Neutral Citation: [2016] IEHC 193

THE HIGH COURT

[2014 No. 2382 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

WILLIAM CASEY AND VICTORIA CASEY

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 15th day of March, 2016

Introduction

1. In this application, the plaintiff seeks summary judgment against the second named defendant in the sum of €1,470,181.05. This indebtedness is alleged to have arisen on foot of six loan agreements entered into by the defendants between June 2005 and November 2011.

2. The first named defendant did not enter an appearance to the proceedings and judgment was marked against him in the Central Office.

3. The second named defendant is the former wife of the first named defendant. She resists judgment essentially on the following grounds: she stated that in the course of acrimonious separation proceedings in the Circuit Family Court, she became aware that there was a significant amount of documentation upon which her signature was forged. While it is not expressly stated, the inference is that the forgeries were carried out by her ex-husband, or by someone acting at his behest. In this case, she has had five of the six loan agreements examined by an independent forensic handwriting expert. It is his expert opinion that the signature of the second named defendant appearing on two of the loan agreements, are not the genuine signatures of the second named defendant. Of the remaining four loan agreements, one was not addressed by him and in the case of three loan agreements, the second named defendant's expert has stated that it is his opinion, that the signature of the second named defendant appearing thereon, is the genuine signature of the second named defendant.

4. The second named defendant submits that as forgery is such a serious matter, it is necessary to examine this issue in depth at the trial of the action and, in those circumstances, the second named defendant seeks to have the matter remitted to plenary hearing.

5. The second named defendant has also put up a secondary line of defence, to the effect that the plaintiff failed to explain to her the extent and nature of the liabilities under the various credit agreements and loan facilities. It is also alleged that the plaintiff was guilty of negligent misrepresentation to the second named defendant and it is alleged that the plaintiff failed in its duty to properly advise the plaintiff to get independent legal advice prior to signing the loan agreements. The second named defendant has further stated that she intends to cross examine the bank's witnesses and in such circumstances, it is necessary to remit the matter to plenary hearing.

The Plaintiff's Claim

6. The plaintiff's application for summary judgment is based on the affidavit of Ms. Jo Ann Shannon, a case manager with the plaintiff bank, sworn on 20th January, 2015. The first loan agreement was contained in a letter dated 17th June, 2005, which was accepted by the defendants in or around 21st June, 2005. Under that loan agreement, the plaintiff agreed to make available to the defendants a loan facility in the sum of €102,000.00 on the terms set out in the loan agreement. The loan was to be secured, inter alia, by means of legal charges over certain properties held by the defendants and by assignments of certain life assurance policies of the defendants.

7. The 17th June, 2005, loan agreement provided that the loan was to expire on 30th May, 2013, with ninety-five repayment instalments at the date of offer of €305.25 (interest only) and a single repayment of €102,305.00 on 30th May, 2013, scheduled to be made by the defendants plus interest accrued to the date of repayment not already provided.

8. Ms. Shannon states that the defendants agreed to the 17th June, 2005, credit agreement and drew down funds pursuant to the facility as outlined above. She exhibited a copy of the said credit agreement dated 17th June, 2005, together with the defendants' written acceptance of same and also exhibited account statements recording the draw down of the loan and the management of the loan thereafter.

9. Ms. Shannon stated that interest was charged on the facility in accordance with the terms of the 17th June, 2005, credit agreement and is continuing to accrue at a rate of €4.40 per day. She further stated that the defendants failed to abide by the terms of the 17th June, 2005, credit agreement in relation to repayment thereof and the loan account went into arrears. She submitted that this represented an event of default under the terms of 17th June, 2005, credit agreement, entitling the plaintiff to demand payment of the principal and interest due and all monies and liabilities owing on foot of the said credit agreement.

10. By separate letters dated 6th February, 2014, addressed to each of the defendants, the plaintiff formally notified the defendants that the said loan account was substantially in arrears and that the aggregate sum due on the loan account as of 6th February, 2014, was €105,473.46. Demand was made on behalf of the plaintiff for payment of the said sums within seven days of the date of the service of the letter. Ms. Shannon exhibited copies of the said letters of demand.

11. Ms. Shannon went on to outline the second loan agreement in the following terms: by letter of offer dated 28th March, 2007, issued by the plaintiff and accepted by the defendants and pursuant to certain terms and conditions attaching thereto as agreed to by the defendants, the plaintiff agreed to make available to the defendants a loan facility in the sum of €250,000.00 secured, inter

alia, by means of legal charges over certain properties held by the defendants, assignments of certain life assurance policies on the lives of the defendants and a letter of lien over credit funds with AIB Group. She exhibited a copy of the said letter of offer, together with the applicable terms and conditions attaching thereto.

12. Ms. Shannon stated that the 28th March, 2007, loan facility provided that the loan was to expire on 30th March, 2011, with sixteen repayment instalments at the date of offer of €3,359.38 and a single repayment of €250,000.00, on 28th March, 2011, scheduled to be made by the defendants plus interest accrued to date of repayment not already provided. Ms. Shannon further stated that the defendants agreed to the 28th March, 2007, loan facility and drew down funds pursuant to the facility. She exhibited account statements recording the said draw down of funds. She stated that interest was charged on the said facility in accordance with the terms of the 28th March, 2007, loan facility at a rate of €11.11 per day.

