

## THE HIGH COURT

[2011 No. 4529 S.]

BETWEEN

ALLIED IRISH BANK PLC

PLAINTIFF

AND

CATHAL O'DONOVAN AND PATRICK CROWLEY

DEFENDANTS

**JUDGMENT of Mr. Justice Eagar delivered on the 27th day of July, 2017**

1. This is a judgment on a notice of motion seeking summary judgment in the final sum of €216,395.63 together with interest pursuant to contract.

2. The notice of motion was grounded on the affidavit of Tom O'Reilly, assistant manager of the Insolvency and Debt Recovery Unit at Allied Irish Bank Plc. He said that both defendants maintain a current account 00972035 (hereinafter the "Account") with the plaintiff at the plaintiff's branch office at 7/12 Dame Street, Dublin 2. The Account is subject to the plaintiff's terms and conditions which include, *inter alia*, that any monies advanced by the plaintiff to the defendants, or paid by the plaintiff for the defendants bear interest until repayment at the plaintiff's current bank rates, and further, that monies due to the plaintiff are repayable on demand.

3. Mr O'Reilly says that sums of money have from time to time been advanced by the plaintiff to the defendants, or paid by the plaintiff for the defendants and at their request. The defendants have been accommodated by the plaintiff, in the way that the plaintiff generally accommodates his customers. He says that on the 7th of April, 2011 the defendants were indebted to the plaintiff in the sum of €216,395.63 on foot of the Account. By letter dated the 18th of May, 2011 addressed to the first named defendant and by letter dated the 2nd of June, 2011 address to the second named defendant, the plaintiff demanded payment of the said sum. Mr. O'Reilly also states that the second named defendant Patrick Crowley does not have a *bona fide* defence either at law or on the merits. He exhibits the letters of demand addressed to the first named defendant and the second named defendant.

4. Patrick Crowley, the second named defendant swore an affidavit on the 22nd of March, 2012 in response to the affidavit of Tom O'Reilly. He says that he had a *bona fide* defence both in law and on the merits to the claim. The alleged overdraft on the Account held by the defendants with the plaintiff, the subject of the claim arose from a business overdraft account operated by the defendants for the purposes of the solicitors' firm of O'Donovan Solicitors of 73 Capel Street, Dublin 1.

5. The basis of the plaintiff's claim is that despite demands being made on the defendants, they had failed and neglected to repay the monies demanded, or any monies by the date of the swearing of the affidavit. He says per para. 5 of the said affidavit that the advances of money are governed by the plaintiff's terms and conditions. Such terms and conditions include *inter alia* the provision that monies due to the plaintiff on foot of the said accounts are repayable on demand.

6. Mr Crowley says while the demand letter has been exhibited in these proceedings, the plaintiff's terms and conditions are not so exhibited. He states that he is advised by his solicitor and counsel that the plaintiff's claim is not properly constituted, or in the alternative is not adequately constituted for the purpose of summary disposition by the court. He also makes the following points in relation to the firm of O'Donovan solicitors (hereinafter called "the Firm") which impacted negatively on the management of the overdraft and the Account:

(a) The Firm was founded in or about 1992 and the second named defendant became a partner thereof in or about 1994. The Firm had a good practice with a very strong fee income. The said fee income collapsed in or around early 2008 due to the illegal activities of an employee solicitor David O'Shea.

(b) The said David O'Shea raided client accounts and took funds from them for his own personal benefit. The said fraud was discovered by the partners in the Firm in or around early 2008. The defendants reported the fraud to both the gardaí and the Law Society and dismissed Mr. O'Shea. Mr. O'Shea was subsequently brought to trial in the Dublin Circuit Criminal Court wherein he pleaded guilty to one sample charge out of 26 sets of charges proffered against him.

(c) The extent of Mr. O'Shea's activities involved huge attention being paid by the defendants to all of the work in which Mr. O'Shea had been involved, in order to determine the extent of his fraudulent behaviour. As a result, the Firm's regular legal business suffered accordingly.

