. the letter of 24th June, 2013] with my financial adviser and wish to comment as follows…".* He then proceeds to raise various queries, e.g., "*The €50k – please explain zero coupon and is the full amount [of] €50,000 payable with no interest at [the] end [of] 5 years?".* At a later point, he states "*In relation to [the] Edinburgh properties there are a number of aspects that I would like AIB to consider…".* He then concludes "*I would like to thank you for all your assistance in this matter to date and would be grateful if the bank could issue an amended letter of offer which would take due cognisance of the points raised above".* It is very clear from all of this that as of 15th August, 2013, Mr Hogan considered that what had been issued to him was a letter of offer and, as he was perfectly entitled to do, he was seeking to revise the terms of same; it is also clear that nothing has been agreed.

6. It appears that some form of revised letter of offer may have issued, because on 22nd November, 2013, one finds Mr Hogan writing another letter to AIB in which he states, inter alia, *"I cannot accept the latest offer and I refer to the previous letter from AIB and confirm that I am not prepared to proceed on that basis".* So the more recent letter of offer is unacceptable and "the previous letter" (most likely a reference to the letter of June 2013) is also rejected. Unfortunately, Mr Hogan also indicates in his letter of 22nd November that the continuing failure to arrive at an amicable resolution of matters with AIB has been taking its toll on him, such that he has become unwell. But even this remark, in truth, entails an admission by Mr Hogan that as late as November 2013, nothing has been agreed between himself and AIB.

7. The court agrees with counsel for Mr Hogan that there does appear to be some sort of hardening of position on the part of AIB from around January 2014 onwards. New members of the AIB credit team appear to have been assigned to deal with Mr Hogan's liabilities, and in letters of 16th January, 2014, 10th February, 2014, and 3rd March, 2014, relations deteriorate from "*The Bank is committed to working with you to reach a possible solution*" to "*It is very important that you give this matter your immediate attention" to "We must inform you that if you do not respond to the Bank within 7 business days of the date of this letter with the required information, AIB may have no option but to take whatever steps are deemed necessary to recover these facilities"*. None of these letters indicates any agreement between the parties. They refer respectively to *"a potential debt restructure", "the possibilities for a restructuring", and "the possibilities around restructuring [your AIB facilities]…to a sustainable basis".* And all of these letters leave the reader with the depressing sense that notwithstanding AIB's stated (and, one hopes and presumes, truthful)

desire to arrive at some form of agreement, such agreement was going to be difficult to arrive at –and certainly no such agreement had yet been concluded.

8. On 4th March, 2014, Mr Hogan's solicitors entered en scène. In a letter to AIB they stated, *inter alia,* that "*We are instructed specifically that an offer was made to our client by the Bank on certain conditions. These conditions were met. The Bank subsequently withdrew the offer that was made."* Clearly Mr Hogan's solicitors were acting with the utmost integrity on the basis of what they had been advised. But, as the above chronology shows, what they had been advised was wrong. Mr Hogan had rejected what was offered by AIB. So, for example, in his letter of 22nd November, 2013, he states, inter alia, *"I cannot accept the latest offer and I refer to the previous letter from AIB and confirm that I am not prepared to proceed on that basis".* This is not therefore a case in which an offer was accepted and a deal acted upon, with Mr Hogan then seeking to re-negotiate a still better deal. It was a case in which multiple offers had been rejected by Mr Hogan. To act consistently with an offer that one has previously rejected is not, of itself and without more, sufficient to transform that rejection into acceptance and to yield a concluded agreement.

9. One oddity does present. Mr Hogan had a loan account and a current account with AIB Bank and a separate loan account with AIB Mortgage Bank that related to a holiday home. When the holiday home was sold to clear the AIB Mortgage Bank loan, there was a surplus of €7k that appears to have been used to write down a portion of Mr Hogan's debt with AIB Bank plc. The court has not been presented with any of the terms and conditions concerning any or all of these accounts but suspects, sight unseen, that the retention of the €7k may have been done pursuant to some form of 'all sums due' or 'set off' clause that applies on a cross-group basis where there is indebtedness to any member of AIB Group. However, as part of the order to be made pursuant to this judgment, the court will order that AIB and AIB Mortgage Bank (i) re-visit this aspect of matters to determine that they have each acted lawfully,(ii) thereafter write a letter explaining fully to Mr Hogan what has been done in this regard, and (iii) refunding the €7k plus interest, if that is appropriate. However, the court does not consider that in treating so with the €7k, AIB has somehow affirmed the existence of a non-existent agreement concerning the repayment of Mr Hogan's indebtedness.

Part 3

Law

10. AIB Bank plc and AIB Mortgage Bank commenced these proceedings to seek recovery of the debts outstanding to them from Mr Hogan. As mentioned, Mr Hogan's indebtedness to AIB Mortgage Bank has latterly been cleared. Consequently, what remains is a claim by AIB Bank plc for recovery on a summary basis of the sums now due to it. That there is a clear contractual basis for the sums claimed and that they are outstanding has been established in the affidavit evidence before the court. For his part, Mr Hogan maintains that the issues raised by him, and considered above, are such that the matter ought to go now to plenary hearing.

11. Not a lot of law was raised in the court, there appearing to be no dispute between the parties as to the law that binds the court in deciding the within application. That law can be quite shortly stated. The hurdle that Mr Hogan must cross to succeed in having matters sent to plenary hearing is low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623:

> *"In my view, the 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?"*

12. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised, as follows, the relevant principles that apply 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."

Part 4

Conclusion

13. Mr Hogan has the court's sympathy for the financial predicament in which he now finds himself. He is proof that the claws of the 'Celtic Tiger' sank deep and that many still go scarred. Yet, while conscious of the low threshold propounded by Hardiman J. in *Aer Rianta,* and mindful of that "*discernible caution*" to which McKechnie J. refers in *Harrisrange*, the court must regretfully conclude, for the reasons outlined above, that Mr Hogan offers no basis on which the within matter should be sent now to plenary hearing. It is very clear that he has no case when it comes to the claims made for the monies owed by him to AIB Bank plc. Such issues as he has raised are simple and easily determined and have been addressed comprehensively above. His affidavit evidence, and the contentions made on his behalf, fail to disclose even an arguable defence. The court is therefore coerced by law into granting the summary judgment sought. It will also make the additional order referred to in paragraph 9 above.