13. Ms. Shannon stated that the defendants failed to abide by the terms of the 28th March, 2007, loan facility in relation to repayment thereof and the loan account went into arrears. She stated that this represented an event of default under the terms of the said facility, entitling the plaintiff to demand repayment of principle and interest due and all monies and liabilities owing on foot of the 28th March, 2007, loan facility.

14. By separate letters dated 11th February, 2014, addressed to each of the defendants, the plaintiff formally notified the defendants that the loan account was substantially in arrears and that the aggregate sum due on the loan account as of 11th February, 2014, was €265,930.28, with unpaid interest of €762.27 accrued making an aggregate sum of €266,692.55 due and owing. The plaintiff demanded payment of the said sums within seven days of the date of service of the letter. She exhibited copies of the letters of demand.

15. Ms. Shannon outlined the position in relation to the third loan agreement in the following way: by letter of offer dated 31st May, 2010, issued by the plaintiff and accepted by the defendants in writing in or around 16th August, 2010, and pursuant to certain terms and conditions attaching thereto as agreed to by the defendants, the plaintiff agreed to make available to the defendants two loan facilities in the amounts of €100,000.00 and €612,765.00, secured, inter alia, by means of legal charges over certain properties held by the defendants and assignments of certain life assurance policies on the lives of the defendants. She exhibited a copy of the said letter of offer together with the applicable terms and conditions attaching thereto. As appeared therefrom, the 31st May, 2010, loan facility provided for repayment/refinance of the facility on 30th April, 2011, subject to extension at the plaintiff's discretion. The interest rate was stated to be base lending rate varying plus 3% per annum (3.666% at the time of offer) including a funding premium of 1.4%.

16. Ms. Shannon stated that the defendants agreed to the 31st May, 2010, loan facility and drew down funds pursuant to the facility as outlined above. She exhibited account statements recording the draw down and the management of the account. Ms. Shannon stated that interest was charged on the said facility in accordance with the terms of the 31st May, 2010, loan facility and was accruing at a rate of €9.75 per day on account 93638301852658 and at a rate of €59.87 per day on account 93638306456141.

17. Ms. Shannon stated that the defendants failed to abide by the terms of the 31st May, 2010, loan facility in relation to repayment thereof and the loan account went into arrears. She stated that this represented an event of default under the terms of the said facility, entitling the plaintiff to demand repayment of principal and interest due on all monies and liabilities owing on foot of the 31st May, 2010, loan facility.

18. She stated that by separate letters dated 6th February, 2014, addressed to each of the defendants, the plaintiff formally notified the defendants that the loan account was substantially in arrears and that the balance due on the loan account as of 6th February, 2014, was €797,867.88, with unpaid interest of €3,900.10 accrued, making an aggregate sum of €801,767.98, due and owing. The plaintiff demanded payment of the said sums within seven days of the date of the service of the letter. Copies of the said letters of demand were exhibited to the affidavit.

19. Ms. Shannon outlined the details of the fourth loan agreement in the following terms: by letter of offer dated 21st March, 2011, and accepted by the defendants in writing in or around 1st May, 2011, the plaintiff agreed to make available to the defendants the sum of €121,088.00, secured, inter alia, by means of legal charges over certain properties held by the defendants and assignments of certain life assurance policies on the lives of the defendants. She exhibited a copy of the said letter of offer, together with the applicable terms and conditions attaching thereto.

20. Ms. Shannon stated that the 21st March, 2011, credit agreement provided for repayment of the facility by means of four specific repayments with the final repayment of €121,088.00, due on 28th February, 2012, plus interest accrued and not charged at that date (APR 4.12939%). Ms. Shannon stated that the defendants agreed to the 21st March, 2011, credit agreement and drew down funds pursuant to the facility. She exhibited statements recording the said draw down of funds. She stated that interest was charged on the facility in accordance with the terms of the 21st March, 2011, credit agreement and was then accruing at a rate of €11.21 per day.

21. Ms. Shannon stated that the defendants failed to abide by the terms of the 21st March, 2011, credit agreement in relation to the repayment thereof and the loan account went into arrears. She stated that this represented an event of default under the terms of the said agreement, entitling the plaintiff to demand payment of the principal and interest due and all monies and liabilities owing on foot of the 21st March, 2011, loan facility.

22. By separate letters dated 6th February, 2014, addressed to each of the defendants, the plaintiff formally notified the defendants that the loan account was substantially in arrears and that the balance due on the loan account as of 6th February, 2014, was €128,458.38, with unpaid interest of €627.92, accrued on the said sum, making an aggregate sum of €129,086.30 due and owing. The plaintiff demanded payment of the said sums within seven days of the date of the service of the letter. Ms. Shannon exhibited copies of the said letters of demand.