(d) The first named defendant advised Mr Crowley towards the end of 2008 that, he was not renewing his practicing certificate for 2009. This was the de facto end of the partnership and the first named defendant has refused to contribute either financially or professionally to the Firm's business since that date. As a result, Mr Crowley is now taking steps to have the partnership, as between the first named defendant and himself, dissolved in separate proceedings before the court.

(e) He said in or around the end of 2009 he was unable to obtain professional indemnity insurance for 2010 due to Mr. O'Shea's activities. This meant that he had to cease practice as a solicitor from in or about December, 2009 and the Firm ceased at this point.

(f) He was diagnosed with cancer in or around July, 2009 and in or around the period August to November 2009 he had chemotherapy for a week in hospital each month. The first named defendant was a sole practitioner in this period and endeavoured to keep the Firm functioning. He had major surgery in or around January, 2010 and hoped to be in a position to resume work on a gradual basis thereafter. While recovering from his cancer surgery, in or around September 2010 he again became unwell and was readmitted to hospital. He was in intensive care and was diagnosed with endocarditis and underwent open heart surgery. He remains under medical attention and is certified as unable to work.

7. He said that in addition to the summary proceedings, he had a valid counterclaim against the plaintiff. He was induced by the plaintiff, its servants or agents in or around September, 2002 to invest in funds in a geared fund loan, styled as 2nd Belfry Property

Fund (hereinafter the "Fund"). The said Fund was represented to him as a safe fund which could be used to create a pension. He invested €75,000.00 in the Fund and while it initially performed well, the value has now been written down to zero. He said this loss constitutes part of his pension. For this reason, he states that the relief sought in the notice of motion is not capable of summary disposition.

8. The second named defendant swore a supplemental affidavit on the 13th of November, 2014. He said that he denies the allegation that the first named defendant and he jointly maintained the Account with the plaintiff at the plaintiff's branch situated at 7/12 Dame Street, Dublin 2 or at any of its branch offices. He said the account stood in the sole name of the first named defendant having been opened by him before he, the second named defendant, joined the legal practice initially as an employee and he exhibits a copy of the solicitors' office account statement.

9. He further said that the account was at all times operated solely by the first named defendant and critically that he, the second named defendant, was never an account holder on the said account even after his admission to the legal practice. He said that the first named defendant was adjudicated bankrupt in England and Wales in or around the 22nd of December, 2012 and that he understands that he is now being discharged from bankruptcy.

10. He says there was a further employee in the firm of O'Donovan solicitors, namely David O'Shea, who held himself out as a partner in the Firm. He says he may seek to join Mr. O'Shea through the within proceedings when it is appropriate to do so. He says that Mr. O'Shea was dismissed in March, 2008 for fraud and was subsequently in prison.

11. The next affidavit is that of Aoife Scanlon sworn on the 21st of April, 2015. She says the second defendant is correct in saying the subject account was originally opened as a fact account held by the first named defendant before the second defendant became a partner in about 1994. She says by mandate of 8th of November, 2005 the subject account was converted into a joint and several account by the defendants and refers to a copy of the mandate. In the mandate she says the plaintiff was authorised to act on the signature or on the instructions of any one of five named persons, and at para. 2 of the said mandate the defendant expressly agreed and declared they would be jointly and severally liable for any debts incurred by them.

12. She says by letter to the second named defendant dated 3rd of April, 2006 the plaintiff offered to renew the overdraft facility subject to its terms and conditions covering business lending as set out in the booklet dated May, 2004. She stated that the second named defendant is mistaken in thinking that the subject account was in the sole name of the first named defendant.

13. She says the plaintiff was surprised to learn of the defendant's difficulties, and bore with them for a number of years but the subject debt was not addressed and remains to be paid. She also says that the second named defendant's complaints about the investment in the Fund were not a defence to claim.

14. It appears that the plaintiff is only in a position to produce a copy of the Firm mandate in respect of O'Donovan solicitors and relates to its account to 7/12 Dame Street, Dublin 2. It is certified as a true copy but there is no mention of the account number and it is signed by the first named defendant, the second named defendant, David O'Shea, Mary Meegan and Eamon McGinley. Mr. McGinley describes himself as an accountant and he witnesses the signatures of Cathal O'Donovan, Patrick Crowley, David O'Shea and Mary Meegan.

