

THE HIGH COURT

[2013 No. 1007S]

BETWEEN

DANSKE BANK A/S

PLAINTIFF

AND

DECLAN CROWE AND MARIAN CROWE

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 9th day of September, 2015

The plaintiff is a bank with its registered office situate at 3, Harbourmaster Place, IFSC, Dublin 1. The defendants are a married couple who reside at Moynehall, Cavan, Co. Cavan.

In these proceedings, commenced by summary summons issued on the 28th March, 2013, the plaintiff's claim is for the total sum of €1,206,719.65 on foot of various loans made available by the plaintiff to the defendants by facility letters dated 22nd June, 2006, 1st March, 2007 and 18th December, 2007.

By affidavit sworn on 29th August, 2013, Mr. Niall O'Reilly, an officer of the plaintiff bank, deposes that the defendants failed to make the necessary repayments in accordance with the terms and conditions of the loan facility letters, whereupon by letter dated 18th January, 2013 the plaintiff wrote to the defendants demanding payment of the sum of €1,221,621.32 in respect of both principal and interest then due and owing in respect of the advances made. Interest on the sums due was waived as and from 8th March, 2013.

The first named defendant filed an affidavit in response on the 12th March, 2014 in which he raised what might be described as multiple technical objections, the principal ones being that the plaintiff bank was not entitled to judgment because (a) it had securitised its loan receivables and (b) that the plaintiff bank has never been issued a licence in this country by the Central Bank of Ireland and therefore cannot maintain the present proceedings.

It should be noted that all sums advanced in this case were business related. The defendants conducted their own defence when the matter came before this Court on the 31st July, 2015.

The Court pointed out that the issue of securitisation had been dealt with in a number of High Court decisions including *Freeman v. Bank of Scotland* [2014] IEHC 284, *Wellstead v. Judge White & Ors.* [2011] IEHC 438, and *Harrold v. Nua Mortgages Ltd.* [2015] IEHC 15. However, the defendants made clear that the sole focus of their defence in these proceedings was their assertion that the plaintiff bank was not duly licensed within this jurisdiction and as such could not maintain the present proceedings. There was no denial that the sums claimed had been advanced, or that same had become due by reason of the failure on the part of the defendants to make repayments in accordance with the terms of the facility letters.

In an affidavit sworn on the 4th June, 2015, the first named defendant deposed as follows:-

"I say that both I and my wife, the second named defendant, did execute a mortgage in favour of National Irish Bank (i.e. in respect of the advances made)."

He deposed that neither his wife nor himself gave consent for the mortgage to be transferred to the present plaintiff. Insofar as the plaintiffs sought to rely on the provisions of S.I. No. 29 of 2007, the defendants submit that this statutory instrument is void and of no legal effect as the then Minister was relying on s.33 of S.I. No. 24 of 1971 to make the transfer. That statutory instrument contained no provision for such a transfer, as the section only permitted the Minister to approve transfers from a transferor entity holding a licence issued from the Central Bank of Ireland to a transferee entity holding a licence issued from the Central Bank of Ireland. As the plaintiff had never been issued a licence by the Central Bank of Ireland, the transfer and order were null and void.

By affidavit in response sworn by Mr. O'Reilly on the 11th June, 2015, Mr. O'Reilly confirms that the loan facilities the subject of the within proceedings were granted originally by National Irish Bank to the defendants. He states that under the provisions of S.I. No. 29 of 2007, the then Minister for Finance approved a scheme of transfer whereby the business of National Irish Bank Ltd. was transferred to Danske Bank A/S, the plaintiff in these proceedings. The scheme of transfer thereby approved was contained in an agreement made between National Irish Bank and Danske Bank A/S on the 30th November, 2006 and under which the effective date for the transfer of the business occurred on the 1st April, 2007. The business that was transferred under the scheme was the banking business of National Irish Bank, including the assets and liabilities of that business.

He further deposes that the three loan facilities the subject of these proceedings, were part of the banking business of National Irish Bank that was transferred to Danske Bank. They were not part of the "excluded business" that was specified in schedule 3 to the agreement.

The deponent then addresses the assertion that s.33 of the Central Bank Act 1971 only applies where the particular bank holds a banking licence from the Central Bank of Ireland. He deposes that the requirements of s.33 of the 1971 Act were superseded and expanded by the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. No. 395 of 1992) which Regulations were introduced into law by the Oireachtas in order to permit any credit institution already licensed in another member state to undertake banking business in Ireland without the necessity of a licence from the Central Bank of Ireland. Denmark was such a member state. Accordingly, by 1992 it was no longer necessary for each bank that was party to a scheme of transfer of banking business to hold a licence in order to come within the scope of s.33 of the 1971 Act and for that reason the Minister was entitled to approve the scheme of transfer from National Irish Bank to Danske Bank A/S in 2007 on the basis that the plaintiff herein was a credit institution authorised by a competent authority of another member state and 'having and acting' through a branch in Ireland.