23. Ms. Shannon gave an outline of the fifth loan agreement in the following terms: by letter of sanction dated 24th November, 2011, and accepted by the defendants in writing in or around 9th January, 2012, and pursuant to certain terms and conditions attaching thereto as agreed to by the defendants, the plaintiff agreed to make available to the defendants a loan facility in the amount of €8,452.00, secured, inter alia, by means of legal charges over certain properties held by the defendants and assignment of life assurance policies on the lives of the defendants. She exhibited a copy of the said letter of sanction together with the applicable terms and conditions attaching thereto.

24. Ms. Shannon stated that the 24th November, 2011, loan facility provided for repayment of the facility by way of a single payment equivalent to principal plus interest accrued and not yet paid on 12th October, 2012. The interest rate was stated to be base lending

rate varying plus 3% per annum (4.563%) at the time of offer. Ms. Shannon stated that the defendants agreed to the 24th November, 2011, loan facility and drew down funds pursuant to the facility as outlined above. She exhibited account statements recording the said draw down. She stated that interest was charged on said facility in accordance with the terms of the 24th November, 2011, loan facility and was then accruing at a rate of €0.77 per day.

25. Ms. Shannon stated that the defendants failed to abide by the terms of the 24th November, 2011, loan facility in relation to repayment thereof and the loan account went into arrears. She stated that this represented an event of default under the terms of the said facility, entitling the plaintiff to demand repayment of principle and interest due and all monies and liabilities owing on foot of the 24th November, 2011, loan facility.

26. Ms. Shannon stated that by separate letters dated 6th February, 2014, addressed to each of the defendants, the plaintiff formally notified the defendants that the loan account was substantially in arrears and that the balance due on the loan account as of 6th February, 2014, was €8,877.37, with unpaid interest of €43.39 accrued on the said sum, making an aggregate sum of €8,920.76 due and owing. The plaintiff demanded payment of the said sums within seven days of the date of service of the letter. She exhibited copies of the letters of demand.

27. Ms. Shannon gave details concerning the sixth and final loan agreement as follows: by letter of offer dated 25th November, 2011, issued by the plaintiff and accepted by the defendants in writing in or around 9th January, 2012, and pursuant to certain terms and conditions attaching thereto as agreed to by the defendants, the plaintiff agreed to make available to the defendants a loan facility in the amount of STG£129,683.00, secured, inter alia, by means of legal charges over certain properties held by the defendants and assignment of a life assurance policy on the lives of the defendants. She exhibited a copy of the said letter of offer together with the applicable terms and conditions attaching thereto.

28. Ms. Shannon stated that the 25th November, 2011, loan facility provided for repayment of the facility on 12th October, 2012, by means of a single repayment equivalent to principal plus interest accrued and not yet paid at that date. The interest rate was stated to be market related rate plus 1% per annum. She further stated that the defendants agreed to the 25th November, 2011, loan facility and interest was then accruing at a rate of €5.20 per day.

29. Ms. Shannon stated that the defendants failed to abide by the terms of the 25th November, 2011, loan facility in relation to repayment thereof and the loan account went into arrears. She stated that this represented an event of default under the terms of the said facility, entitling the plaintiff to demand repayment of principle and interest due and all monies and liabilities owing on foot of the 25th November, 2011, loan facility.

30. Ms. Shannon stated that by separate letters dated 9th September, 2014, addressed to each of the defendants, the plaintiff formally notified the defendants that the loan account was substantially in arrears and that the balance due on the loan account as of 8th September, 2014, was STG£126,389.79. The plaintiff demanded payment of the said sum within seven days of the date of service of the letter. A copy of the said letter was exhibited to her affidavit.

31. Ms. Shannon stated that on or about 21st November, 2014, the plaintiff converted the 25th November, 2011, loan facility to Euro as it was entitled to do under the terms of the said facility. On 21st November, 2014, the amount demanded in the letter of 9th September, 2013, STG£126,389.79 converted to €158,240.00 at a conversion rate of 0.798722 and the facility was duly converted at that rate. On this basis, Ms. Shannon stated that €158,240.00 was due and owing from the defendants to the plaintiff under the 25th November, 2011, loan facility.

32. Ms. Shannon stated that despite each of the letters of demand as set out above and exhibited to her affidavit, the defendants and each of them had failed, refused or neglected to pay the sums demanded, or any sum, in satisfaction or reduction of their liabilities to the plaintiff or to engage with the plaintiff in any, or any meaningful, way. The sums demanded in the said letters of demand remained due and owing together with daily interest accruing thereon in respect of each agreement.

33. Ms. Shannon stated that the proceedings were commenced by way of summary summons issued on 24th September, 2014. An appearance was entered in person by the second named defendant on 23rd October, 2014. She stated that it was her belief that the second named defendant did not have any bona fide or arguable defence to the claim made by the plaintiff in these proceedings and that the said appearance had been entered by the second named defendant solely for the purpose of delaying the plaintiff in obtaining judgment. She prayed for the reliefs as set out in the notice of motion.