15. Also exhibited to her affidavit is the letter addressed to the second named defendant dated the 3rd of April, 2006, confirming that a copy of the sanction was being forwarded to the first named defendant.

16. The next affidavit was the affidavit of Patrick Crowley sworn on the 19th of November, 2016. He says that he is placing the plaintiff on full proof that the mandate alleged to have been signed by him in or about the 8th of November, 2005 related to the account the subject matter of these proceedings. He says that his solicitor was informed that the exhibit was a photocopy and that originals were not held by the solicitor of the plaintiff. He says that he cannot accept that this mandate relates to the account the subject matter of these proceedings as there is no account number noted on the mandate. He says he believes that the mandate may relate to some other matter.

17. He referred to a copy of the letter sent by his solicitors to AIB Data Protection Section on or about the 23rd of April, 2010. His solicitor asked for a copy of the mandate, and following a further letter, his solicitor received a letter from AIB Data Protection indicating that no mandate could be located.

18. The final affidavit was that of Evan Geoghegan assistant manager of Allied Irish Banks Financial Solutions Bank Centre, Ballsbridge sworn on the 25th of April, 2016. He says that the original mandate cannot be found despite searches. The second named defendant's solicitor with or without a handwriting expert are welcome to examine the copy mandate which is now in the custody of the plaintiff's solicitors. The copy mandate does not bear or have an account number. The mandates used by the plaintiff do not generally bear account numbers.

19. Counsel on behalf of the plaintiff indicated that it was clear that the mandate related to the account and that it was signed by the second named defendant. Furthermore he states that the second named defendant would have known that it related to the account, and that no defence had been raised by the second named defendant.

20. Counsel on behalf of the second named defendant presented written outline submissions. They quoted initially O. 27, r. 7 of the Superior Court Rules as follows:-

"The honourable court may upon the hearing of a motion for liberty to enter final judgment pursuant to summary summons:-

Give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action."

Counsel then referred to Hardiman J.'s judgment in *Aer Rianta CPT v. Ryanair* [2001] 4 I.R. 607, where Hardiman J. summarised the criteria:-

"In my view the fundamental question to be posed on an application such as this remained: "Is it very clear" that the defendant has no case? Is 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?"

Hardiman J. further noted:-

"The fair and reasonable probability of the defendants have a real or *bona fide* defence is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable"

21. Counsel on behalf of the second named defendant further submits that the case is not appropriate for summary judgment as follows:-

- (1) The plaintiff has not exhibited in his pleadings the original loan agreement with the second named defendant. Neither has the plaintiff exhibited any documents setting out the detailed terms and conditions in respect of the said loan agreement.
- (2) The plaintiff has not exhibited any document or presented any evidence whatsoever as to how and from what date the alleged loan agreement has been breached and how and why the account in contention (namely, current account No. 00972035) stood at €216, 395.63 as on the 7th of April, 2011.
- (3) Although the plaintiff has exhibited and seems to rely on its general terms and conditions of business lending, the said terms and conditions are not referred to in the Bank mandate dated the 8th of November, 2005.
- (4) The only basis for the plaintiff's claim seems to be a Bank mandate dated the 8th of November, 2005 although the same was not referred to or exhibited with the plaintiff's grounding affidavit.
- (5) What the second named defendant says is credible, therefore the second named defendant has a fair or reasonable probability of having a real or *bona fide* defence.

22. The Court notes the mandate, the original of which cannot be found, does not mention the Bank account.

23. Further the Court accepts that the current account of 00972035 is overdrawn to the sum of €216,395.63. The Court accepts that the plaintiff has failed to demonstrate the original loan agreement, or any documents setting out the detailed terms and conditions in respect of the loan agreement.

24. In these circumstances, the Court refuses to grant summary judgment and adjourns the plaintiff's claim to plenary hearing.