The first named defendant in turn filed a further affidavit in response on the 26th June, 2015 which challenges the plaintiff's interpretation of the powers contained in the 1992 Regulations. He asserts that there is nothing contained in that instrument which

allows the Minister to approve a scheme of transfer to take place between an Irish licensed bank and some other entity.

DECISION

I have carefully considered the submissions of both parties and am satisfied that the plaintiff is entitled to the relief sought.

Section 33 of the Central Bank Act 1971 relates to the approval of the Minister of the transfer of a bank's business and provides as follows:-

"33.—(1) Whenever the holder of a licence (in this Part referred to as the transferor) agrees to transfer, in whole or in part, to another holder of a licence (in this Part referred to as the transferee) the business to which the licence relates

(a) the transferor and transferee may, not less than four months before the date on which the transfer is intended to take effect (in this Part referred to as the transfer date), submit to the Minister for his approval a scheme for the transfer,

(b) the transferor and transferee shall, not less than one month before the transfer date, publish notice of the transfer in at least one daily newspaper published in the State,

(c) the Minister, after consultation with the Bank, may, not less than two months before the transfer date, either approve of or decline to approve of the scheme by order,

(d) if the Minister approves of the scheme under this section, the provisions of sections 34 to 39 and 42 of this Act shall, if, and to the extent only that, the scheme so provides, have effect in relation to the transfer,

(e) the Minister may, at the request of the transferor and transferee, include in an order approving of the scheme under paragraph (c) of this subsection such incidental, consequential and supplemental provisions as he thinks appropriate for facilitating and implementing the transfer and securing that it shall be fully and effectively carried out, including provisions for substituting the name of the transferee for the transferor or otherwise adapting references to the transferor in any statute or instrument made under statute.

(2) An order under subsection (1) of this section or under this subsection may, after consultation with the Bank and with the consent of the transferor and the transferee to whom it relates, be amended by the Minister by order."

While this provision indicates that a 'transferee' will hold a licence from the Central Bank of Ireland, the Court accepts the submission of the plaintiff that the requirements of s.33 were superseded and expanded by the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. 395 of 1992). The explanatory note to the Regulations provides:-

"The purpose of these Regulations is to give effect to the EEC Second Council Directive (89/646/EEC) of 15 December, 1989, on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

The mutual recognition of banking services will allow any credit institution already licensed in another Member State to undertake banking business in the State without the need for a licence from the Central Bank or prudential supervision by the Bank. Such institutions will be supervised by the home Member State. The same arrangements will apply to Irish institutions seeking to provide banking services in other Member States. The Regulations do not impinge on the legal owners of the Bank in regard to monetary policy."

Regulation 11(1) of the Regulations, which came into operation on 1st January, 1993, provides as follows:-

"11. (1) Any provision of the supervisory enactments or any other enactment which has the effect of requiring a credit institution to seek or to hold an authorisation from the Bank to establish or carry on business in the State shall not apply to a branch of such a credit institution if the credit institution is authorised to so carry out such business in another Member State and the authorisation is in accordance with the Directive:

Provided that Regulation 20 (2) shall apply to every such branch established in the State."

Regulation 20(2) states:-

"A credit institution referred to in paragraph (1) shall, in so far as its operations or proposed operations within the State are concerned, comply with all relevant requirements of these Regulations and with the provisions of any enactment relating to the activities set out in the Schedule."

'Authorisation' as it appears in the Regulations is defined as "authorisation by the Bank to carry on the business of a credit institution in accordance with the provisions of any of the supervisory enactments". The term 'supervisory enactments' is defined in the Regulations as relating to, inter alia, the Central Bank Acts 1942 to 1989, which include the requirements of having a licence issued by the Central Bank.

The Court is satisfied therefore that, as a result of the Regulations, by 1st January, 1993 it was no longer necessary for each bank that was a party to a scheme of transfer of banking business to hold a licence issued by the Central Bank of Ireland in order to come within the scope of s.33 of the 1971 Act. As set out in the provisions of S.I. 29 of 2007, the plaintiff Bank is "authorised to act as a credit institution in the State by virtue of the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. 395 of 1992)".

I am satisfied that the submission of the defendants as to the validity of S.I. 29 of 2007 is misconceived and that the Minister was entitled to approve the scheme of transfer from National Irish Bank to the plaintiff bank under the provisions of S.I. 29 of 2007.

In light of the foregoing, the plaintiff is entitled to judgment in the sum claimed.