The Defendants' Case

34. The second named defendant has filed a number of affidavits in response to the plaintiff's claim herein. In her first affidavit sworn on 11th February, 2015, she outlined that she was engaged in extremely acrimonious and hostile proceedings with her estranged husband in the Circuit Family Court in Cork. She stated that there were ten properties as far as she was aware, owned jointly by her estranged husband and her. She stated that her signatures on the documents exhibited by the plaintiff as JAS4, and JAS10, were simulated. She said that the remaining documents may contain her signature, but that the copy provided by the plaintiff was of such poor quality, that she could not be definite as to this. She said that the issue required further investigation. She stated that in the course of the aforementioned Circuit Court family law proceedings, she had come to learn that numerous documents upon which her husband was relying in those proceedings, were not signed by her, but her signature had been forged thereon. She exhibited a copy of a preliminary report from a forensic handwriting expert, Mr. David Madden.

35. The second named defendant swore a supplemental affidavit on 16th April, 2015. She stated that it was only in the course of the extremely acrimonious and hostile divorce proceedings with her estranged husband, that she came to learn of the existence of a number of documents upon which she believed her signature had been forged.

36. In relation to the credit agreement dated 17th June, 2005, she alleged that her signature thereon had been "wholly simulated". She said that despite repeated requests, the plaintiff had failed to provide her solicitors with the original of this document, or even a facility to inspect the document.

37. In relation to the loan facility dated 28th March, 2007, she stated that the plaintiffs had failed to provide her solicitors with the original of this document, or even a facility to inspect same. She stated that she was concerned that her signature may have been simulated on same. She further stated that she never received any benefit of the said funds and on this account, she suspected that the first named defendant may have diverted the said monies from the purpose for which they were originally allegedly acquired.

38. The second named defendant stated that in relation to the loan facility dated 31st May, 2010, in the letter of sanction which had been addressed to Mr. William Casey, the last sentence read:- "A copy of this letter of sanction is being forwarded to Victoria

Casey". The second named defendant stated that she was a stranger to this transaction and to the letter of sanction exhibited. She had no knowledge of the transaction. She stated that despite repeated requests, the plaintiffs had failed to provide her solicitors with the original of this document, or even a facility to inspect same. She stated that she was concerned that her signature may have been simulated on the document. She stated that she never received any benefit from the said funds, which were allegedly drawn down pursuant to this loan facility. The second named defendant further stated that she was a stranger to the property listed in the particulars of the facility letter dated 31st May, 2010, and she had no knowledge of the property described in the said loan facility, more particularly a Portuguese property consortium (Castre Verde) for which the facility purports to have been sanctioned to finance. She stated that as she was a stranger to the transaction, she needed to examine and inspect all original documentation dealing with the said transaction in order to ascertain the authenticity of same.

39. The second named defendant also referred to the credit agreement dated 21st March, 2011, and stated that her alleged signature thereon had been "wholly simulated". She again stated that despite repeated requests, the plaintiff had failed to provide her solicitors with the original of the document, or provide a facility to inspect same. She stated that she was concerned that her signature may have been simulated on the relevant documents and in the circumstances the plaintiff should be required to make available to the second named defendant the original of the document to be examined and inspected to test the authenticity of her signature thereon.

40. The second named defendant also referred to the credit agreement dated 24th November, 2011. She stated that she was a stranger to this transaction and had no knowledge of it. She stated that the copy of the document which had been furnished to her solicitors, was a poor and illegible copy and in the circumstances, neither the second named defendant, nor her handwriting expert, were able to determine if the said document contained her genuine signature or not. She again stated that despite repeated requests, the plaintiff had failed to provide her solicitors with the original documents or even a facility to inspect same.

41. The second named defendant went on to refer to the credit agreement dated 25th November, 2011. She noted that in the letter of sanction which was addressed to Mr. William Casey, the last sentence read: "A copy of this letter of sanction is being forwarded to Victoria Casey". The second named defendant stated that she was a stranger to the transaction and to the letter of sanction, which had been exhibited and had no knowledge of the transaction. She stated that the copy of the said credit agreement, which had been furnished to her solicitors, was a poor and illegible copy and neither she, nor the handwriting expert, was able to determine if the said document contained her genuine signature. She said that despite repeated requests, the plaintiffs had failed to provide her solicitors with the original of the document, or even a facility to inspect same.

42. The second named defendant stated that in the course of addressing matters for her family law proceedings, it had come to her attention that numerous documents upon which her husband was relying in the said family law proceedings, were not signed by her, but her signature had been simulated thereon. Further to the discovery of the simulation of her signature on these various documents, she became very concerned in respect of same and caused her solicitor to engage a forensic handwriting expert, one David Madden, for the purposes of addressing these concerns. Mr. Madden was furnished with copies of the documents which had been made available to the plaintiff. He issued a preliminary report which she exhibited to the affidavit.

43. The second named defendant stated that as a result of the discovery of simulated signatures on legal documentation associated with various alleged borrowings, it was necessary to have a comprehensive examination of all the original documentation relied upon by the plaintiff herein. She stated that the nature of summary proceedings did not allow such an examination to take place. She stated that she had a bona fide defence to the within proceedings and such defences rely upon a thorough examination of any documents allegedly executed by the second named defendant.

44. The second named defendant said that in the light of these findings, it was necessary that all of the original loan and security documentation should be examined by her handwriting expert. To that end, her solicitor had, by letter dated 11th February, 2015, requested the defendants to make voluntary discovery of the relevant documents. The second named defendant further stated that it was her intention to seek to cross examine the plaintiff's deponent, Ms. Jo Ann Shannon. She stated that in such circumstances, this matter was not suitable for summary disposal.

45. The second named defendant also stated, without prejudice to any other defences which may be available to her, that the plaintiff had failed to explain the extent and nature of the liabilities, or any liability under the various credit agreements and loan facilities as described in the within proceedings and that the plaintiff breached its duties to the second named defendant, as a wife to a seasoned businessman, and as such failed in its duty of care to her, in particular it had failed to properly advise her to get independent legal advice and to wholly ensure that any of the documentation pertaining to these loan facilities, would only be signed with her fully informed consent and knowledge.

46. The second named defendant stated that the plaintiff was purporting to rely on documents which, to the best of the second named defendant's knowledge, information and belief, contained simulated signatures of the second named defendant. She stated that the plaintiff should not be permitted to enforce the purported agreements against her.

47. The second named defendant also stated that the plaintiff failed to act with the utmost good faith during the course of its dealings with her. She stated that in these circumstances she had been advised that affidavit evidence alone would not suffice to prove her defence to this action. She stated that having regard to the nature of the allegations contained in her defence to the claims herein, a plenary hearing was required to try all the issues in dispute between the parties.

48. Furthermore, she stated that she had been advised, that she required discovery of all loan and security documentation and further required to cross examine bank officials, in order to properly establish the extent of the plaintiff's dealings with her now estranged husband and documents alleged to have been created in her name, in order to fully defend the allegations as against her by the plaintiff herein. She stated that as a result of the proceedings herein being in a summary format, that this could not be done in the course of such proceedings. She, therefore, asked the Court to refuse the reliefs set out in the notice of motion and either dismiss the plaintiff's action, or in the alternative, to remit the matter to plenary hearing.

49. An affidavit was sworn by Mr. Fergus Appleby, the solicitor acting for the second named defendant on 12th June, 2015. In the affidavit, he stated that the plaintiff had consented to making available for inspection all the original and ancillary borrowing and security documents herein. However, they had not specified a date for the carrying out of such inspection.

50. Mr. Appleby further stated that the case had very many serious issues to be tried and the issues involved were neither simple nor capable of being easily determined by way of summary motion. Furthermore, he said that there may be a number of bona fide defences to the plaintiff's application for judgment, which rendered this application inappropriate for summary disposal. He stated that it was his belief that affidavit evidence alone would not suffice to prove the defence to this action and, as such, a plenary hearing

was required to try all of the issues in dispute between the parties.

51. He further stated that discovery of bank documentation and cross examination of bank witnesses, would be required to consolidate the defence of the second named defendant herein. He stated that this could not be done in the course of summary proceedings. He stated that it was necessary and just that these issues should be tried together by way of plenary hearing and that it was not a suitable matter to be tried by affidavit.

52. The second named defendant swore a second supplemental affidavit on 9th December, 2015. In the affidavit, the second named defendant stated that on 14th July, 2015, her expert, Mr. David Madden, had attended at the offices of the solicitors acting for the plaintiff and had carried out an inspection of the originals of various documents. As a result of that inspection and analysis, Mr. Madden had been in a position to issue a comprehensive report, which was exhibited to this affidavit.

53. It would appear that in relation to the six agreements which are in issue in the proceedings herein, Mr. Madden came to the following conclusions: he did not reach any conclusion in relation to the agreement dated 17th June, 2005, as this was not made available to him on the day of the inspection. In relation to the agreement dated 28th March, 2007, he was of opinion that the signature thereon purporting to be the signature of the second named defendant, was not her genuine signature. In relation to the agreement dated 31st May, 2010, he was of opinion that the signature appearing thereon, was the genuine signature of the second named defendant. In relation to the agreement dated 21st March, 2011, he was of opinion that the signature appearing thereon purporting to be that of the second named defendant, was not, in fact, her genuine signature. In relation to the agreements dated 24th November, 2011 and 25th November, 2011, he was of opinion that the signatures appearing thereon were the genuine signatures of the second named defendant.

54. The second named defendant further stated that a mortgage deed appearing to be dated 13th June, 2007, relating to a property at 96, Alderbrook, Cork, contained a forgery of her signature. She had instructed her solicitor to write to the receiver appointed over a number of properties including the property covered by this mortgage deed. She stated that neither the plaintiffs, nor the solicitor for the plaintiffs, or the receiver, had addressed the fact of confirmation of her simulated signature on a number of these financial documents in any meaningful way to date. She stated that such was the nature of the findings made in Mr. Madden's report, that the issue of her simulated signatures on various documents, should be explored fully in open court. She stated that the plaintiff should not be allowed to attempt to force through obtaining a judgment herein in complete disregard of the issue, more particularly when it pertained to some base documents in respect of charges which were registered against some of these properties, which involved an issue of criminal fraud, which required to be addressed by both the Court and other relevant authorities.

55. She again stated that it was her intention to seek to cross examine the plaintiff's deponent, Ms. Jo Ann Shannon. She stated that the plaintiff had failed to reply to her solicitor's letter in this regard and had not stated anything in relation to the availability of Ms. Shannon for cross examination. She stated that this was a further reason why the application was not suitable for summary disposal.

56. The plaintiff went on in the affidavit to state that she wished to draw the following matters to the attention of the court:-

> (a) That the plaintiff acting through its servants or agents, failed to explain to the defendant the extent and nature of the liabilities under the various credit agreements and loan facilities.
>
> (b) The plaintiff was guilty of negligent misrepresentation to the second named defendant and was therefore estopped in equity from enforcing the said alleged liabilities as against her.
>
> (c) The plaintiff breached its duties to the second named defendant as a wife (who was in grave marital difficulties) to a seasoned businessman/investor, and as such, failed in its duty of care to her, in particular, it had failed in its duty to properly advise her to get independent legal advice and to ensure that any of the documentation pertaining to these loan facilities, would only be signed with her fully informed consent and knowledge. The second named defendant stated that the plaintiff had wholly failed to ensure these matters and instead was purporting to rely on documentation which, to the best of the second named defendant's knowledge, information and belief, contained simulated signatures of the defendant and the plaintiff should not be permitted to enforce the purported agreements against her.
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> (d) The second named defendant stated that in the alternative, the plaintiff bank had failed, refused and/or neglected to advise the second named defendant to obtain independent legal advice prior to executing the aforementioned loan facilities and credit agreements and it in fact was wholly lacking in ensuring the second named defendant was aware of the extent of her ultimate liabilities.

57. The second named defendant stated that it was her belief and she had been so advised, that affidavit evidence alone would not suffice to prove her defence to the action and as such a plenary hearing was required to try all of the issues in dispute between the parties. Furthermore, she stated that she required to cross examine the bank's witnesses to consolidate her defence. This could not be done in the course of summary proceedings. In the circumstances it was therefore necessary and just that these issues should be tried together by way of a plenary hearing and that it was not a suitable matter to be tried by affidavit.

Submissions on behalf of the plaintiff

58. The plaintiff's counsel stated that in relation to the credit agreement dated 17th June 2005, which was not addressed by Mr Madden, he accepted that this agreement had been stipulated by the solicitors acting for the second named defendant in their letter dated 28th June, 2015, as one of the documents in respect of which they required their expert to have access. The plaintiff's counsel stated that his instructions were that unfortunately the original of that document was not available on the day of the inspection. The other five agreements were examined by Mr Madden at the inspection held on 14th July 2015.

59. The plaintiff's counsel noted that in relation to some of the alleged loan agreements, the defendant had put in a very wide denial. For example in relation to the loan agreement dated 31st May, 2010, the second named defendant stated that she never received any letter from the bank about that loan and was a stranger to the loan itself. She stated that she never received any funds and did not know anything about the property in Portugal. She said that she never received any benefit from the funds concerned. Counsel noted that the second named defendant would make wide denials in respect of some loans, such as this one, but not in respect of other loan agreements. He pointed out that ironically this particular loan agreement was one in respect of which Mr Madden was of the opinion that the second named defendant's signature was genuine.

60. Counsel further submitted that it did not matter whether the document was in fact signed, if the plaintiff received the benefit of the funds under the agreement. Signature was not necessary to make the contract enforceable. Where she does not deny having the benefit of a transaction, she must be taken as having received the benefit of the loan.

61. In relation to the allegation of negligent misrepresentation, the plaintiff submitted that it was not sufficient for the second named defendant to make a bare allegation in this regard. She had not stated what was the content of the alleged misrepresentation, nor by whom it was made, or when it was made. Nor had she stated that she was misled or acted to her detriment as a result of any such misrepresentation. In the circumstances, it was submitted that this was not sufficient to enable the second named defendant to have this matter remitted to plenary hearing.

62. It was also noted that the second named defendant made allegations, that the bank should have ensured that she had independent legal advice prior to entering into any of the loan agreements. Counsel for the plaintiff stated that he would rely on the responses which had been given in the previous set of proceedings against the second named defendant. These were to the effect that, there was no obligation on the bank to ensure that its customer had independent legal advice prior to entering into a loan agreement. If the plaintiff had asserted that she had acted under the undue influence of her husband in entering into the agreement and that this fact was known, or ought to have been known, by the bank, then she may have been in a position to argue that the bank should have ensured that she had independent legal advice prior to entering into the contract. However, in this case, there was no such assertion made by the second named defendant. There was merely a bare assertion that the bank owed her a duty of care to ensure that she had independent legal advice prior to entering into any of the agreements. The plaintiff submitted that the bank did not owe any such duty to the second named defendant.

Submissions on behalf of the Second Named Defendant
63. Counsel for the second named defendant stated that she was a housewife and mother who had to look after her two children, who were aged twelve years and ten years respectively. The first named defendant had been an employee of an airline and had extensive business dealings. The second named defendant only learnt of these dealings in the course of the family law proceedings.

64. The second named defendant contended that she was a stranger to the loan transactions and this was supported by the evidence of the handwriting expert in respect of two of the agreements.

65. The second named defendant also stated that there were two further documents, which were not part of the present proceedings, that were relevant. They were the documents identified in Mr. Madden's report at Q. 12 and Q. 15. These were two mortgage documents. Mr. Madden was of the opinion that the second named defendant did not sign these mortgage documents. These mortgage documents referred to a number of properties, which had been cross charged. The signatures on the mortgage documents would appear to have been witnessed by a solicitor. It was submitted that this was a very serious matter and was an issue of grave concern, which ought to be fully investigated by the court.

66. The second named defendant stated that the first named defendant had left the family home in 2012 and ceased to be an employee of the airline. However, he did work for the airline through a company. The second named defendant had no knowledge of this company. She had been in the dark for over three and a half years. The first named defendant was being paid through the limited company.

67. It was stated that the second named defendant was a stranger to the agreements the subject matter of these proceedings. She stated that, as far as she could ascertain, she did not get the benefit of any of the funds. She could not say where the money had gone. She surmised that the money may have been diverted by her ex-husband into his own various accounts.

68. The second named defendant noted that the plaintiff had got judgment in the Central Office as against the first named defendant. The second named defendant did not know what arrangements had been entered into between the bank and the first named defendant. She had been left in the dark about the business dealings of her husband and where money had gone. In these circumstances, she needed plenary hearing to discover the true facts.

69. It was submitted that this case came within the dictum of Baron J. in *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220, where the learned judge stated as follows at p. 233:-

> *"This Court does not have to decide whether these submissions or any of them will ultimately succeed. It is sufficient that the defendant should not be shut out from making a bona fide case: see First National Commercial Bank plc v. Anglin [1996] 1 I.R.*
>
> *Usually, liberty to defend is sought upon the ground that there is an issue of fact to be determined. When the issue is solely one of law, then the court may determine that issue and give final judgment. Where, however, the court would be in a better position to determine the issue of law after a closer and fuller examination of the facts, then the defendant should be given liberty to defend."*

70. It was submitted that in this case, the second named defendant should be given the opportunity to have a full plenary hearing, because there were serious issues of fact to be decided, in particular, was her signature forged and in the case of two mortgage documents, was the purported signature witnessed. Given the serious nature of the factual issues, it was submitted that there was a serious issue to be tried and, on this account, the action should be remitted to a full plenary hearing. It was stated that, if the matter were remitted to plenary hearing, there would be no prejudice to the bank, as there was a receiver in place over a number of the properties and he was getting ongoing rent thereon.

The Applicable Law
71. The defendant relied on the decision in Bank of Ireland v. Educational Building Society [1999] 1 I.R. 220, and in particular to the following portion of the judgment of Barron J. at p. 233:-

> *"This Court does not have to decide whether these submissions or any of them will ultimately succeed. It is sufficient that the defendant should not be shut out from making a bona fide case: see First National Commercial Bank plc v. Anglin [1996] 1 I.R.*
>
> *Usually, liberty to defend is sought upon the ground that there is an issue of fact to be determined. When the issue is solely one of law, then the court may determine that issue and give final judgment. Where, however, the court would be in a better position to determine the issue of law after a closer and fuller examination of the facts, then the defendant should be given liberty to defend."*

72. The defendant also referred to the decision in Aer Rianta v. Ryanair Limited [2001] 4 I.R. 607, and in particular to the following

portions of the judgment of Hardiman J. at p. 621:-

> *"More recent Irish authority, in my view, supports the impression gleaned from authorities from the early days of the summary judgment jurisdiction, that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is one to be used with great care."*

73. Having reviewed certain Irish authorities, Hardiman J. continued as follows:

> *"In light of these authorities, I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in First National Commercial Bank plc. v. Anglin [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The 'fair and reasonable probability of the defendants having 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."*

74. Further on, Hardiman J. stated as follows at p. 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"*

75. Finally, the defendant referred to *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, where McKechnie J. commented on the conclusions reached by Hardiman J. in the Aer Rianta case and stated as follows at p. 7:-

> *"In his analysis of the law, Hardiman J. surveyed what might be described as the historical cases as well as the most modern authorities on this topic. His conclusion was, I think, that leave to defend should be granted unless it was 'very clear' that the defendant had no defence, not even one which could be described as arguable.*
>
> *From these cases it seems to me that the following is a summary of the present position:-*
>
> *(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, there being several ways in which this may best be done;*
>
> *(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, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
>
> *(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?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
>
> *(viii) this test is not the same as and should be not 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 in 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."*

The plaintiff did not disagree that the authorities cited represented an accurate statement of the law in this area.

Conclusions

76. In respect of three of the agreements, being the agreements dated 31st May, 2010; 24th November, 2011; and 25th November, 2011, the second named defendant's handwriting expert, Mr. Madden, has stated that in his opinion, the signature of the second named defendant appearing on the said agreements, is her genuine signature. It seems to me that in respect of those agreements, the second named defendant has not established even an arguable defence. Her primary line of defence is that she did not sign these agreements. However, her own expert, has come to the conclusion that she did, in fact, sign the documents. In these circumstances, the plaintiff cannot elect to accept only those findings made by Mr. Madden, which are favourable to her case. It seems to me that once she puts his report in evidence, she is bound to accept both the positive and negative findings therein.

77. It seems to me that the plaintiff is entitled to judgment in respect of the sums claimed under these three agreements.

78. The plaintiff has also raised a number of ancillary defences. Firstly, she argues that the servants or agents of the plaintiff failed to explain the extent and nature of the liabilities under the various credit agreements and loan facilities. I do not accept there was any such obligation on the plaintiff bank. The plaintiff was dealing with adult customers of the bank, who were entering into a commercial transaction. I do not see how there can be any obligation on the bank to explain the extent and nature of any liabilities that may have been undertaken by the second named defendant in the circumstances.

79. Secondly, the second named defendant alleges that there was negligent misrepresentation made to her by the plaintiff and the plaintiff was therefore estopped in equity from enforcing the alleged liabilities as against her. I accept the submissions of counsel on behalf of the plaintiff, to the effect that it is not sufficient for the second named defendant merely to make an allegation in this regard. She has not identified what actual misrepresentation was allegedly made, by whom it was allegedly made or when it was made. In the circumstances, I do not see this as being an arguable defence to the plaintiff's action.

80. Thirdly, the second named defendant argued that there was a duty on the plaintiff to advise her to get independent legal advice prior to entering into the loan agreements. No authority was cited by the second named defendant to support this proposition. It may have been that if the second named defendant had been a vulnerable person, or had been acting under the undue influence of her husband, which fact was known or ought to have been known to the plaintiff, then it could be argued that there was a duty on the bank to ensure that she had independent legal advice prior to entering into the contracts. However, no such assertion is made by the second named defendant in these proceedings. In the circumstances, I do not see that the plaintiff was under any duty to ensure that the second named defendant had independent legal advice prior to entering into the contracts.

81. Finally, the second named defendant has resisted judgment on the basis that she wishes to cross examine the plaintiff's deponent, Ms Jo Ann Shannon. It seems to me that the second named defendant cannot just state that she wishes to cross examine a witness and that this is sufficient to prevent the plaintiff from obtaining summary judgment against her. She must establish that she has an arguable defence and that cross examination is necessary to determine the issues of fact that arise as part of the arguable defence put forward by the second defendant.

82. I am satisfied that in relation to the agreements where the signature of the second named defendant has been held by Mr. Madden as being genuine, the plaintiff is entitled to judgment on foot of these agreements. Accordingly, the plaintiff is entitled to the sum of €801,767.98, as against the second named defendant pursuant to the loan agreement dated 31st May, 2010. In addition, the plaintiff is entitled to interest on the sum of €801,767.98, at the base lending rate varying plus 3% per annum, including a funding premium of 1.4% from 6th February, 2014, to today's date. Under that agreement, interest on account No. 93638301852658, was accruing at the rate of €9.75 per day and at the rate of €59.87 per day on account No. 93638306456141. For the period, 7th February, 2014 to 15th March, 2016, that gives a total figure for interest of €53,398.54. This gives rise to a total sum of €855,166.52 due under the agreement dated 31st May, 2010. The plaintiff is entitled to judgment in respect of this sum.

83. The plaintiff is entitled to the sum of €8,920.76, against the second named defendant in respect of the loan agreement dated 24th November, 2011. In addition, the plaintiff is entitled to interest on the sum of €8,920.76, at the base lending rate varying, plus 3% per annum from 6th February, 2014 to today's date. Interest was accruing at the rate of €0.77 per day. For the period 7th February, 2014 to 15th March, 2016, the amount of interest due is €590.59. This gives a total sum of €9511.35, due under the agreement dated 24th November, 2011. The plaintiff is entitled to judgment for this sum.

84. Finally, the plaintiff is entitled to the sum of €158,240 against the second named defendant pursuant to the loan agreement dated 25th November, 2011. In addition, the plaintiff is entitled to interest on the sum of €158,240.00, at market related rate plus 1% per annum from 8th September, 2014, to today's date. Interest was accruing at the rate of €5.70 per day. For the period 9th September, 2014 to 15th March, 2016, the amount of interest due is €3,157.80. This gives a total sum of €161,397.80, due under the agreement dated 25th November, 2011. The plaintiff is entitled to judgment for this sum.

85. In total, the plaintiff is entitled to judgment against the second named defendant in the sum of €1,026,075.67.

86. I will remit the plaintiff's action in respect of the remaining agreements, being the agreements dated 17th June, 2005; 28th March, 2007; and 21st March, 2011, to plenary hearing. While I appreciate that in respect of the first of these agreements, being the agreement dated 17th June, 2005, Mr. Madden did not have the opportunity to examine the original of the agreement, it is nonetheless appropriate that the claim under this agreement be remitted to plenary hearing. It is my opinion that in respect of the latter two agreements, the plaintiff has raised an arguable defence, to the effect that her signature was forged on the relevant agreements. Therefore, it is appropriate to remit the proceedings on foot of these agreements to plenary hearing.